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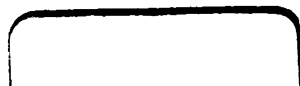
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THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1852:

COMPRISING
REPORTS OF CASES

IN THE COURTS OF
**Chancery and in Bankruptcy, Queen's Bench and the Bail Court,
Common Pleas,
Exchequer, and Exchequer Chamber,**

FROM
MICHAELMAS TERM 1851, TO TRINITY TERM 1852,
BOTH INCLUSIVE.

*(Decisions in Error in the Exchequer Chamber will be found in the respective Courts from which the Errors
come; the Common Pleas includes the Appeals from Revising Barristers, and the County Court
Appeals are in the Queen's Bench, Common Pleas, and Exchequer respectively.)*

ALSO
NOTES OF JUDGMENTS IN THE HOUSE OF LORDS, DURING THAT PERIOD; AND A SEPARATE
ARRANGEMENT OF CASES RELATING TO THE DUTIES OF MAGISTRATES, INCLUDING
CROWN CASES RESERVED.

EDITED BY MONTAGU CHAMBERS Esq. QUEEN'S COUNSEL,
PHILIP TWELLS, Esq. AND FRANCIS TOWERS STREETEN, Esq.
BARRISTERS-AT-LAW.

VOL. XXX.

NEW SERIES—VOL. XXI.

LONDON:
Printed by James Holmes, 4, Took's Court, Chancery Lane.
PUBLISHED BY EDWARD BRET INCE, 6, QUALITY COURT, CHANCERY LANE.

MDCCCLII.

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NAMES OF THE REPORTERS.

1852.

Lord Chancellor's Court,
EDWARD COOKE, Esq. BARRISTER-AT-LAW.

Court of Appeal in Chancery,
SAMUEL VALLIS BONE, Esq. BARRISTER-AT-LAW.

Rolls Court,
THOMAS PARKER, JUN. Esq. BARRISTER-AT-LAW.

Court of the First Vice Chancellor,
JOHN FITZPATRICK VILLIERS, Esq. BARRISTER-AT-LAW.

Court of the Second Vice Chancellor,
THOMAS WYATT GUNNING, Esq. BARRISTER-AT-LAW.

Court of the Third Vice Chancellor,
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^{AND}
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Court of Exchequer,
HENRY HORN, Esq. and EDWARD WISE, Esq. BARRISTERS-AT-LAW.

CASES RELATING TO MAGISTRATES,

REPORTED PRINCIPALLY BY
HENRY JOHN HODGSON, Esq., COLLEY HARMAN SCOTLAND, Esq.
^{AND}
FRANCIS RUSSELL, Esq. BARRISTERS-AT-LAW.

JUDGES AND LAW OFFICERS.

FROM MICHAELMAS TERM 1851, TO TRINITY TERM 1852, INCLUSIVE.

IN THE COURTS OF CHANCERY.

The Right Hon. LORD TRURO, } Lord High Chancellor.
The Right Hon. LORD ST. LEONARDS, }
The Right Hon. Sir JAMES LEWIS KNIGHT BRUCE, Knt., Lord Justice.
The Right Hon. LORD CRANWORTH, Lord Justice.
The Right Hon. Sir JOHN ROMILLY, Knt., Master of the Rolls.
The Right Hon. Sir GEORGE JAMES TURNER, Knt., Vice Chancellor.
The Hon. Sir RICHARD TORIN KINDERSLEY, Knt., Vice Chancellor.
The Hon. Sir JAMES PARKER, Knt., Vice Chancellor.

COURT OF APPEAL IN BANKRUPTCY.

The Right Hon. Sir JAMES LEWIS KNIGHT BRUCE, Knt., } Lords Justices.
The Right Hon. LORD CRANWORTH, }

IN THE COURT OF QUEEN'S BENCH.

The Right Hon. LORD CAMPBELL, Lord Chief Justice.
The Hon. Sir JOHN PATTESON, Knt.
The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.
The Hon. Sir WILLIAM WIGHTMAN, Knt.
The Hon. Sir WILLIAM ERLE, Knt.
The Hon. Sir CHARLES CROMPTON, Knt.

IN THE COURT OF COMMON PLEAS.

The Right Hon. Sir JOHN JERVIS, Knt., Chief Justice.
The Hon. Sir WILLIAM HENRY MAULE, Knt.
The Hon. Sir CRESSWELL CRESSWELL, Knt.
The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.
The Hon. Sir THOMAS NOON TALFOURD, Knt.

IN THE COURT OF EXCHEQUER.

The Right Hon. Sir FREDERICK POLLOCK, Knt., Chief Baron.
The Right Hon. Sir JAMES PARKE, Knt.
The Hon. Sir EDWARD HALL ALDERSON, Knt.
The Hon. Sir THOMAS JOSHUA PLATT, Knt.
The Hon. Sir SAMUEL MARTIN, Knt.

Sir ALEXANDER COCKBURN, Knt., } Attorney General.
Sir FREDERIC THESIGER, Knt., }
Sir WILLIAM PAGE WOOD, Knt., } Solicitor General.
Sir FITZROY KELLY, Knt., }

PREFERMENTS AND MEMORANDA.

In the vacation after *Hilary Term*, LORD TRURO resigned the office of Lord High Chancellor, and was succeeded by Sir EDWARD BURTENSHAW SUGDEN, who was created a Peer by the title of BARON ST. LEONARDS.

At the same time Sir ALEXANDER COCKBURN and Sir WILLIAM PAGE WOOD resigned the offices of Attorney and Solicitor General, and were succeeded by Sir FREDERIC THESIGER and Sir FITZROY KELLY.

In the same vacation Sir JOHN PATTESON, one of the Judges of the Court of Queen's Bench resigned his seat, and was appointed a Privy Councillor. CHARLES CROMPTON, Esq., of the Inner Temple, was appointed as his successor, and received the honour of knighthood. He gave rings with the motto "*Quære verum.*"

In the vacation after *Trinity Term* Sir JAMES PARKER, one of the Vice Chancellors, died after a short illness. JOHN STUART, Esq., one of Her Majesty's Counsel, was appointed in his stead.

In the same vacation R. MATTHEWS, Esq. and RALPH THOMAS, Esq. were raised to the degree of the Coif, and gave rings with the motto "*Hoc age.*"

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Courts of Chancery.

REPORTED BY
EDWARD COOKE, Esq.,
SAMUEL VALLIS BONE, Esq., THOMAS PARKER, JUN. Esq.,
JOHN FITZPATRICK VILLIERS, Esq.
THOMAS WYATT GUNNING, Esq.,
AND
BENEDICT LAWRENCE CHAPMAN, Esq.
BARRISTERS-AT-LAW.

DURING FOUR TERMS,
VIZ.
MICHAELMAS 1851, HILARY, EASTER AND TRINITY, 1852.
15 & 16 VICTORIÆ.

ORDERS OF COURT.

Tuesday, May 4, 1852.

WHEREAS, under and by virtue of an Act passed in the thirty-sixth year of the reign of His Majesty King George the Third, c. 52, intituled "An Act for repealing certain Duties on Legacies and Shares of Personal Estates, and for granting other Duties thereon in certain Cases," and of an Act passed in the thirty-seventh year of the reign of his said Majesty, c. 135, to explain and amend the said Act, it is enacted, that monies paid in under the first-recited Act into the Bank of England, with the privity of the Accountant General of the High Court of Chancery, when paid in, be laid out by the said Accountant General, without any formal request for that purpose, in the purchase of Bank 3l. per cent. annuities. By virtue of the powers contained in the last-mentioned of the said Acts, and of all other powers enabling him in that behalf, the Right Honourable EDWARD BURTENSHAW LORD ST. LEONARDS, Lord High Chancellor of Great Britain, DOETH HEREBY ORDER AND DIRECT that the Accountant General be at liberty, unless he shall have received, on behalf of some party claiming to be entitled, notice in writing of an intended application to the Court for otherwise disposing of the fund, from time to time, to lay out and invest the dividends on such stock, when so purchased, and all accumulations thereon, as the same shall accrue due, in the purchase of like Bank 3l. per cent. annuities, without any formal request for that purpose, and place the stock purchased with such dividends to the said several matters and accounts to which the original sums of stock respectively stand; and the Accountant General is to declare the trust thereof when purchased, subject to the order of this Court; and for the purposes aforesaid, the Accountant General is to draw on the Bank, according to the forms prescribed by the Act of Parliament and the General Rules and Orders of this Court in that case made and provided.

ST. LEONARDS, C.

Friday, May 7, 1852.

THE Right Honourable EDWARD BURTENSHAW LORD ST. LEONARDS, Lord High Chancellor of Great Britain, with the assistance of the Right Honourable SIR JOHN ROMILLY, Knight, Master of the Rolls, DOETH HEREBY, in pursuance of an Act of Parliament passed in the tenth and eleventh year of the reign of Her present Majesty, intituled "An Act for better securing Trust Funds, and for the Relief of Trustees," and in pursuance and execution of all other powers enabling him in that behalf, ORDER AND DIRECT in manner following, that is to say:—

Where any trustee desiring to pay money or transfer stock or securities into the name of the Accountant General of the Court of Chancery, under the said Act, is, under a General Order of the said Court, dated the tenth day of June, one thousand eight hundred and forty-eight, directed to file an affidavit entitled in the matter of the Act

and of the trust, setting forth certain matters and things in the said Order of Court specified and declared, in future, such affidavit, in every case where the parties deem it unnecessary to have the money or the dividends or interest of stock or securities invested in the mean time, shall further contain a statement to that effect; and if the affi-

davit shall contain no such statement, the Accountant-General shall be at liberty to invest, as soon as conveniently may be, the said cash in Bank 3l. per cent. annuities, in the matter of the particular trust; or in cases of dividends or interest on stock or securities transferred, such dividends or interest in the like stock, and all accumulations of the dividends of the stock in which such cash shall be invested, and of the dividends or interest on such stock or securities as aforesaid, from time to time, in the like matter, without any special order made by the Court in that behalf, and without any formal request for that purpose. And the Accountant General is to declare the trust thereof when purchased, subject to the order of this Court. And for the purposes aforesaid, the Accountant General is to draw on the

Bank, according to the form prescribed by the Act of Parliament and the General Rules and Orders of this Court in that case made and provided.

Provided always, that if, at any time, a request in writing, by or on behalf of any party claiming to be entitled, that such investment be discontinued, shall be left with the Accountant General, he shall be at liberty to cease making any further investment in the matter of the particular trust until the Court shall have made some order in that behalf.

ST. LEONARDS, C.

JOHN ROMILLY, M.R.

Saturday, August 7, 1852.

THE Right Honourable EDWARD BURTENSHAW LORD ST. LEONARDS, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable Sir JOHN ROMILLY, Master of the Rolls, the Right Honourable the Lord Justice Sir JAMES LEWIS KNIGHT BRUCE, the Right Honourable the Lord Justice LORD CRANWORTH, the Right Honourable the Vice Chancellor Sir GEORGE JAMES TURNER, the Honourable the Vice Chancellor Sir RICHARD TORIN KINDERSLEY, and the Honourable the Vice Chancellor Sir JAMES PARKER, DOETH HEREBY, in pursuance of an Act of Parliament passed in the fifteenth and sixteenth years of Her present Majesty, intituled "An Act to amend the Practice and Course of Proceeding in the High Court of Chancery," and in pursuance and execution of all other powers enabling him in that behalf, ORDER AND DIRECT:—

That all and every the Orders, Rules, and Directions hereinafter set forth shall henceforth be, and for all purposes be deemed and taken to be, General Orders and Rules of the High Court of Chancery, viz.

Printing.

I.—Bills and claims are to be printed on writing royal paper, quarto, in pica type, leaded; and the copy to be filed is to be interleaved with paper of the same description.

II.—No costs are to be allowed, either as between party and party, or as between solicitor and client, for any written bill or written copy of a bill, filed under the 15 & 16 Vict. c. 86. s. 6, or for any written copy thereof, served upon any defendant thereto, or for any written brief of such bill, unless the Court shall, in disposing of the costs of the cause, direct the allowance thereof.

III.—The Clerks of Records and Writs shall, at the expiration of fourteen days from the filing of any written bill or written copy of a bill, take off the files of the Court, without further order, the bill or copy so filed, unless a printed copy thereof shall in the mean time have been filed, and the plaintiff in the suit, or his solicitor, who shall personally have undertaken to file such printed copy, shall pay to the defendant

all the costs incurred by him in the suit, such costs to be taxed by the Taxing Master, without further order, upon production to him of the certificate of the Clerk of Records and Writs, that a printed copy of the bill has not been filed pursuant to such undertaking, and to be recoverable in like manner as costs ordered to be paid by a party in a suit to another party in a suit are now recoverable.

IV.—In lieu of the fees now payable to solicitors for instructions for bills, for engrossing bills and claims, for copies of bills and claims, for abbreviating bills and making a brief thereof, solicitors shall be entitled to charge, and be allowed in suits commenced after these Orders come into operation, the fees specified in Schedule (A.) to these Orders.

V.—The payment to be made by the defendant to the plaintiff for printed copies of the bill or claim shall be at the rate of one half-penny per folio.

VI.—No defendant shall be at liberty to demand from the plaintiff more than ten printed copies of his bill or claim.

Amendment of Bills and Claims.

VII.—Where, according to the present practice of the Court, an amendment of a bill or claim may be made without a new engrossment thereof, a bill or claim may be amended by written alterations in the printed bill of complaint or claim so to be filed, and by additions on the paper to be interleaved therewith, according to the directions of Order I.

VIII.—The practice of amending a defendant's copy of the bill shall with respect to the amendment of bills filed after these Orders come into operation, be abolished.

IX.—A copy of an amended bill or claim, whether upon an amendment by a reprint, or by such alterations and additions as mentioned in Order VII., is to be served upon the defendant or his solicitor; and such copy may be partly printed and partly written, if the amendment is not made by a reprint; but in every case the copy to be served is to be stamped with the proper stamp by one of the Clerks of Records and Writs, indicating the filing of such amended bill or claim, and the date of the filing thereof.

X.—In all cases where, according to the present practice of the Court, a subpoena to appear to and to answer an amended bill may be served upon the solicitor of a defendant, service upon the defendant's solicitor of a copy of an amended bill, whether wholly printed, or partly printed and partly written, shall be good service on the defendant.

XI.—Where a defendant has appeared in person to any bill, service at the address for service of such defendant of a copy of an amended bill, whether wholly printed, or partly printed and partly written, shall be good service on the defendant.

Limitation of preceding Orders.

XII.—None of the preceding Orders shall apply to bills or claims filed before these Orders come into operation, though afterwards amended; and the existing practice of the Court is to continue in force, with reference to the amendment of such bills and claims.

XIII.—The existing practice of the Court with reference to issuing and serving writs of subpoena to appear to and answer bills and writs of summons on claims is also to continue in force with respect to bills and claims filed before these Orders come into operation.

Form of Bill.

XIV.—Bill may be in a form similar to the form set out in Schedule (B.) to these Orders, with such variations as the nature and circumstances of each particular case may require.

Interrogatories.

XV.—The interrogatories for the examination of the defendant to a bill may be in a form similar to the form set out in Schedule (C.) to these Orders, with

such variations as the nature and circumstances of each particular case may require.

XVI.—In cases in which the plaintiff requires an answer to any bill from any defendant or defendants thereto, the interrogatories for the examination of such defendant or defendants are to be filed within eight days after the time limited for the appearance of such defendant or defendants.

XVII.—If the defendant appear in person, or by his own solicitor, within the time limited for that purpose by the rules of the Court, the plaintiff is, within eight days after the time allowed for such appearance, to deliver to the defendant or defendants so required to answer, or to his or their solicitor or solicitors, a copy of the interrogatories so filed as aforesaid, or of such of them as the particular defendant or defendants shall be required to answer. And the copy so to be delivered is to be examined with the original, and the number of folios counted by the Clerks of Records and Writs, who, on finding that such copy is duly stamped and properly written, are to mark the same as an office copy.

XVIII.—If any defendant to a suit commenced by bill do not appear in person, or by his own solicitor, within the time allowed for that purpose by the rules of the Court, and the plaintiff has filed interrogatories for his examination, the plaintiff may deliver a copy of such interrogatories so examined and marked as aforesaid, to the defendant, at any time after the time allowed to such defendant to appear and before his appearance in person or by his own solicitor; or the plaintiff may deliver a copy of such interrogatories so examined and marked as aforesaid, to the defendant or his solicitor, after the appearance of such defendant in person or by his own solicitor, but within eight days after such appearance.

XIX.—A defendant required to answer a bill must put in his plea, answer, or demurrer thereto, not demurring alone, within fourteen days from the delivery to him or his solicitor of a copy of the interrogatories which he is required to answer; but the Court shall have full power to enlarge the time, from time to time, upon application being made to the Court for that purpose.

XX.—After the time allowed by Order XVI. for filing interrogatories for the examination of any defendant, no interrogatories are to be filed for the examination of such defendant, without special leave of the Court, to be applied for upon notice of motion.

Form of Answer.

XXI.—Answers may be in a form similar to the form set out in Schedule (D.) to these Orders, with such variations as the nature and circumstances of each particular case may require.

Motion for Decree.

XXII.—One month's notice is to be given by the plaintiff to the defendant or defendants, of the motion for a decree or decretal order.

XXIII.—The affidavits to be used in support of such motion are to be filed before the service of such notice, and a list of such affidavits is to be set forth at the foot of such notice.

XXIV.—The defendant, within fourteen days after service of such notice, is to file his affidavits in answer, and to furnish the plaintiff or his solicitor with a list thereof.

XXV.—Within seven days after the expiration of such fourteen days the plaintiff is to file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and he is to furnish the defendant or his solicitor with a list thereof; and except so far as these affidavits are in reply, they are not to be regarded by the Court, unless upon the hearing of the motion the Court shall give leave to the defendant to answer them, and in that case the costs of such affidavits, and of the further affidavits consequent upon them, shall be paid by the plaintiff, unless the Court shall otherwise order.

XXVI.—No further evidence on either side is to be used upon such motion for a decree or decretal order, without leave of the Court.

XXVII.—Every notice of motion for a decree or decretal order is to be entered with the Registrar, who is to make out a list of such motions, and the same are to be heard according to such list, unless the Court shall make order to the contrary.

XXVIII.—Where a defendant shall not have been required to answer and shall not have answered the plaintiff's bill, so that under the 15 & 16 Vict. c. 86. s. 26, he is to be considered as having traversed the case made by the bill, issue is nevertheless to be joined by filing a replication in the form or to the effect of the replication now in use.

Dismissal for want of Prosecution.

XXIX.—A defendant to a suit commenced by bill, who shall not have been required to answer the bill, and shall not have answered the same, shall be at liberty to apply for an order to dismiss the bill for want of prosecution, at any time after the expiration of three months from the time of his appearance, unless a motion for a decree or decretal order shall have been set down in the mean time, or the cause shall have been set down to be heard; and the Court may, upon such application, if it shall think fit, make an order dismissing the bill, or make such other order or impose such terms as may appear just and reasonable.

Impertinence.

XXX.—The application to be made for the costs of any impertinent matter introduced into any bill, answer, or other proceeding, is to be made at the time when the Court disposes of the costs of the cause or matter, and not at any other time.

Evidence.

XXXI.—The time within which the plaintiff in any suit commenced by bill is to give the defendant notice of the mode in which he desires that the evidence to be adduced in the cause shall be taken, is to be seven days after issue joined therein; and if the plaintiff shall not, within such time, give any such notice, or if the plaintiff shall give such notice, and shall therein desire the evidence to be adduced upon affidavit, the plaintiff and defendant respectively shall be at liberty to verify their respective cases by affidavit, unless the defendant, or some or one of the defendants if more than one, shall, within fourteen days after the expiration of the said period of seven days, give notice to the plaintiff, or his solicitor, that he or they desire the evidence to be oral.

XXXII.—The evidence on both sides in any cause to be used at the hearing thereof, whether taken orally (and including the cross-examination and re-examination of any witness or witnesses) or taken upon affidavit, is to be closed within nine weeks after issue joined therein, except that any witness who has made an affidavit intended to be used by any party to such cause at the hearing thereof shall be subject to cross-examination within one month after the expiration of such period of nine weeks.

XXXIII.—No affidavit filed before issue joined in any cause shall be received or receivable at the hearing thereof, unless within one month after issue joined notice in writing shall have been given by the party intending to use the same, to the opposite party of his intention in that behalf.

XXXIV.—Any party desiring to cross-examine a witness who has made an affidavit in any cause intended to be used at the hearing thereof, shall give forty-eight hours' notice to the party on whose behalf such affidavit was filed, or to the party intending to use the same, of the time and place of such intended cross-examination, in order that such party may, if he shall think fit, be present at such cross-examination.

XXXV.—The re-examination of any such witness is immediately to follow his cross-examination, and is not to be delayed to a future period.

XXXVI.—Any party in any cause or matter requiring the attendance of any witness before an Examiner, for the purpose of his being examined or cross-examined, with a view to his evidence being used upon any claim, motion, petition, or other proceeding before the Court, not being the hearing of a cause, shall give to the opposite party or parties forty-eight hours' notice at least of his intention to examine such witness, and of the time and place of such examination, unless the Court shall in any case think fit to dispense with such notice.

XXXVII.—And where it is desired to cross-examine any party, whether a party to the cause or matter or not, who has made an affidavit to be used, or which shall be used on any claim, motion, petition, or other proceeding before the Court, not being

ORDERS OF COURT.

v

the hearing of a cause, the party desiring so to cross-examine such deponent shall give such notice to the opposite party as is required by Order XXXIV. with reference to the cross-examination of a witness who has made an affidavit to be used on the hearing of a cause.

XXXVIII.—All the above Orders with reference to the examination, cross-examination, and re-examination of witnesses, shall extend and be applicable to evidence taken in any cause subsequently to the hearing thereof.

XXXIX.—In suits in which issue shall have been joined when these Orders come into operation, the evidence to be used at the hearing of the cause shall be taken according to the existing practice of the Court, unless the parties shall consent, or the Court shall order, that the same shall be taken in the mode prescribed by the Act 15 & 16 Vict. c. 86, and these Orders.

Adding to Decree.

XL.—The time within which a party served with notice of a decree under section 42. of the above Act may apply to the Court to add to the decree, is to be one month after such service.

XLI.—A memorandum of the service upon any person or persons of notice of the decree in any suit under the said section, rule 8, is to be entered in the office of the Clerks of Records and Writs upon due proof by affidavit of such service.

Summons.

XLII.—The summons to be obtained under section 45. of the above Act may be in a form similar to the form set forth in Schedule (E.) to these Orders, with such variations as the circumstances of the case may require.

Revivor and Supplement.

XLIII.—Any party under no disability, or under the disability of coverture, who may be served with an order to revive any suit, or to carry on the proceedings therein, may apply to the Court to discharge such order within twelve days after such service; and any party being under any disability, other than coverture, who may be so served, may apply to the Court to discharge such order within twelve days after the appointment of a guardian or guardians *ad litem* for such party; and until such period of twelve days shall have expired such order shall have no force or effect as against such last-mentioned party.

New Facts or Circumstances.

XLIV.—If the plaintiff in any cause which is not in such a state as to allow of an amendment being made in the bill shall desire to state or put in issue any facts or circumstances which may have occurred after the institution of the suit, he may state the same, and put the same in issue by filing in the

Record and Writ Clerks' office a statement, either written or printed, to be annexed to the bill; and such proceedings by way of answer, evidence, and otherwise, are to be had and taken upon the statement so filed, as if the same were embodied in a supplemental bill: provided always, that the Court may make any order which it shall think fit for accelerating the proceedings thereunder, or proceedings therein, in any manner which may appear just and practicable.

Injunction.

XLV.—No injunction for stay of proceedings at law is to be granted as of course for default of appearance or answer to the bill.

Power of Court.

XLVI.—The power of the Court to enlarge or abridge the time for doing any act or taking any proceedings in any cause or matter, upon such, if any, terms as the justice of the case requires, is unaffected by these Orders.

Commencement of Orders.

XLVII.—These Orders shall take effect and come into operation on the 2nd of November 1862.

Interpretation.

XLVIII.—In these Orders the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction; viz.:

1. Words importing the singular number include the plural number, and words importing the plural number include the singular number.
2. Words importing the masculine gender include females.
3. The word "bill" includes "information."
4. The word "party" includes a body politic or corporate.
5. The word "affidavit" includes "affirmation."

ST. LEONARDS, C.

JOHN ROMILLY, M.R.

J. L. KNIGHT BRUCE, L.J.

CRANWORTH, L.J.

G. J. TURNER, V.C.

RICHARD T. KINDERSLEY, V.C.

JAMES PARKER, V.C.

SCHEDULE (A.)

TABLE OF FEES.

	£.	s.	d.
For instructions for bill	1	14	0
For making a copy of a bill or claim for the printer, per folio	0	0	4
For correcting the proof sheet, per folio	0	0	2
For printer's bill (as paid), deducting any copies paid for by the defendant			
For amending each copy of a bill or claim to serve where there is no reprint	0	13	4
Instructions for brief to be allowed on a replication being filed, or on a motion for a decree on a bill, or in an injunction cause on moving for the injunction; but so that this fee shall be charged once only in the progress of a cause	1	1	0
For amending each brief of a bill or claim where there is no reprint	0	13	4
For perusing and considering the bill on behalf of each defendant, or set of defendants, appearing by the same solicitor	1	1	0

SCHEDULE (B.)

Form of Bill.

In Chancery.

John Lee Plaintiff.
 James Styles }
 and } Defendants.
 Henry Jones }

Bill of Complaint.

To the Right Honourable EDWARD BURTON-SHAW Baron St. LEONARDS, of Slaughtam, in the County of Sussex, Lord High Chancellor of Great Britain.

Humbly complaining, sheweth unto his Lordship, John Lee, of Bedford Square, in the county of Middlesex, Esq., the above-named plaintiff, as follows:—

1.—The defendant James Styles, being seised in fee simple of a farm called Blackacre, in the parish of A. in the county of B., with the appurtenances, did, by an indenture dated the 1st of May 1850, and made between the defendant James Styles of the one part, and the plaintiff of the other part, grant and convey the said farm with the appurtenances unto, and to the use of, the plaintiff, his heirs, and assigns, subject to a proviso for redemption thereof, in case the defendant James Styles, his heirs, executors, administrators or assigns, should on the 1st of May 1851, pay to the plaintiff, his executors, administrators, or assigns the sum of 5,000*l.*, with interest thereon, at the rate of 5*l.* per centum per annum, as by the said indenture will appear.

2.—The whole of the said sum of 5,000*l.*, together with interest thereon at the rate aforesaid, is now due to the plaintiff.

3.—The defendant, Henry Jones, claims to have some charge upon the farm and premises comprised in the said indenture of mortgage of the 1st of May 1850, which charge is subsequent to the plaintiff's said mortgage.

4.—The plaintiff has frequently applied to the defendants, James Styles and Henry Jones, and required them either to pay the said debt, or else to release the equity of redemption of the premises, but they have refused so to do.

5.—The defendants, James Styles and Henry Jones, pretend that there are some other mortgages, charges or incumbrances affecting the premises, but they refuse to discover the particulars thereof.

6.—There are divers valuable oak, elm, and other timber, and timber-like trees growing and standing on the farm and lands comprised in the said indenture of mortgage of the 1st of May 1850, which trees and timber are a material part of the plaintiff's said security; and if the same or any of them were felled and taken away, the said mortgaged premises would be an insufficient security to the plaintiff for the money due thereon.

7.—The defendant James Styles, who is in possession of the said farm, has marked for felling a large quantity of the said oak and elm trees and other timber, and he has by hand-bills, published on the 2nd of December instant, announced the same for sale, and he threatens and intends forthwith to cut down and dispose of a considerable quantity of the said trees and timber on the said farm.

Prayer.

The plaintiff prays as follows:—

1.—That an account may be taken of what is due for principal and interest on the said mortgage.

2.—That the defendants, James Styles and Henry Jones, may be decreed to pay to the plaintiff the amount which shall be so found due, together with his costs of this suit, by a short day to be appointed for that purpose, or, in default thereof, that the defendants James Styles and Henry Jones, and all persons claiming under them, may be absolutely foreclosed of all right and equity of redemption in or to the said mortgaged premises.

3.—That the defendant James Styles may be restrained by the injunction of this honourable Court from felling, cutting, or disposing of any of the timber or timber-like trees now standing or growing in or upon the said farm and premises comprised in the said indenture of mortgage, or any part thereof.

4.—That the plaintiff may have such further or other relief as the nature of the case may require.

Names of defendants.

ORDERS OF COURT.

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The defendants to this bill of complaint are,
James Styles,
Henry Jones,
Y. Y.,
(name of counsel.)

NOTE.—This bill is filed by Messrs. A.B. and C.D., of Lincoln's Inn, in the county of Middlesex, solicitors for the above-named plaintiff.

SCHEDULE (C.)

Form of Interrogatories.

In Chancery.

John Lee	.	.	.	Plaintiff.
James Styles	}	.	.	Defendants.
and				
Henry Jones				

Interrogatories for the examination of the above-named defendants in answer to the plaintiff's bill of complaint.

1.—Does not the defendant Henry Jones claim to have some charge upon the farm and premises comprised in the indenture of mortgage of the 1st of May 1850, in the plaintiff's bill mentioned?

2.—What are the particulars of such charge, if any, the date, nature and short effect of the security, and what is due thereon?

3.—Are there or is there any other mortgages or mortgage, charges or charge, incumbrances or incumbrance, in any and what manner affecting the aforesaid premises, or any part thereof?

4.—Set forth the particulars of such mortgages or mortgage, charges or charge, incumbrances or incumbrance; the date, nature, and short effect of the security; what is now due thereon; and who is or are entitled thereto respectively; and when and by whom, and in what manner, every such mortgage, charge, or incumbrance was created.

The defendant James Styles is required to answer all these interrogatories.

The defendant Henry Jones is required to answer the interrogatories numbered 1 and 2.

Y. Y.,
(name of counsel.)

SCHEDULE (D.)

Form of Answer.

In Chancery.

John Lee	.	.	.	Plaintiff.
James Styles	}	.	.	Defendants.
and				
Henry Jones				

The Answer of James Styles, one of the above-named Defendants to the Bill of Complaint of the above-named Plaintiff.

In answer to the said bill, I, James Styles, say as follows:—

1.—I believe that the defendant, Henry Jones, does claim to have a charge upon the farm and premises comprised in the indenture of mortgage of the 1st of May 1850, in the plaintiff's bill mentioned.

2.—Such charge was created by an indenture dated the 1st of November 1850, made between myself of the one part, and the said defendant Henry Jones of the other part, whereby I granted and conveyed the said farm and premises, subject to the mortgage made by the said indenture of the 1st of May 1850, unto the defendant Henry Jones for securing the sum of 2,000*l.* and interest at the rate of 5*l.* per centum per annum, and the amount due thereon is the said sum of 2,000*l.* with interest thereon, from the date of such mortgage.

3.—To the best of my knowledge, remembrance, and belief there is not any other mortgage, charge, or incumbrance affecting the aforesaid premises.

M. N.
(name of counsel.)

SCHEDULE (E.)

Form of Summons.

In Chancery.

In the Matter of the Estate of John Thomas, late of the Parish of A., in the County of B., deceased.

Joseph Wilson
against
William Jackson.

Upon the application of Joseph Wilson, of Russell Square, in the county of Middlesex, Esq., who claims to be a creditor upon the estate of the above-named John Thomas, let William Jackson, the executor of the said John Thomas, attend at my chambers [in the Rolls Yard, Chancery Lane, Middlesex], [or at No. —, — square, Lincoln's Inn, Middlesex] on the — day of —, at — of the clock in the afternoon, and shew cause, if he can, why an order for the administration of the personal estate of the said John Thomas, by the High Court of Chancery, should not be granted.

Dated the — day of — 1852.

JOHN ROMILLY, Master of the Rolls, *or*,
G. J. TURNER, Vice Chancellor, *or*,
RICHD. T. KINDERSLEY, Vice Chancellor, *or*,
JAMES PARKER, Vice Chancellor.

NOTE.—If the above-named William Jackson does not attend either in person or by his solicitor, at the time and place above mentioned, such order will be made in his absence as the Judge may think just and expedient.

This summons was taken out by A. and B., of Lincoln's Inn, in the county of Middlesex solicitors for the above-named Joseph Wilson.

Saturday, August 7, 1852.

THE Right Honourable EDWARD BURTENSHAW LORD ST. LEONARDS, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable Sir JOHN ROMILLY, Master of the Rolls, the Right Honourable the Lord Justice Sir JAMES LEWIS KNIGHT BRUCE, the Right Honourable the Lord Justice LORD CRANWORTH, the Right Honourable the Vice Chancellor Sir GEORGE JAMES TURNER, the Honourable the Vice Chancellor Sir RICHARD TORIN KINDERSLEY, and the Honourable the Vice Chancellor Sir JAMES PARKER, DOETH HEREBY, in pursuance and execution of all powers enabling him in that behalf, ORDER AND DIRECT :—

That all and every the Orders, Rules, and Directions hereinafter set forth shall henceforth be, and for all purposes be deemed and taken to be, General Orders and Rules of the High Court of Chancery, viz. :—

I.—That no appeal from any Decree, Order, or Dismission, or any re-hearing of the case on which such Decree, Order or Dismission is founded, shall be allowed, unless the same is set down for hearing, and the requisite notice thereof duly served, within five years from the date of any such Decree, Order, or Dismission respectively.

II.—That all Decrees and Orders, and all Dismissions, pronounced or made in any cause, claim or matter in this Court which shall be enrolled, shall be so enrolled within six calendar months after the same shall be so pronounced or made respectively, and not at any time after without special leave of the Court, such leave to be obtained in manner next hereinafter mentioned.

III.—In case any party is desirous to enrol a Decree, or Order, or Dismission after the expiration of six calendar months from the time the same shall have been made, he shall obtain an order for that purpose, and which order, unless made by consent of the adverse party, or on motion and notice to all the parties, shall be a conditional order in the first instance, but shall become absolute without further order, unless cause is shewn against it within twenty-eight days after service of the order.

IV.—That where a *caveat* is entered with the proper officer to stay the signing of the docket of the enrolment of any Decree, Order, or Dismission, such *caveat* shall be prosecuted with effect within twenty-eight days after the docket of such Decree, Order, or Dismission shall be left to be signed with the proper officer by the party who entered the same, otherwise

such *caveat* shall be of no force; and the docket of such Decree, Order, or Dismission may immediately after the expiration of the said twenty-eight days be presented to be signed, as if no such *caveat* had been entered.

V.—That no enrolment of any Decree, Order, or Dismission shall be allowed after the expiration of five years from the date thereof.

VI.—That the Lord Chancellor, either sitting alone, or with the Lords Justices, or either of them, shall be at liberty, where it shall appear to him under the peculiar circumstances of the case to be just and expedient, to enlarge the periods hereinbefore appointed for a re-hearing, or an appeal, or for an enrolment.

VII.—That these Orders shall take effect on and from the twenty-eighth day of October next.

(Signed)

ST. LEONARDS, C.

JOHN ROMILLY, M.R.

J. L. KNIGHT BRUCE, L.J.

CRANWORTH, L.J.

G. J. TURNER, V.C.

RICHARD T. KINDERSLEY, V.C.

JAMES PARKER, V.C.

Saturday, October 16, 1852.

THE Right Honourable EDWARD BURTENSHAW LORD ST. LEONARDS, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable Sir JOHN ROMILLY, Master of the Rolls, the Right Honourable the Vice Chancellor Sir GEORGE JAMES TURNER, and the Honourable the Vice Chancellor Sir RICHARD TORIN KINDERSLEY, DOETH HEREBY, in pursuance of an Act of Parliament passed in the fifteenth and sixteenth years of Her present Majesty, intituled "An Act to abolish the Office of Master in Ordinary of the High Court of Chancery, and to make provision for the more speedy and efficient despatch of Business in the said Court," and in pursuance and execution of all other powers enabling him in that behalf, ORDER AND DIRECT :—

That all and every the Orders, Rules, and Directions hereinafter set forth shall henceforth be, and for all purposes be deemed and taken to be, General Orders and Rules of the High Court of Chancery, viz. :—

Summons.

I.—The summons for the purpose of proceedings before the Master of the Rolls and Vice Chancellors respectively at Chambers, whether originating in chambers or not, may be in a form similar to the form set forth in Schedule (A) to these Orders, with such variations as the circumstances of the case may require.

II.—The summons to be issued under section 30. of the Act of 15 & 16 Vict. c. 80. may be in a form similar to the form set forth in Schedule (B) to these Orders, with such variations as the circumstances of the case may require.

III.—A seal is forthwith to be provided for the chambers of the Master of the Rolls and each of the Vice Chancellors, and summonses are to be prepared by the parties, and sealed by one of the clerks, at the chambers of the Judge from whose chambers they are issued, and a copy of such summons is to be left at the Judge's chambers by the party obtaining such summons.

IV.—In cases of applications under 15 & 16 Vict. c. 86. s. 45. applications for guardianship and maintenance of infants, originating in chambers, and of all other applications originating in chambers, a duplicate of the summons is to be filed in the Record and Writ Office, and in cases where service is required, the copies served are to be stamped in the manner provided by section 46. of the Act of 15 & 16 Vict. c. 86.

V.—In cases where proceedings originate in chambers, the original summons is to be served seven clear days before the return thereof. All other

summonses, not being summonses referred to in Order II., are to be served two clear days before the return thereof.

VI.—In cases where proceedings originate in chambers, and where from any cause the summons may not have been served upon any party seven clear days before the return thereof, an indorsement may be made upon the summons, and upon a copy thereof stamped for service, appointing a new time for the parties not before served to attend at the chambers of the Judge, and such indorsements are to be sealed at the Judge's chambers, and the service of the copy so indorsed and sealed, is to have the same force and effect as the service of an original summons and where any party has been served before such indorsement, the hearing thereof may upon the return of the summons be adjourned to the new time so appointed.

Appearances.

VII.—In all cases where proceedings originate in chambers, the parties served are before they are heard in chambers to enter appearances in the Record and Writ Office, and give notice there.

Orders and Directions, applicable to all Cases, whether originating in Chambers or not.

VIII.—In all cases in which by any Order any accounts are directed to be taken, or inquiries to be made, each direction shall be numbered, so that as far as may be each distinct account and inquiry may be designated by a number, and such Order may be in the form set forth in Schedule (C) to these Orders, with such variations as the circumstances of the case may require.

IX.—Where an order is made directing an account of debts, claims, or liabilities, or an inquiry for next-of-kin or other unascertained persons, unless otherwise ordered, all persons who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement, are to be excluded from the benefit of the order.

X.—Where an order is made directing an account of the debts of a deceased person, unless otherwise ordered, interest is to be computed on such debts as to such of them as carry interest after the rate they respectively carry, and as to all others after the rate of 44 per cent. per annum, from the date of the order.

XI.—Where an order is made directing an account of legacies, unless otherwise ordered, interest is to be computed on such legacies after the rate of 44 per cent. per annum, from the end of one year after the deceased's death, unless any other time of payment or rate of interest is directed by the will, and in that case according to the will.

XII.—Where an order is made directing any property to be sold, unless otherwise ordered, the same is to be sold with the approbation of the Judge to whose Court the cause or matter is attached, to the best purchaser that can be got for the same, to be allowed by such Judge, and all proper parties are to join therein as such Judge shall direct.

XIII.—Where an order is made directing a receiver to be appointed, unless otherwise ordered, the person to be appointed is first to give security, to be allowed by the Judge to whose Court the cause is attached, and taken before an officer or agent of the court in the country, if there shall be occasion, duly to account for what he shall receive on account of the rents and profits, for the receipt of which he is to be appointed, at such periods as such Judge shall appoint, and to account for and pay the same as the Court shall direct, or as the case may be, to be answerable for what he shall receive in respect of the personal estate, for the getting in and collection of which he is to be appointed, and to account for and pay the same as the Court shall direct; and the person so to be appointed is to be allowed a proper salary for his care and pains in receiving such rents and profits, or, as the case may be, to have an allowance made to him in respect of his collecting such personal estate.

XIV.—The General Orders of the Court with respect to receivers shall, *mutatis mutandis*, apply to receivers appointed under orders made after these Rules and Regulations come into operation.

XV.—Recognizances which have been heretofore given to the Master of the Rolls and the Senior Master in Ordinary are hereafter to be given to the Master of the Rolls and the Senior Vice-Chancellor for the time being.

Proceedings in Chambers.

XVI.—In all cases where matters, in respect of which summonses have been issued, are not disposed of upon the return of the summons, the parties are to attend from time to time without further summons, at such time or times as may be appointed for the consideration or further consideration of the matter.

XVII.—In all cases of proceedings in chambers under any order, the solicitor prosecuting the same shall leave a copy of such order at the Judge's chambers, and shall certify the same to be a true copy of the order as passed and entered.

XVIII.—Upon a copy of the order being left, a summons is to be issued to proceed with the accounts or inquiries directed, and upon the return of such summons, the Judge is to be satisfied by proper evidence that all necessary parties have been served with notice of the order, and thereupon directions are to be given as to the manner in which each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the parties who are to attend on the several accounts and inquiries, and the time within which each proceeding is to be taken; and a day or days may be appointed for the further attendance of the parties, and all such directions may afterwards be varied or added to as may be found necessary.

XIX.—If, upon the hearing of the summons, it shall appear to the Judge that by reason of absence, or for any other sufficient cause, the service of notice of the order upon any party cannot be made, or ought to be dispensed with, the Judge may, if he shall think fit, wholly dispense with such service, or may, at his discretion, order any substituted service, or notice by advertisement or otherwise, in lieu of such service.

XX.—If, in the prosecution of the order, it shall appear to the Judge that it would be expedient that further accounts should be taken or further inquiries made, he may order the same to be taken or made accordingly, or if desired by any party may direct the same to be considered in open court.

XXI.—At the time any summons or appointment is obtained, an entry thereof is to be made in a book, called "The Summons and Appointment Book," stating the date on which the summons is issued or appointment made, the name of the cause or matter, and by what party, and, shortly, for what purpose, such summons or appointment is obtained, and at what time returnable.

XXII.—Lists of matters appointed for each day are to be made out and affixed outside the doors of the chambers of the respective Judges, and, subject to any special direction, such matters are to be heard in the order in which they appear in such List.

XXIII.—The course of proceeding in chambers is ordinarily to be the same as the course of proceeding in Court upon motions. No states of facts,

charges, or discharges are to be brought in. But when directed, copies, abstracts, or extracts of or from accounts, deeds, or other documents, and pedigrees and concise statements, are to be supplied for the use of the Judge and his Chief Clerk, and, where so directed, copies are to be handed over to the other parties. But no copies to be made of deeds or documents where the originals can be brought in, without special direction.

XXIV.—The party intending to use any affidavit on any proceeding in chambers is to give notice to the other parties concerned of his intention in that behalf.

XXV.—The practice of the Court with respect to evidence before the hearing, when applied to evidence to be taken before an Examiner in any cause subsequently to the hearing, is to be subject to any special directions which may be given in any particular case.

XXVI.—Where a Chief Clerk is directed by the Judge to examine any witness, the practice and mode of proceeding is to be the same as in the case of the examination of witnesses before the Examiner, subject to any special directions which may be given in any particular case.

XXVII.—The original examinations and depositions of parties and witnesses taken by or before the Chief Clerk, authenticated by his signature, are to be transmitted by him to the Record and Writ Office, to be there filed, and any party to the suit or proceeding may have a copy thereof, or of any part or portion thereof, upon payment of the proper fee.

XXVIII.—All orders made in chambers, and drawn up by the Chief Clerks or Registrars are to be entered in the same manner and in the same office as orders made in open Court are entered.

XXIX.—Where any account is directed to be taken, the accounting party is, unless the Judge shall otherwise direct, to make out his account and verify the same by affidavit. The items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and to be left in the Judge's chambers.

XXX.—Any party seeking to charge any accounting party beyond what he has by his account admitted to have received is to give notice thereof to the accounting party, stating, so far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner.

XXXI.—Upon a Receiver's account being left in the Judge's chambers to be passed, a summons to proceed thereon is to be taken out; and the account, when passed, is to be entered by the solicitor of the Receiver in books, in the same manner as heretofore; but the affidavit verifying the account so passed is to refer to it as an exhibit, and not to be annexed to it.

XXXII.—When a receivership has been completed, the book containing the accounts is to be deposited in the Record and Writ Office.

XXXIII.—Where advertisements are required for any purpose, a peremptory and only one is to be issued, unless for any special reason it may be thought necessary to issue a second advertisement or further advertisements; and any advertisement may be repeated as many times and in such papers as may be directed.

XXXIV.—The advertisements are to be prepared by the solicitor, and submitted to the Chief Clerk for approval, and, when approved, are to be signed by him, and such signature is to be sufficient authority to the printer of the Gazette to insert same.

XXXV.—Advertisements for creditors or other claimants are to fix a time for the creditors or claimants to come in and prove their claims, and to appoint a day for the hearing and adjudicating thereon, and may be in a form similar to the form set forth in Schedule (D) to these Orders, with such variations as the circumstances of the case may require.

XXXVI.—Claimants coming in pursuant to advertisement are to enter their claims at the chambers of the Judge in the "Summons and Appointment Book," for the day appointed for hearing by the advertisement, and are to give notice thereof and of the affidavit filed to the solicitors in the cause, within the time specified in the advertisement for bringing in claims.

XXXVII.—The claimants filing affidavits are not to be required to take office copies; but the party prosecuting the cause or matter is to take office copies, and produce the same at the hearing, unless otherwise ordered in chambers.

XXXVIII.—If on the day appointed for hearing the claims, there are any not then disposed of, an adjournment day for hearing such claims is to be fixed; and where further evidence is to be adduced, a time may be named within which the evidence on both sides is to be closed, and directions may be given as to the mode in which such evidence is to be adduced.

XXXIX.—Any claimant who has not before entered his claim, may be heard on such adjournment day, provided he enters his claim and files his affidavit four clear days prior to such day, and no certificate of debts or claims shall in the mean time have been made.

XL.—Creditors claiming debts not exceeding 5*l*. need not attend on the day of hearing, unless required to do so by notice from some party.

XLI.—After the time fixed by the advertisement, no claims are to be received except as before provided, in case of an adjournment, unless the Judge at chambers shall think fit to give special leave,

upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the Judge shall think fit.

XLII.—A list of all claims allowed shall, when required by the Judge, be made out and left in the Judge's chambers by the party prosecuting the order.

XLIII.—In cases where the Court directs any computation of interest, or the apportionment of any fund, which is to be acted upon by the Accountant-General or other person, without any further order from the Court, the order to be made by the Court may direct such computation or apportionment to be made by one of the Chief Clerks attached to the Court of such Judge, and may direct the certificate thereof, signed by such Chief Clerk, to be acted upon accordingly, without the same being signed and adopted by the Judge.

XLIV.—Where an account has been directed, the certificate or report is to state the result of such account, and not set the same out by way of schedule, but is to refer to the account verified by the affidavit filed, and to specify by the numbers attached to the items in the account, which, if any, of such items have been disallowed or varied, and to state what additions, if any, have been made by way of surcharge. In any case in which the account verified by the affidavit has been so altered that it is necessary to have a fair transcript of the account as altered, such transcript may be required to be made by the solicitor prosecuting the order, and is then to be referred to by the certificate or report. The accounts and the transcripts, if any, referred to by certificates or reports, are to be filed therewith, but no copies thereof are to be required to be taken by any party.

XLV.—The certificates or reports to be made by the Chief Clerk to the Judge are not, except the special circumstances of the case shall render it necessary, to set out the order, or any documents, or evidence, or reasons, but are to refer to the order, documents, and evidence, or particular paragraphs thereof, so that it may appear upon what the result stated in any such certificate or report is founded.

XLVI.—The certificate of the Chief Clerk to the Judge may be in a form similar to the form set forth in Schedule (E) to these Orders, with such variations as the circumstances of the case may require, and when prepared and settled, it is to be transcribed by the solicitor prosecuting the proceedings, in such form and within such time as the Chief Clerk shall require, and is then to be signed by the Chief Clerk at an adjournment to be made for that purpose. But where, from the nature of the case, the certificate can be drawn and copied in chambers whilst the parties are present before the Chief Clerk, the same shall be then completed and signed by him without any adjournment.

XLVII.—The time within which any party is to be at liberty to take the opinion of the Judge upon

any proceeding which shall have been concluded, but as to which the certificate or report of a Chief Clerk shall not have been signed and adopted by the Judge, is to be four clear days after the certificate or report shall have been signed by the Chief Clerk.

XLVIII.—Any party desiring to take the opinion of the Judge, as mentioned in the last preceding rule, is within four clear days after the certificate or report shall have been signed by the Chief Clerk, to obtain a summons for such purpose.

XLIX.—At the expiration of four clear days after the certificate or report shall have been signed by the Chief Clerk, if no party has in the mean time obtained a summons to take the opinion of the Judge thereon, the Chief Clerk is to submit the certificate or report to the Judge for his approval, and the Judge may thereupon, if he approve the same, sign such certificate or report in testimony of his adoption thereof as follows:—"Approved, this day of ."

L.—The certificate or report, when signed by the Judge, with the accounts, if any, to be filed therewith, is to be transmitted by the Chief Clerk to the Report Office, to be there filed.

LI.—The time within which an application may be made by summons or motion to discharge or vary any certificate or report which has been signed and adopted by the Judge sitting in chambers, is to be eight clear days after the filing of such certificate or report.

LII.—Certificates of the Chief Clerk made as mentioned in Rule XLIII., and not required to be signed and adopted by the Judge, are to be transmitted and filed in the same manner as those signed and adopted by the Judge.

LIII.—The Orders XLVII., XLVIII., XLIX., and LI., are not to apply to certificates on passing Receiver's accounts. Such certificates may be approved and signed by the Judge without delay, and upon being so signed are to be filed and forthwith acted upon.

LIV.—A register is to be kept of all proceedings in the Judge's chambers, with proper dates, so that all the proceedings in each cause or matter may appear consecutively and in chronological order, with a short statement of the questions or points decided or ruled at any hearing.

LV.—Parties attending any proceeding in chambers, without having obtained the previous leave of the Judge to attend the same, are not to be allowed any costs of such attendance, unless by special order of the Court.

LVI.—The costs of counsel attending the Judge in chambers are not in any case to be allowed, unless

ORDERS OF COURT.

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the Judge certifies it to be a proper case for counsel to attend.

Deposit of Deeds.

LVII.—Where any deeds or other documents are ordered to be left or deposited, the same are to be left or deposited in the Record and Writ Office, and are to be subject to such directions as may be given for the production thereof.

Power of Judge.

LVIII.—Powers and authorities given to the Masters in Ordinary of the Court of Chancery by any General Order or Orders of the Court, may be exercised by the Judge sitting in chambers.

LIX.—The power of the Court and of the Judge sitting in chambers to enlarge or abridge the time for doing any act or taking any proceeding, and to give any special direction as to the course of proceeding in any cause or matter, is unaffected by these Orders.

Commencement of Orders.

LX.—These Orders shall take effect and come into operation from and after the 1st day of Michaelmas Term, 1852.

Interpretation.

LXI.—In these Orders the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject, or context, repugnant to such construction; viz. :—

1. Words importing the singular number include the plural number, and words importing the plural number include the singular number.
2. Words importing the masculine gender include females.
3. The word "party," includes a body politic or corporate.
4. The word "affidavit," includes affirmation.
5. The word "Order," includes decree and decretal order.
6. The word "Receiver" includes consignee and manager.

ST. LEONARDS, C.

JOHN ROMILLY, M.R.

G. J. TURNER, V.C.

RICHARD T. KINDERSLEY, V.C.

SCHEDULE (A).

Form of Summons.

In Chancery.

In the Matter of John Thomas, an Infant,

or Joseph Wilson

against

William Jackson.

Let all parties concerned attend at my chambers [in the Rolls Yard, Chancery Lane, Middlesex], [or, at No. —, — Square, Lincoln's Inn, Middlesex], on the — day of —, at — of the clock in the — noon, on the hearing of an application on the part of [here state on whose behalf the application is made and the precise object of the application].

Dated this — day of — 1852.

JOHN ROMILLY, Master of the Rolls, or,

GEORGE JAMES TURNER, Vice-Chancellor, or,

RICHARD T. KINDERSLEY, Vice-Chancellor, or,

JOHN STUART, Vice-Chancellor.

This summons was taken out by A. and B. of Lincoln's Inn, in the county of Middlesex, solicitors for

To

The following Note to be added to the original summons where proceedings originals in chambers; and when the time is altered by indorsement, the indorsement to be referred to as below.

NOTE.—If you do not attend, either in person or by your solicitor, at the time and place above mentioned [or, at the place above mentioned, at the time mentioned, in the indorsement hereon], such order will be made, and proceedings taken, as the Judge may think just and expedient.

N.B.—The Form of Summons to be obtained under section 45. of the Act 15 & 16 Vict. c. 86, is prescribed by Rule XLII. of the Orders of 7th August 1852.

SCHEDULE (B).

Form of Summons by Chief Clerk.

In Chancery.

In the Matter of the Estate of John Thomas, late of —, in the county of — deceased,

or

Joseph Wilson

against

William Jackson.

The defendant, William Jackson [or, A.B. of, &c.] is hereby summoned to attend at the chambers of

ORDERS OF COURT.

the Master of the Rolls [or Vice Chancellor],
in the Rolls Yard, Chancery Lane [or, No. —, —
Square, Lincoln's Inn, Middlesex], on the
day of at of the clock in the noon,
to be examined [or, to be examined as a witness] on
the part of the for the purpose of the proceed-
ings directed by the Master of the Rolls [or, the said
Vice Chancellor] to be taken before me.

Dated this day of 1852.

A. B.

Chief Clerk.

This summons was taken out by A. and B. of
Lincoln's Inn, in the county of Middlesex,
solicitors for .

SCHEDULE (C).

Form of Order.

This Court doth order, that the following accounts
and inquiries be taken and made; that is to say,

1. An account of the personal estate not speci-
fically bequeathed, of A. B., deceased, the tes-
tator in the pleadings named, come to the hands
of, &c.
2. An account of the said testator's debts.
3. An account of the said testator's funeral
expenses.
4. An account of the said testator's legacies.
5. An inquiry what parts (if any) of the said
testator's personal estate are outstanding or
undisposed of.

And it is ordered, that the said testator's personal
estate not specifically bequeathed, be applied in pay-
ment of his debts and funeral expenses in a course of
administration, and then in payment of his legacies.

And it is ordered, that the following further ac-
counts and inquiries be taken and made; that is to
say,

6. An inquiry what real estate the said testator
was seized of or entitled to at the date of his will
and at the time of his death.
7. An inquiry what incumbrances affect the
said testator's real estate.
8. An account of the rents and profits of the
said testator's real estate received by, &c.
9. And it is ordered, that the said testator's
real estate be sold.

And it is ordered, that the further consideration of
this cause be adjourned, and any of the parties are
to be at liberty to apply as they may be advised.

SCHEDULE (D).

Form of Advertisement.

Pursuant to a decree or order of the High Court
of Chancery, made in a cause

against

the creditors of [or persons claiming debts, or liabili-
ties affecting the estate of, or the persons claiming to
be next-of-kin to, or the heir of, as the case may be],
late of in the county of

who died in or about the month of are by
their solicitors, on or before the day of
to come in and prove their debts or claims at the
chambers of the Master of the Rolls, in the Rolls
Yard, Chancery Lane [or, of the Vice-Chancellor
No. —, — Square, Lincoln's Inn],
Middlesex, or in default thereof they will be peremp-
torily excluded from the benefit of the said decree
[or order].

Monday, the day of at
o'clock in the noon, at the said chambers,
is appointed for hearing and adjudicating upon
the claims.

Dated this day of 1852.

A. B.

Chief Clerk.

SCHEDULE (E)

Form of Certificate of Chief Clerk.

In the Matter of ; [or Between .]
[State title.] In pursuance of the directions given
to me by the Master of the Rolls [or, the Vice-
Chancellor], I hereby certify, that
the result of the accounts and inquiries which have
been taken and made, in pursuance of the order in
this cause, dated the day of , is as
follows:—

1. The defendants, the exe-
cutors of , the testator, have
received personal estate to the amount of £ ,
and they have paid, or are entitled to be allowed on
account thereof, sums to the amount of £ ,
leaving a balance due from [or to] them of £ ,
on that account.

The particulars of the above receipts and pay-
ments appear in the account marked ,
verified by the affidavit of , filed on
the day of , and which account is to
be filed with the certificate, except that in addition
to the sums appearing on such account to have been
received, the said defendants are charged with the
following sums [state the same here, or in a schedule],
and except that I have disallowed the items of dis-
bursement in the said account numbered and

[Or in cases where a transcript has been made.]

The defendants have brought in
an account verified by the affidavit of ,
filed on the day of , and which account

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is marked , and is to be filed with this certificate. The account has been altered, and the account marked , and which is also to be filed with this certificate, is a transcript of the account as altered and passed.

2. The debts of the testator which have been allowed are set forth in the Schedule hereto, and with the interest thereon and costs mentioned in the Schedule, and due to the persons therein named and amount altogether to £ .

3. The funeral expenses of the testator amount to the sum of £ , which I have allowed the said executors in the said account of personal estate.

4. The legacies given by the testator are set forth in the Schedule hereto, and with the interest therein mentioned remain due to the persons therein named, and amount altogether to £ .

5. The outstanding personal estate of the testator consists of the particulars set forth in the Schedule hereto.

6. The real estate to which the testator was entitled consists of the particulars set forth in the Schedule hereto.

7. The incumbrances affecting the said testator's real estate, are specified in the Schedule hereto.

8. The defendants have received rents and profits of the testator's real estate, &c. [in a form similar to that provided with respect to the personal estate.]

9. The real estates of the testator directed to be sold have been sold, and the purchase-money, amounting altogether to £ , have been paid into court.

N.B.—The above numbers are to correspond with the numbers in the decrees.

After each statement the evidence produced is to be stated as follows:—

The evidence produced on this account [or inquiry] consists of the probate of the testator's will, the affidavit of A.B. filed , and paragraph No. of the affidavit of C.D. filed .

ST. LEONARDS, C.

JOHN ROMILLY, M.R.

G. J. TURNER, V.C.

RICHD. T. KINDERSLEY, V.C.

* * ORDERS regulating the Fees and Allowances to Solicitors, in respect of the matters to which the foregoing Orders relate, and regulating the Fees to be payable by Suitors of the Court to the Officers thereof in respect of the Business to be conducted before the Master of the Rolls, and the Vice Chancellors, at Chambers, and their respective Chief Clerks, will be issued before the first day of Michaelmas Term.

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Saturday, October 23, 1852.

THE RIGHT HONOURABLE EDWARD BURTENSHAW LORD ST. LEONARDS, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable Sir JOHN ROMILLY, Master of the Rolls, the Right Honourable the Vice Chancellor Sir GEORGE JAMES TURNER, and the Honourable the Vice Chancellor Sir RICHARD TORIN KINDERSLEY, DOIT HEREBY, in pursuance of an Act of Parliament passed in the fifteenth and sixteenth years of Her present Majesty, intituled "An Act to abolish the Office of Master in Ordinary of the High Court of Chancery, and to make Provision for the more speedy and efficient Despatch of Business in the said Court," and in pursuance and execution of all other powers enabling him in that behalf, ORDER AND DIRECT, as follows, viz. :—

I. The Chief Clerks of the Master of the Rolls, and Vice Chancellors respectively, are directed to take the following fees :—

	£.	s.	d.
1. For every original summons for the purpose of proceedings originating in chambers	0	5	0
2. For every duplicate thereof	0	5	0
3. For every other summons	0	3	0
4. For every advertisement	1	0	0
5. For every certificate or report	1	0	0
6. For every certificate upon the passing of a Receiver's or Consignee's account, a further fee in respect of each 100 <i>l.</i> received of	0	10	0
7. For every order drawn up by the Chief Clerk made upon applications for time to plead, answer or demur, for leave to amend bills or claims, or for enlarging publication or the period for closing evidence, or for the production of documents, or applications relating to the conduct of suits or matters ...	0	5	0
8. For every other order drawn up by the Chief Clerk	1	0	0

II. The Registrars are directed to take the following fees :—

For orders made by a Judge in chambers, drawn up by the Registrar, the like fees as before directed to be taken by the Chief Clerk for orders drawn up by him.

III. The Record and Writ Clerks are directed to take the following fees :—

For office copies of original depositions, and examinations, per folio	0	0	4
For entering appearances to Judge's summons, same charge as for appearing to a bill.			

NEW SERIES, XXI.—CHANC.

	£.	s.	d.
For stamping every copy of a bill or claim for service	0	5	0
For stamping every copy of a Judge's summons for service	0	5	0
For examining every copy or part of a copy of a set of interrogatories, and marking same as an office copy	0	5	0

IV. All fees received by officers of the court, under the preceding Orders, are to be accounted for and paid by them respectively, once in every month, into the Bank of England, in the name of the Accountant General, to be placed to the account there entitled "The Sutors' Fee Fund Account;" the amount so received and paid by such officers respectively to be verified by the affidavit of the accounting party.

V. Solicitors are entitled to charge and be allowed the following fees :—

For instructions to commence proceedings originating in chambers, or to defend the same	0	13	4
For preparing an original summons for the purpose of proceedings originating in chambers, and the duplicate thereof ...	0	13	4
For attending at chambers to get such summons and duplicate examined and sealed	0	6	8
For attending at the Record and Writ Office to file duplicate and examine copies, and get same stamped	0	6	8
For indorsing a summons and the copies under Order VI. of 16th October, 1852, and attending to get same sealed	0	6	8
For entering the appearance for one or more defendants, if not exceeding three	0	6	8
If exceeding three, for every additional number not exceeding three an additional sum of	0	6	8
In cases of proceedings originating in chambers the same term fee as in a suit.			

C

	£.	s.	d.		£.	s.	d.
For preparing every other summons and attending to get same filled up and sealed at chambers	0	6	8	For attending to enter claim under Order XXXVI. of 16th October, 1852, and to file affidavit	0	6	8
For each copy of a summons to serve or leave at chambers	0	2	0	For perusing the affidavits of claimants coming in under Order XXXVI. of 16th October, 1852, and attending in chambers at the time appointed by the advertisement, where the number of claims does not exceed five	1	1	0
For attending on a summons or other appointment, each day, a fee of 6s. 8d., 13s. 4d., or 1l. 1s., according to circumstances; but the fee is to be 6s. 8d., unless a larger fee is allowed by the Judge or his Chief Clerk.				Where the number exceeds five, for every additional number, not exceeding five, an additional sum of	1	1	0
Where from the length of the attendance, or from the difficulty of the case, the Judge shall think the highest of the above fees an insufficient remuneration for the services performed, or where the preparation of the case to lay it before the Judge shall have required skill and labour for which no fee has been allowed, the Judge may allow such further fee, not exceeding one guinea, as in his discretion he may think fit.				For attending to bespeak and procure office copy of certificate or report	0	6	8
For preparing every advertisement	0	6	8	For all other business performed such fees as by the practice of the court they are entitled to for similar business.			
For attending to get same approved and signed	0	6	8				
For attending for every order drawn up by the Chief Clerk, and at the Registrar's office to get same entered	0	6	8				

(Signed)

ST. LEONARDS, C.

JOHN ROMILLY, M.R.

G. J. TURNER, V.C.

RICHARD T. KINDERSLEY, V.C.

Monday, October 25, 1852.

THE Right Honourable EDWARD BURTENSHAW LORD ST. LEONARDS, Lord High Chancellor of Great Britain, DOETH HEREBY, in pursuance of an Act of Parliament passed in the fifteenth and sixteenth years of the reign of Her present Majesty, intituled "An Act for the Relief of the Suitors of the High Court of Chancery," and in pursuance and execution of all other powers enabling him in that behalf, ORDER AND DIRECT that all and every the Orders, Rules, and Directions hereinafter set forth shall henceforth be, and for all purposes be deemed and taken to be, "General Orders and Rules of the High Court of Chancery," viz. :—

1.—In lieu of copies of pleadings and other proceedings in the Court of Chancery, and of the documents relating thereto, being made and delivered by officers of the court at the office in which they are filed or left, copies of such pleadings, proceedings, and documents (save as hereinafter excepted), are to be made, delivered, charged, and paid for according to the following regulations :—

1. The following copies are exempted from this Order, that is to say, office copies of proceedings filed in the Report Office; office copies of answers, pleas, and demurrers; office copies of depositions of witnesses, and examination of parties to be made for and

taken by the party on whose behalf such depositions and examinations have been taken; office copies of affidavits to be made for and taken by the party filing the same; and office copies of affidavits to be taken under Order XXXVII. of 16th October, 1852.

2. The party or his solicitor requiring any copy, save as hereinbefore excepted, is to make a written application to be delivered to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges.

3. Upon such requisition being made with such undertaking as aforesaid, copies of such pleadings,

proceedings, or documents, are to be made by the party or his solicitor filing or leaving the same, or who under the first rule may have taken office copies thereof.

4. The copies are to be ready to be delivered at the expiration of forty-eight hours after the delivery of such request and undertaking, or within such other time as the Court may in any case direct, and are to be delivered accordingly upon demand and payment of the proper charges.

5. The charges for all such copies are to be at the rate of 4d. per folio.

6. Copies of bills of costs are to be made side for side, so as to correspond with the bills of costs left in the office.

7. The folios of all copies are to be numbered consecutively in the margin thereof, and the name and address of the party or solicitor, by whom the same is made, is to be indorsed thereon in like manner as upon the proceedings in the court; and such party or solicitor is to be answerable for the same being true copies of the original, or of an office copy of the original pleadings, proceeding, or document of which it purports to be a copy, as the case may be.

8. In cases of *ex parte* applications for injunctions, or writs of *ne exeat regno*, the party making such application is to deliver copies of the affidavits upon which it is granted, upon payment of the proper charges immediately upon the receipt of such written request and undertaking as aforesaid, or within such time as may be specified in such request, or may have been directed by the Court.

9. Any party or solicitor who has taken any office copy mentioned in Rule 2, is to produce the same in court, or at the Judge's chambers, when required for the purpose of the proceedings to which the same relate.

II.—That all office copies, and copies to be furnished by parties or their solicitors, shall be written on paper of a convenient size, with a sufficient margin, and in a neat and legible manner, similar to that which is usually adopted by law stationers; and in the case of copies to be furnished by parties or their solicitors, unless so written, the parties or solicitors furnishing them shall not be entitled to be paid for the same.

III.—That in case any solicitor who shall be required to furnish any such copy as aforesaid shall either refuse, or for two clear days from the time when the application for such copy shall have been made shall neglect, to furnish the same, the person by whom such application shall be made shall be at liberty to procure a copy from the office in which the original shall have been filed, in the same way as if no such application had been made to the solicitor, and in such case no costs shall be due or payable to the solicitor so making default in respect of the copy or copies so applied for.

IV.—That in case any solicitor by whom any such copy ought to be furnished shall neglect to do so for such two clear days as aforesaid, or for one clear day, an addition of two clear days or one clear day, as the case may be, shall be made to the period within which any proceeding which may have to be taken after obtaining such copy ought to be so taken, so that the person requiring such copy may be as little prejudiced as possible by such neglect as aforesaid.

V.—That the Taxing Master shall not allow any costs in respect of any copy so taken as aforesaid, unless the same shall appear to him to have been requisite, and to have been made with due care both as regards the contents and the writing thereof.

VI.—That from and after the first day of November next, all the fees now payable in relation to such proceedings in the said court as are mentioned in the first part of the first Schedule hereinafter contained shall be abolished; and the fees specified in the second part of such Schedule shall be payable, and the same (save as provided by the seventh of these Orders) shall be collected, not in money, but by means of stamps denoting the amount of such fees, stamped or affixed, at the expense of the parties liable to pay the fees, on or to the vellum, parchment, or paper on which the proceedings in respect whereof such fees are payable are written, or printed, or which may be otherwise used in reference to such proceeding.

And where any of the fees specified in the second part of the said first Schedule shall be payable in respect of any matter or thing to be done by any officer, or in any office of the court, and it shall not have been customary to use any written or printed document or paper in reference to such matter or thing, whereon the stamp could be affixed, the party or his solicitor requiring such matter or thing to be so done, shall make application for the same, by a short note or memorandum in writing, and a stamp denoting the amount of the fee so payable shall be stamped on, or affixed to, such note or memorandum.

VII.—That in all cases where the costs are directed to be paid out of a fund in court, the fees of taxation shall not be payable by means of stamps, but shall be carried over by the Accountant General to the credit of the Sutors' Fee Fund; and, to that intent, the Taxing Master shall in such cases certify the amount of such fees.

VIII.—That from and after the 28th October, 1852, the brokerage which shall or may from time to time be received by the Accountant General of the Court of Chancery shall be paid by him, on the first day of every month, or as soon after as conveniently may be, into the Bank of England, to be there placed to his credit as such Accountant General, to the account entitled "The Sutors' Fee Fund Account."

IX.—That, subject to the superintendence and direction of the Accountant General of the Court of Chancery, with the approbation of the Lord Chancellor, the first, second, and third clerks in each division of the Accountant General's office, shall, from and after the said 28th day of October, 1852, and until other order or provision shall be made in

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that behalf, continue to perform the acts or duties hitherto performed by such clerks, and which are mentioned in the said second Schedule, in addition to the duties prescribed by Act of Parliament as heretofore; and such fees as are specified in the second Schedule hereto shall be paid for such acts as aforesaid, to be accounted for in like manner as the other fees now received in the office of the said Accountant General, and to be collected by means of stamps in like manner as provided by Order VI.; and from and after the said 28th day of October, 1852, no other person shall perform such acts or duties.

And in order to enable the Lord Chancellor, with the consent of the Commissioners of Her Majesty's Treasury, from time to time to fix the amount of the yearly salaries to be paid to such clerks, the Accountant General shall every six months make a return to the Lord Chancellor of the amount received during the preceding six months in respect of such fees.

The FIRST SCHEDULE to which the foregoing Orders refer.

Part I.—FEES NOW PAYABLE WHICH ARE TO BE ABOLISHED.

Masters' Office.

	£.	s.	d.
For drawing every report exclusive of schedules of accounts of parties accounting before the Masters, and exclusive of the fee on signing, per folio.....	0	1	0
For drawing schedules of accounts of parties accounting before the Master, per folio	0	0	6
For taking the acknowledgment of any deed	0	6	0
For searching for papers in a cause or matter not in immediate progress before the Master	0	6	8
For entering accounts of receivers, consignees, and committees, per folio, in each book	0	0	4
For entering accounts of parties accounting before the Master in a book, if required, per folio	0	0	4
For every exhibit	0	2	6
When a Master shall be required to attend a party to administer an oath, there shall be paid a further fee of 10s. over and besides the coach-hire, or reasonable travelling expenses of the Master.....	0	10	0
And for copies of every document or writing made in the Master's office, and also for the transcript of every report, pursuant to the Act of Parliament, 3 & 4 Will. 4. c. 94, and the General Orders of 26th October, 1842, per folio	0	0	4

Registrars' Office.

1 For every decree or order on the original hearing of the cause, and on further directions	3	10	0
2 For every office copy thereof.....	2	0	0
3 For every order on petition or motion of course, not exceeding one side.....	0	3	0
4 For every additional side of such order	0	1	0

	£.	s.	d.
5 For every order on other petitions, where the reference is directed, but the decision of the Master is not to be final, and also where the petition is dismissed	0	10	0
6 For every office copy thereof.....	0	10	0
7 For every order for a special injunction, or for the appointment of a receiver...	2	10	0
8 For every office copy	1	0	0
9 For every order for payment of money out of court, and for no other purpose, where the sum or sums thereby specifically directed to be paid shall not exceed in the whole 100l.....	0	10	0
10 For every office copy thereof.....	0	5	0
11 For every order of transfer out of court, or sale of any sum or sums of government stock or South Sea Annuities, (excepting Long Annuities and Annuities for terms of years,) and for no other purpose, where the sum or sums thereby specifically directed to be transferred or sold shall not exceed in the whole 100l. stock or annuities ...	0	10	0
12 For every office copy thereof.....	0	5	0
13 For every order for payment out of court of any annuity or annuities, not exceeding in the whole 5l. per annum, or of any interest or dividends upon stock or annuities, not exceeding in the whole 5l. per annum, and for no other purpose	0	10	0
14 For every office copy thereof.....	0	5	0
14a For every office copy of every other order for payment or transfer out of court	1	0	0
15 For every other order on special motions	1	0	0
16 For every office copy thereof.....	0	10	0
17 For every order on arguing exceptions	2	0	0
18 For every office copy thereof.....	1	0	0
19 For every order on arguing pleas and demurrers	1	0	0
20 For every office copy thereof.....	0	10	0
21 For every order on petition of appeal or rehearing	2	0	0
22 For every office copy thereof.....	1	0	0
23 For every order on petitions not herein otherwise specified.....	2	0	0
24 For every office copy thereof.....	1	0	0
25 For every order in any matter of lunacy	0	10	0
26 For every office copy thereof.....	0	5	0
27 For every order in any matter of bankruptcy	0	10	0
28 For every office copy thereof.....	0	5	0
29 For every copy of a petition of appeal on the rehearing, per side.....	0	0	6
30 For every order on the hearing of a claim on further directions	2	0	0
31 For every office copy thereof.....	0	10	0
32 For every order on arguing exceptions (on claim)	1	0	0
33 For every office copy thereof.....	0	5	0
34 For every order (on a claim) for transfer out of court or sale of any government stock, &c., exceeding 100l. stock or annuities; and for every order for payment out of court of any annuity			

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	£.	s.	d.
or annuities, or of any interest or dividends upon stock or annuities, exceeding in the whole 5 <i>l.</i> per annum	1	10	0
35 For every office copy thereof.....	0	10	0
36 For every order for payment of money out of court where the sum or sums thereby directed to be paid shall exceed 100 <i>l.</i> and shall not exceed in the whole 500 <i>l.</i> ; and for transfer out of court or sale of any sum or sums of government stock or South Sea Annuities (excepting Long Annuities or Annuities for terms of years), when the sum or sums thereby directed to be transferred or sold shall exceed 100 <i>l.</i> and shall not exceed in the whole 500 <i>l.</i> , and for payment out of court of any annuity or annuities exceeding 5 <i>l.</i> and not exceeding in the whole 25 <i>l.</i> per annum, or of any interest or dividends upon stock or annuities exceeding 5 <i>l.</i> and not exceeding in the whole 25 <i>l.</i> per annum, and for no other purpose	1	0	0
37 For every office copy thereof.....	0	10	0
38 For every other order for payment or transfer out of court	2	0	0

Report Office.

Searches, per year	0	0	6
Examination of office copies for evidence, per folio of ninety words	0	0	1½

Entering Seats.

For every order or decree left for entry, containing 168 words on a side	0	0	6
For every certificate on Master's report ...	0	1	0
Entering every attachment	0	0	2

Affidavit Office.

For filing every affidavit, with or without schedules, or other papers thereto annexed.....	0	0	4
For the Registrar's or his deputy's hand to every copy of an affidavit, with or without schedules or other papers thereto annexed.....	0	1	0
For every search for an affidavit for each term 6 <i>d.</i> , with the liberty of reading it over, if found.....	0	0	6
For searching for, and taking an original affidavit off the file in order to attend the Lord Chancellor or Master of the Rolls therewith, or to be made use of in any court	0	6	8
For attending therewith, at the Lord Chancellor's, or at any of the courts at Westminster, or in London, each time.....	0	6	8
For examining the copy of every affidavit, with the original, in order to make use of such copy as evidence in any other court than the Court of Chancery	0	1	0
Taking affidavits for distringas	0	1	0

	£.	s.	d.
For carrying an original affidavit by the Registrar, or his deputy, to any assizes, for each day, including horse hire and expenses	1	1	0
For trouble, attendance, and taking security to return an original affidavit to the office, when by an order of the Court such original affidavit is directed to be delivered to an associate or clerk of assize, to be made use of at the assizes	0	6	8
For every exhibit	0	2	6

Examiners.

Every witness sworn, including oath	0	2	6
Ditto, sworn, and not examined, including oath	0	5	0
Every witness examined on close holidays	1	7	8
Examining copy depositions, with record to prove on trial at law, if more than forty sheets, for each sheet	0	0	2

Record and Writ Clerks.

Sealing special injunction	1	10	0
Resealing any writ, or any alteration thereof	0	3	0
Every exemplification, per skin exclusive of parchment or duty	1	14	0
Amending every office copy, if more than 10 folios, for every folio over	0	0	4
Search for records when in record-room, or for any person not being a party in the cause, for each year after the first year	0	1	0
Every exhibit to an affidavit, &c.	0	2	6

Taxing Masters.

For copies of bills of costs, and other documents, per folio	0	0	4
For drawing every report, per folio	0	1	0
Per-centage on amount of every bill of costs as taxed	2	10	0
For every exhibit	0	2	6

Door Keeper of the Court of Chancery.

For every cause heard on each side	0	13	0
In every further directions, ditto	0	13	0
In every exceptions, each set	0	13	0
Every appeal, or rehearing, one side	0	13	0
Every plea, or demurrer, one side	0	13	0
Every guardian assigned	0	13	0
Out of 1 <i>l.</i> paid on setting down every petition	0	3	0
Every lunatic petition	0	3	0
Every witness examined <i>vidæ voce</i>	0	1	6
Every prisoner by <i>habeas corpus</i>	0	2	6
Setting down causes to be heard	1	0	0
Setting down cause at Rolls	1	0	0
Term fee from Attorney General	1	10	0
Term fee from Solicitor General	1	0	0
Upon swearing into offices before the Lord Chancellor	2	12	6
From each Queen's Counsel per term ...	1	12	0

Rolls Court—Secretaries.

For drawing and copying every order of course	0	5	6
For entering every order of course	0	0	6

	£.	s.	d.		£.	s.	d.
For entering every order for setting down further directions, exceptions, pleas, and demurrers	0	0	6	<i>In the Office of the Secretary of Decrees and Injunctions.</i>			
For filing every petition for an order of course	0	1	0	Enrolling Lord Chancellor's and Vice Chancellor's decree	0	10	6
For answering and setting down every petition for hearing	0	6	6	The like, Master of the Rolls	0	10	6
For setting down every cause for hearing	1	0	0	Petition to enrol, <i>nunc pro tunc</i>	0	1	0
For setting down every cause on further directions	0	12	6	Answering same	0	10	0
For setting down every set of exceptions... Ditto demurrer ... Ditto plea ... Ditto rehearing ...	0	10	0	If private seal enrolling decree, <i>extra</i> ...	0	3	9
For advancing every cause	0	10	0	Searching if decree enrolled or caveats entered	0	1	0
For entering every caveat against the enrolment of a decree or order	0	5	0				
For every docket or decree or order signed by the Master of the Rolls	0	2	6	<i>Part II.—FEES TO BE COLLECTED BY MEANS OF STAMPS.</i>			
For every office copy of an order	0	0	6	<i>In the Judges' Chambers.</i>			
For every fiat of enrolment	0	5	6	For every original summons for the purpose of proceedings originating in chambers	0	5	0
On hearing out of term of every cause, further directions, pleas, demurrers, and where decree is made, each party	0	13	0	For every duplicate thereof	0	5	0
On hearing of every petition in which an order is made, the petitioner pays	0	7	0	For every other summons	0	3	0
From each party on the hearing of a cause in term time	0	2	6	For every order drawn up by the chief clerk, made upon applications for time to plead, answer, or demur, for leave to amend bills or claims, or for enlarging publication, or the period for closing evidence, or for production of documents, or applications relating to the conduct of suits or matters	0	5	0
From each party on the hearing of a cause in Michaelmas and Hilary terms only...	0	1	0	For every other order drawn up by the Chief Clerk	1	0	0
For papers left at the Secretary's office for the Master of the Rolls on further directions, exceptions, &c.	0	5	0	For every advertisement	1	0	0
For every recognizance vacated	0	6	0	For every certificate or report	1	0	0
On the appointment of every guardian in court for infants out of term	0	7	0	For every certificate upon the passing of a receiver's and consignee's account, a further fee in respect of each 100 <i>l.</i> received of	0	10	0
For silk gowns.—A fee payable by each of Her Majesty's Counsel attending at the Rolls Court, for each term	0	12	6				
				<i>In the Masters' Offices.</i>			
<i>In the Office of the Accountant General.</i>				For every warrant or summons	0	3	0
Certificate of payment in, under order ... Ditto under Act of Parliament	0	2	0	For every certificate or report	1	0	0
Certificate of transfers into court under order	0	4	0	For taking the acknowledgment of every married woman	1	6	8
Ditto under Act	0	4	0	For attending any court per day by the clerk	0	14	0
Certificate of investment of principal money	0	3	6	For every oath	0	1	6
Ditto interest money	0	2	0	For every certificate upon the passing of a receiver and consignee's account, a further fee in respect of each 100 <i>l.</i> received of	0	10	0
Certificate of sale of stock	0	2	6				
Certificate of transfer of stock out of court	0	1	6	<i>In the Registrars' Office.</i>			
Carried over	0	2	6	For every decree or decretal order on the hearing of a cause, or on further directions; and on the hearing of a special case, including the court fee and the charge for entry	4	0	0
Deposit of Exchequer bills	0	5	0	For every order for transfer or payment out of court of an amount not exceeding 200 <i>l.</i> stock or cash, or interest on stock not exceeding 10 <i>l.</i> per annum, and for every order on petition where the petition is dismissed	0	10	0
Delivery out of ditto	0	5	0				
Investment of principal money in Exchequer bills	0	5	6				
Ditto interest money in ditto ...	0	4	0				
Sale of Exchequer bills	0	5	0				
Exchange of Exchequer bills	0	5	0				
<i>Chancery Subpoena Office.</i>							
For every subpoena	0	5	6				
For sealing every distringas	0	5	6				
For filing affidavit	0	1	0				

ORDERS OF COURT.

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	£.	s.	d.		£.	s.	d.
For every order for transfer or payment out of court of an amount exceeding 200 <i>l.</i> , but not exceeding 500 <i>l.</i> stock or cash, or interest on stock exceeding 10 <i>l.</i> per annum, and not exceeding 25 <i>l.</i> per annum, and for every order on special motion not herein otherwise specified ...	1	0	0	If in the country, per day, besides reasonable expenses	2	0	0
For every order on the hearing of claims, pleas, demurrers, exceptions, or on petitions not herein otherwise specified, or on petitions of appeal, rehearing for injunctions, receivers, and for writs of <i>ne exeat regno</i>	2	0	0	Upon every application to inspect depositions, including the inspection	0	3	0
For every office copy of a petition of appeal or rehearing	1	0	0	Upon every application to examine copies of depositions, with record to prove on trial at law	0	5	0
For every order on petition or motion of course, including the entry thereof	0	5	0	Upon every application to search book for causes, including search	0	1	0
For every office copy of a decree or order	1	0	0	Upon every application to search book for depositions, including search	0	1	0

N.B.—These fees will shortly cease to be payable when the new system comes into operation.

In the Record and Writ Clerks' Office.

	£.	s.	d.		£.	s.	d.
<i>In the Report Office.</i>				For all office copies, per folio	0	0	4
Upon every application for a search	0	0	6	Filing every bill or information	1	0	0
For all office copies, at per folio	0	0	4	For filing every claim	0	6	0
<i>Affidavits.</i>				For filing every special case	1	0	0
For filing every affidavit, with or without schedules or other papers thereto annexed, including exhibits, if any	0	2	6	Upon entering every appearance if not more than three defendants	0	7	0
For the copy of every affidavit, for each folio	0	0	4	If more than three and not exceeding six defendants	0	14	0
Upon every application to inspect an affidavit	0	0	6	And the same proportion for every number of defendants.			
Upon every application for the officer to attend with an affidavit or affidavits at the Lord Chancellor's, or at any of the courts at Westminster or in London, each day	0	10	0	For sealing an attachment or distringas, for not appearing or answering	0	8	0
Upon every application for the officer to carry an original affidavit to any assizes, for each day, besides reasonable expenses of officer	1	0	0	For every certificate	0	4	0
For every deponent, affirmant, or declarant to an affidavit, affirmation, or declaration sworn, affirmed, or declared in London, or within ten miles of Lincoln's Inn Hall	0	1	6	For every copy of a bill or claim to be served	0	5	0
Upon any application for the officer to attend an invalid, including the attendance	0	10	0	For every writ of summons, distringas, or subpoena	0	5	0
<i>In the Examiners' Office.</i>				For filing and entering duplicate of every Judge's summons	0	5	0
For filing interrogatories	0	7	0	For stamping every copy thereof	0	5	0
For all office copies, per folio	0	0	4	For sealing every other writ	1	0	0
For every witness sworn and examined, including oath, for each hour	0	5	0	For every oath, affirmation, declaration, or attestation upon honour	0	1	6
For every witness sworn and examined abroad (besides coach hire and reasonable expenses)	1	7	0	For examining every copy, or part of a copy of a set of interrogatories, and marking same as an office copy	0	5	0
If more than five miles from the examiners' office, for the first day	2	15	0	Upon every application for a search for a record, and for searching	0	2	0
For every other day	2	2	0	Upon every application to inspect a record, and for inspecting the same	0	5	0
For attending the Lord Chancellor or the Master of the Rolls with record, per day	0	10	0	Upon every application to inspect exhibits, if occupied not more than one hour ...	0	5	0
For attending any Master at his office ...	0	10	0	If more than one hour, <i>per diem</i>	0	10	0
For attending with record in any other court or place in London or Westminster, per day	1	0	0	Upon every application for the officer's attendance in courts of law <i>per diem</i> , and for his attendance, besides reasonable expenses of the office	1	0	0
				Upon every application for the officer's attendance in a court of equity, <i>per diem</i>	0	10	0
				For examining and signing enrolments of decrees and orders	3	0	0
				For filing caveat against claim to revive, or against decree or order or enrolment ...	0	5	0
				For filing supplemental statement or statement for revivor	0	10	0
				For office copies of depositions taken before examiner, at per folio	0	0	4

ORDERS OF COURT.

In the Taxing Masters' Office.

	£.	s.	d.
For every warrant or summons, but not more than one order or summons is to be issued on one bill, or set of bills, unless the Taxing Master shall think it necessary to issue a new warrant or summons	0	3	0
On signing every report and certificate	1	0	0
Upon the Master's certificate of every bill of costs, as taxed, where the amount shall not exceed 20 <i>l.</i>	0	10	0
Upon every additional 20 <i>l.</i> or fractional part thereof, a further fee of	0	10	0
For every oath, affirmation, or attestation upon honour	0	1	6

In the Lord Chancellor's Principal Secretary's Office.

On all attendable petitions, appeals, rehearing and letters misive	1	0	0
On all non-attendable petitions	0	10	0
On a matter of course order, on a petition of right	0	10	0
On an order for a commission on a petition of right	1	0	0

In the Office of the Secretary at the Rolls.

	£.	s.	d.
On every petition set down for hearing, to include the fee on hearing	1	0	0
On the petition for every order of course	0	7	0
On the admission of every solicitor	1	17	0

The SECOND SCHEDULE to which the foregoing Order refers:—

In the Office of the Accountant General.

1. For preparing English power of attorney with affidavit, exclusive of stamp duty	0	3	6
2. For preparing foreign power of attorney without affidavit	0	3	0
3. For special power of attorney	0	5	0
4. For copies of accounts, debtor and creditor's side, per folio, as to be explained by General Order	0	0	3
5. Upon every application for a search	0	5	0

(Signed) ST. LEONARDS, C.

CASES ARGUED AND DETERMINED

IN THE

Courts of Chancery.

COMMENCING WITH

MICHAELMAS TERM, 15 VICTORIÆ.

L.C.
1851. }
Jan. 18, 21, 22; } MILLER v. HUDDLESTONE.
Nov. 5. }

Will—Construction—Legacies and Annuities—Priority.

*A testator gave all his property to trustees in trust to pay his debts and funeral and testamentary expenses, and to invest the residue in the funds, and out of the interest and dividends to pay certain annuities to his daughter and other persons, and after payment thereof to pay the remainder of the interest and dividends to his wife for life: and after her decease, in case his daughter should have no child, to pay to his daughter a further annuity during her life; but if his daughter should have a child living at the decease of his wife, or born afterwards, her annuities should cease, and his trustees were to raise 20,000*l.* out of his trust estate, and hold it in trust for his daughter for life, and after her death for her children; and if the children should die under twenty-one, that it should sink into his residuary estate thereafter disposed of; and he further directed that after the decease of his wife, his trustees should pay the sum of 5,000*l.*, part of his residuary estate, to such person as his wife should appoint by will, and he gave his wife*

NEW SERIES, XXI.—CHANC.

*power to dispose of 1,000*l.* either by gift in her lifetime or by will to her three co-trustees. The estate was insufficient to pay the annuities and sums of 5,000*l.* and 1,000*l.* in full:—Held, reversing the decision of the Court below, that the annuities and legacies must abate proportionably, and that the annuitants were not entitled to have their annuities made up out of the corpus of the estate.*

The will of Thomas Creswick, dated the 5th of December 1834, after a bequest to his wife, Sarah Creswick, of his household furniture, &c. and of the sum of 1,000*l.* to be paid to her immediately after his decease, was as follows:—"I give, devise and bequeath to the said Sarah Creswick and to my nephews, T. C. Huddleston, W. Jackson and P. Jackson, all my freehold, copyhold and leasehold messuages, lands, tenements and hereditaments whatsoever and wheresoever, and all the rest and residue of my goods, chattels, stock in trade, monies, securities, securities for money, money in the public stocks or funds, debts, effects and personal estate whatsoever and wheresoever, to hold the same to the said Sarah Creswick, T. C. Huddleston, W. Jackson and P. Jackson, their heirs, executors, administrators or assigns, upon trust that the said Sarah Creswick, T. C. Huddleston,

B

W. Jackson and P. Jackson or the survivors or survivor of them, &c., do and shall, with all convenient speed after my death, sell and dispose of my freehold, copyhold and leasehold messuages, lands, tenements and hereditaments, stock in trade and other parts of my said personal estate, and collect and get in all my outstanding debts, and convert the whole of my said trust estate, except monies in the public or government stocks or funds, into ready money, and stand possessed of the money arising from such sale and collection as aforesaid, upon trust to pay all my just debts, funeral and testamentary expenses; and, after such payment, upon trust to invest the residue of the said money arising from such sale and collection in their own names, or in the names or name of the survivors or survivor of them, on government stocks, funds and securities, and stand possessed of the stocks, funds and securities whereon the same shall be invested, upon trust, out of the interest or dividends arising therefrom, and other income arising from my said trust estate, to pay unto my daughter Mary Ann Miller, one annuity or yearly sum of 500*l.* during her life, without any deduction for legacy duty or other deductions whatsoever, by equal half-yearly payments, to and for her own proper use and benefit, and with which her said present or any future husband, with whom she may hereafter intermarry, shall not intermeddle or have anything to do, &c., and her receipt, although covert, shall be the only good and sufficient discharge to my said trustees, from time to time, for such annuity: and upon further trust, out of the said interest or dividends, to pay unto my brother, William Creswick, one annuity or yearly sum of 100*l.* without any deduction for legacy duty, or any other deduction whatsoever, during his life; and from and after the decease of my said brother, upon trust to pay to my nephew, Thomas Creswick, the blind son of my said brother, one annuity of 50*l.* during his life, without any deduction for legacy duty or any deduction whatsoever; and, after payment of the said several annuities, upon trust to pay the remainder of the interest or dividends arising from such investment, and the rents and profits of any part of my

said freehold, copyhold or leasehold hereditaments, which shall be unsold, and let on lease as hereinafter provided, and the interest of any money which shall be lent upon security as hereinafter mentioned unto my said wife, Sarah Creswick, or permit and suffer her to receive the same during her life, and also the said annuities, in case any or either of them shall cease to be longer payable to the said annuitants, any or either of them, in her lifetime, to and for her own proper use and benefit: and, after the decease of my said wife, and during the lifetime of my said daughter, Mary Ann Miller, and if she, the said Mary Ann Miller, shall have no child or children living at the time of the decease of my said wife, upon trust to pay to the said Mary Ann Miller a further annuity of 500*l.* during her life, to and for her own sole and separate use, in the same manner and with the same restriction on her present or any future husband as is hereinbefore contained respecting the first mentioned annuity of 500*l.* payable to her; but if my said daughter shall have any child or children, living at the time of the decease of my said wife, by her said present or any future husband, or if my said daughter shall have any child or children at any time after the decease of my said wife, then, from and after the birth of such child or children, the said two several annuities of 500*l.* each shall cease and be no longer paid or payable to my said daughter, but I will and direct that the said T. C. Huddleston, W. Jackson and P. Jackson, or the trustees or trustee for the time being, shall by the sale of so much of the stocks, funds or securities upon which my said trust estate shall then be invested, as will be sufficient, raise the sum of 20,000*l.*, and, after the same shall be raised as aforesaid, upon trust forthwith to invest the same in some or one of the public or government stocks or funds, in their own names, or in the names or in the name of the trustees or trustee for the time being, and after such investment shall stand possessed of such stocks, funds or securities, upon trust to pay the interest or dividends arising therefrom unto my said daughter, Mary Ann Miller, during her life, to and for her own sole and separate use, and with the like restrictions respecting her said

present or any future husband as are hereinbefore mentioned and expressed concerning the said annuities to be paid to her for life, in case she my said daughter shall have no child or children; and from and after the decease of my said daughter, upon trust for all and every the children of my said daughter, Mary Ann Miller, if more than one, to be divided between them, share and share alike, at their respective ages of twenty-one years; and in case there shall be but one child of my said daughter who shall live to attain the age of twenty-one years, then upon trust for such only child, &c.; and in case all my said daughter's children shall happen to die before they shall attain the age of twenty-one years, I will and direct that the said 20,000*l.*, or the stocks, funds or securities upon which the same shall be invested, shall sink into and become part of my residuary estate hereinafter disposed of; and upon further trust that the said T. C. Huddleston, W. Jackson and P. Jackson, or the trustees or trustee for the time being, do and shall after the decease of my said wife, pay the sum of 5,000*l.*, part of my residuary estate, unto such person or persons, in such parts and proportions and at such time and times as my said wife, Sarah Creswick, shall by her last will and testament appoint in writing, give and bequeath, or direct and appoint the same to be paid unto; and, subject to the trusts of this my will, I give and bequeath the residue of my trust estate unto my said nephews, T. C. Huddleston, W. Jackson and P. Jackson, and my nieces Emma Huddleston, Ann G. Jackson, and Sarah M. Jackson, equally to be divided between them, share and share alike, when and as the same or any part thereof shall become divisible by the deaths of the said annuitants or otherwise; it being my will that after the payment of the said sum of 5,000*l.*, of which my said wife is to have the disposal by her will as aforesaid, the said 1,000*l.* of which she is to have the disposal either by gift in her lifetime or by her will to my said trustees, T. C. Huddleston, W. Jackson and P. Jackson, or such part thereof as she shall so dispose of by her said will, and reserving sufficient of my said trust estate to raise and pay the said annuities given to my said daugh-

ter, or the said 20,000*l.* directed to be held for her, and her children or child in the event of her having any children or child, at any time hereafter, and the said annuity of 100*l.* given to my said brother William Creswick for life, and after his decease of the annuity of 50*l.* given to his son Thomas Creswick during his life, my said residuary estate may be divided between my said residuary legatees at any time after the decease of my said wife, as they, the said T. C. Huddleston, W. Jackson and P. Jackson, or the trustees or trustee for the time being, shall think proper. And as it is my wish to spare my said wife all the care and trouble possible in the management of my affairs, I have appointed my said three nephews to be executors and trustees with her, hoping and expecting they will be active and render every assistance in their power for the settling and arranging my affairs. And to enable my said wife to make them some compensation out of my said trust estate for such care and trouble, I do hereby will and direct that my said wife shall have power to dispose of 1,000*l.*, part of my said trust estate, or such part or parts thereof, either by gift in her lifetime, or bequests by her will, to her said three co-trustees, T. C. Huddleston, W. Jackson and P. Jackson, in such proportions as she, my said wife, shall think fit; and my said trustees are by this my will directed and empowered to pay and dispose of the said 1,000*l.*, or such part or parts thereof as my said wife shall direct, either in her lifetime or after her decease, to the said T. C. Huddleston, W. Jackson and P. Jackson, or any or either of them."

The testator died in September 1840, and his widow retained her legacy of 1,000*l.*, and made valid appointments of the 5,000*l.*, and of 800*l.* part of the 1,000*l.* which she had power to dispose of under the will. The testator's daughter, Mary Ann Miller, the plaintiff in the cause, never had a child; and, at the time of filing the bill, arrears to the amount of 4,567*l.* were due to her in respect of her two annuities of 500*l.* each; and the sums of 5,000*l.* and 800*l.* remained unpaid. The assets being insufficient to pay the legacies and annuities in full, the question raised on the cause coming on for further

directions was, whether the annuities and legacies ought to abate proportionably; or whether the annuities ought to be paid in priority, and, if necessary, out of the corpus of the estate.

The Vice Chancellor of England held that the two annuities of 500*l.* each given to the testator's daughter, and the annuities of 100*l.* and 50*l.* given to the brother and nephew, had priority; and that the arrears, if necessary, ought to be paid out of the corpus of the estate; and that the sum of 800*l.*, part of the sum of 1,000*l.*, ought to be paid in the next place in priority to the legacy or sum of 5,000*l.*

The executors and the persons entitled to the legacy of 5,000*l.* appealed against this decree.

Mr. Lloyd and *Mr. Selwyn* appeared for the appellants; and—

Mr. Rolfe and *Mr. Hetherington*, in support of the decree.

The following cases were cited:—

Scott v. Salmond, 1 Myl. & K. 363.

The Attorney General v. Poulton, 3 Hare, 555.

Foster v. Smith, 2 You. & Coll. C.C. 193; s. c. upon appeal, 1 Phil. 629; s. c. 15 Law J. Rep. (N.S.) Chanc. 183.

Boyd v. Buckle, 10 Sim. 595.

Darby v. Rickards, 14 Ibid. 537; s. c. 14 Law J. Rep. (N.S.) Chanc. 344.

Leacroft v. Maynard, 1 Ves. jun. 279.

Crowder v. Clowes, 2 Ibid. 449.

Beeston v. Booth, 4 Madd. 161.

Thwaites v. Foreman, 1 Coll. 409; s. c. 15 Law J. Rep. (N.S.) Chanc. 397.

Innes v. Mitchell, 1 Phil. 710; s. c. 16 Law J. Rep. (N.S.) Chanc. 415.

Allan v. Backhouse, 2 Ves. & B. 65.

Lewin v. Lewin, 2 Ves. sen. 415.

Brown v. Brown, 1 Keen, 275.

Creed v. Creed, 11 Cl. & F. 491.

Wroughton v. Colquhoun, 1 De Gex & Sm. 357; s. c. 16 Law J. Rep. (N.S.) Chanc. 70.

Heneage v. Lord Andover, 3 You. & J. 360.

Nov. 5, 1851.—The LORD CHANCELLOR.

—This is an appeal from an order of the Vice Chancellor of England, made on the

2nd of August 1849, by which it was declared that certain annuities bequeathed by the will of Thomas Creswick were entitled to priority over the legacies given by his said will, and payment of certain arrears due in respect of such annuities was directed to be made out of the corpus of the estate. Thomas Creswick by his will, dated in 1834, bequeathed, &c.—[His Lordship here stated the will and the facts of the case.]—The estate being deficient, two questions arise on the will: first, whether the annuities bequeathed thereby to his daughter and brother and nephew have any priority over the legacy of 5,000*l.* and the second legacy of 1,000*l.*, of which the wife was to have the power of disposing, or whether those annuities must abate respectively. Second, whether so much of those annuities as the income of the estate is insufficient to pay is chargeable upon the corpus? With regard to the first question, I am of opinion that the annuities had no priority.

The rule is, that in case of a deficiency all the annuities and legacies abate rateably. This rule is, indeed, subject to exceptions, for there are cases in which some annuities or legacies are to be paid in priority to others. But it is settled that the onus lies on the party, seeking priority, to make out that such priority was intended by the testator; and the proof of this must be clear and conclusive. The reason is that a testator, in the absence of clear and conclusive proof, must be deemed to have considered, that his estate would be sufficient, and consequently not to have thought it necessary to provide against a deficiency, by giving a priority, in case of a deficiency, to some of the objects of his bounty. It is true that the testator does in many cases, contemplate the possibility of a deficiency, and provides against it; but I think it may be safely affirmed, that, in the absence of all indication to the contrary, it is generally to be assumed, that the testator considers that his estate may be sufficient to answer the purposes to which he has devoted it, and consequently makes no provision against a deficiency; and such being the general rule, the Court would not be right in saying, without clear and conclusive reason, that he intended to provide against an event, which in general it is not to be supposed that he ever con-

templated. In *Brown v. Brown*, Lord Langdale observes, "The onus is upon those who contend for a priority to shew that the testator meant to give a preference to a particular legatee;" and in *Thwaites v. Foreman*, Vice Chancellor Knight Bruce makes these observations :—" *Primâ facie* all bequests stand on an equal footing, and it lies upon those who assert the contrary to prove it. It is not sufficient that the words of the will should leave the question in doubt. They must positively and clearly establish that it was the intention of the testator that the bequests should not stand upon an equal footing. Now, in considering whether such was the intention of this testator, we must recollect that words that are merely introductory cannot generally by themselves be held to direct any order of payment; we should also bear in mind an opposite observation of Sir John Leach, (I think contained in *Beeston v. Booth*,) that unless the testator tells you himself that he believes his assets to be insufficient, you must attribute to him the notion that he has assets sufficient to satisfy all the bequests that he makes, and if you attribute that notion to him, you cannot well infer that he intended to make provision for an order of payment applicable only to the case of the assets being insufficient." Now, to apply these principles to the present case, I conceive that the annuitants have failed in adducing clear and conclusive proofs of an intended priority. It seems to me to be so plain that no such proof has been or can be furnished from the language of this will, that it appears quite unnecessary to comment on particular points of it, although there are expressions which furnish matter of argument in favour of priority, but which are much too ambiguous to be relied on, in support of a preference, which for the reasons I have mentioned, is antecedently improbable, when those ambiguous expressions can be fully satisfied by another and more probable construction. If the words in *Beeston v. Booth* and *Thwaites v. Foreman* did not import a priority, much less can the words used in the will. The words "after payment," may merely refer to the order of payment to be made on the supposition that there was a sufficiency of assets to pay all the legacies, and do not necessarily

or clearly import a preference in the event of a deficiency of assets; they are merely introductory to what follows, importing no more than would have been implied without them. And I may add, that the order in which the different bequests stand in the first part of the will, even if it were material, is altered when they are all referred to in a subsequent part of the will.

As to the cases in which a priority has been allowed, I may observe that *Brown v. Brown* was a perfectly clear case of priority, insomuch that, as observed by Lord Langdale, there would have been no way in which effect could have been given to the words used by the testator but by giving a priority to the second legatee. In *Boyd v. Buckle*, the circumstances and language were so different, and the judgment so short and so entirely limited in its application to the particular words there used, that it can afford no assistance in the decision of the present case. There is only one case calculated to suggest any doubt; I allude to *Lewin v. Lewin*. There a testator gave an annuity of 120*l.* to his wife for life, and directed his executors to purchase, if they could, the said annuity of 120*l.* in government securities, or ninety-nine years or some other longer term, or if they could not do that, to purchase lands of 200*l.* a-year value, to be settled in such a way that the said annuity should be to his wife free from taxes, with remainders over. He also directed, that if he should have any child living at his death, his executors should out of the profits of the residue of his estate pay to his wife 30*l.* per annum for the maintenance of such child, and he gave legacies to some collateral relations and friends; and all the residue of his estate he directed to be put out to the best advantage for his children at his death; and Lord Hardwicke held that the annuity should not abate. He remarked "This is a very strong case to shew that this annuity and the fund for it, was intended by the testator to be preferred to all the other legacies in the will. It is not suggested that either the wife or children have any other provision, and when a man is so situated as he was, and (as appears from other words in the will,) having a prospect of more children, and no provision, by settlement or otherwise, under which his wife or children could claim, it

was natural for him, in making a disposition of his estate, so to give it that their provision should be in the first place, and not to abide by the contingency of his estate producing more or less at the time of his death, and of sharing in proportion with others, strangers in blood, though friends to him or collateral relations, to whom he had given legacies; it was natural he should not intend they should abide by that event, though that is the general rule of law." "It is said there are cases wherein the Court has gone a great way to level legatees and make them abide in proportion, as in *Brown v. Allen* (1). I do not remember the state of that case; and there may be a difference in the state of it; for if the testator says 'imprimis,' or 'in the first place I give such a legacy,' that amounts only to the order in which he expresses his gifts in the will; to nothing more. But if he had said 'to be paid in the first place,' and it had been in that case a provision for a wife, I should have doubted of that determination, and should have inclined to think it was a declaration of his intent that that provision for his wife should come out of the personal estate, and be paid in the first place, because there is ground for that from the preference to a wife and children unprovided for. If, indeed, in that will they all stood in equal degree, it was sufficient ground for the Court not to presume a preference; but if it was a provision for a wife or child, unprovided, that is different."

The question in the present case is between a brother and a child on the one hand, and the appointees of the wife, who are the nieces of the testator, on the other. But it is plain from the words which I have quoted, that Lord Hardwicke regarded the circumstance of mere relationship, where viewed as a reason for priority, as not being itself a sufficient ground, but as constituting an auxiliary reason for allowing such priority, where the words used in the will favour the notion of a priority to a sufficient degree. I do not think, however, that the words used in this will are sufficient to establish a preference, even in conjunction with the cir-

cumstances of filial relationship; but I confess I do not attach much weight to that circumstance. And in *Blower v. Morret* (2) Lord Hardwicke speaks of that circumstance in terms which seem to shew, that subsequently to the adjudication of the question in *Lewin v. Lewin*, he had somewhat altered his views as to the degree of consideration which was due to the circumstance of filial relationship in the determination of questions of priority; for, in the case of *Blower v. Morret*, he speaks of the fact of near relationship in these very qualified terms: "There is, to be sure, some colour and reason that a man, giving a legacy or provision for his wife, may have an intent to prefer her, because it is a duty he owes to nature; and so of children; whereas the others are out of mere voluntary bounty or favour." And in the same case he said that the governing reason in *Lewin v. Lewin* was that the testator had constituted two residues of his estate; the first to be computed after taking out the money for the purchase of the annuity to his wife; the other to be computed after taking out the money left to the pecuniary legatees.

If we must speculate on the presumable intention of the testator, I do not consider it by any means clear that the testator must be presumed to have intended a preference of his child, which might operate to the exclusion of others, for whom he had manifested an intention to make some provision. If the testator has thought fit to provide for other persons besides his children and his wife,—if he has not made them the exclusive objects of his bounty, in the case of the property being sufficient, he might never have intended them to be the exclusive objects of that bounty, even in the event of a deficiency. He may have intended that the others should share with them in the latter case as well as in the former, and in the same proportion. And I can imagine many cases in which to give priority on the ground of propinquity would be to do what, in all probability, would be most foreign to the intention of a testator. Take, for example, the common instance of a legacy of a large sum to a child, and another legacy of a smaller

(1) 1 Vern. 31.

(2) 2 Ves. sen. 421.

sum to an aged relation, or another legacy of a still smaller sum to a friend in poverty or to an old servant. By giving priority to the child's legacy, the other might lose his or her legacy altogether, and yet in most cases this would be utterly repugnant to what it may fairly be presumed the testator would have intended, had he known that there would have been a deficiency of assets. Where the words are ambiguous, I certainly think it is allowable to consider what is the presumable intention of the testator, not, indeed, what the testator would have intended had he known that there would be a deficiency of assets, but what it may fairly be presumed he did intend to accomplish by the words used in the will. But, for the reasons which I have given, it cannot be fairly presumed that the testator intended to give a priority to his daughter from the circumstance of the filial relationship, in conjunction with the ambiguous expressions which occur in this will.

With reference to the opinion which I have formed, that those expressions are too ambiguous to be at all relied on, there is an apposite passage in Lord Hardwicke's judgment, in *Blower v. Morret*, where he says, "In most cases the Court has disclaimed the laying weight on particular words, as the saying 'imprimis,' or 'in the first place,' or a direction for the time of payment. All these are always disclaimed, and that upon just and solid reason, because if the Court was, upon such grounds, to give a preference to one pecuniary legatee, there would be no end of it, considering the variety of expression and the incorrectness with which wills are frequently drawn."

With regard to the second question, I think the annuities are not payable out of the corpus. As to the annuity to the brother, and the first annuity of 500*l.* to the daughter, the testator has expressly directed that they are to be paid out of the interest and dividends of his trust estate. And with respect to the second annuity of 500*l.* to the daughter, the words "in the same manner" appear to me to mean that the second annuity is to be payable out of the "interest and dividends" of the trust estate, "without any deduction for legacy duty, or other deduction whatsoever, by

equal half-yearly payments." To hold that they relate to the words by which the first annuity is given to the daughter's separate use, and by which her husband is expressly excluded, would be unnecessarily to construe them as mere surplusage. But independently of the words "in the same manner," the second annuity would be payable in the same way as the first. In support of this, I may observe that in *Crowder v. Clowes*, Sir R. P. Arden, Master of the Rolls, observed "Lord Thurlow has determined that substituted and added legacies shall be raised out of the same fund and subject to the same conditions." To say that the bequest of the second annuity of 500*l.* explains the bequest of the first annuity of 500*l.* is to make the more ambiguous and indefinite expressions explain the more clear and definite, and in fact it is to make the second bequest explain the first bequest, although the testator has himself shewn, in express terms, that the second bequest was to be explained by the first; or, in other words, it is to reverse the natural and proper order of things. No argument can be drawn from the substitution of the 20,000*l.*, as the daughter is only to have the interest or dividends; and, indeed, to hold that the annuities are chargeable on the corpus, might have had the effect of taking away the provision for the children.

For these reasons, the decision of the Vice Chancellor must be reversed.

KINDERSLEY, V.C. } *Ex parte* BRYAN'S
Nov. 4. } TRUST.

Will—Construction—Persona designata—Second Husband.

A testatrix gave the interest of certain money in the funds to her daughter Mary for life, and after her decease the capital to be divided between the husbands of her daughters and her son, or such of them as might be living at the decease of her daughter Mary. One of the daughters married a second husband, after the death of the testatrix, who was living at the death of the tenant for life:—Held, that the testatrix meant to designate the particular husbands living at the time she made her will, and

that the second husband was not entitled to a share of the trust fund.

This petition was presented by W. Darnborough, and it stated that Ann Bryan, by her will, dated the 16th of May 1808, after giving various legacies, continued in the following words: "I will and direct that the interest arising from the stock remaining in my name in the Bank of England be received and paid half-yearly to my daughter Mary, the wife of William Dudley, during her life and for her own use, by my executor, his heirs or assigns, and that her receipt only for the same be his or their discharge. I also will and direct, notwithstanding what is directed in the preceding clause, that should my executors think proper to sell the principal of the said stock out of the Bank, and purchase an annuity with the proceeds of the said stock for the life of my said daughter Mary, to be received by him and paid to her receipt only, I do hereby authorize and empower him so to do, but should he not so dispose of the said stock, then I give and bequeath, after the decease of my said daughter Mary, the whole of the said stock to be equally divided between the husbands of my said daughters and my son, or to such of them as may be living at the time of my decease. And I do hereby appoint my son, John Bryan, whole and sole executor of this my will and testament."

The petition then stated that the testatrix died in March 1809, and the will was duly proved by her son John Bryan. That at the time of her death the only stock remaining in her name was the sum of 372*l.* 16*s.*, 3*l.* per cent. reduced annuities. That at the time of her death the testatrix left, her surviving, the said John Bryan, her son, and her three daughters, Ann, the wife of James Winson, and the said James Winson, Harriet, the wife of the petitioner, William Darnborough, and the petitioner, and Mary, the wife of W. Dudley, and the said W. Dudley. That the said J. Winson died in February 1829, and the said W. Dudley died in May 1849. That the said J. Bryan died in June 1824. That the said Ann Winson intermarried with Joseph Strutt in July 1829, and afterwards died in March 1850. That the said Mary Dudley did

not marry again, but died in April 1850. That at the time of the death of the said Mary Dudley, the petitioner and the said J. Strutt were the only husbands of the daughters of the testatrix, Ann Bryan, who were then alive and who survived the said Mary Dudley; and the petitioner submitted that he thereby became entitled to the whole of the said trust fund, the said J. Strutt having intermarried with the said Ann Winson long after the death of the testatrix. That the said J. Strutt died shortly after the death of Mary Dudley, and on the 14th of May 1850, having made his will, and appointed J. Chamberlain and R. Chamberlain his executors, who duly proved his will and became his legal personal representatives.

The petition, which was presented by the said W. Darnborough, prayed a declaration that, under the circumstances, he was entitled to the whole of the said trust fund.

Mr. Bethell and *Mr. E. F. Smith*, in support of the petition, contended that the testatrix, by the expression, "the husbands of her daughters," meant only those husbands who were living at the time she made her will, and that *Mr. Strutt*, the second husband of one of her daughters, was not entitled to any share in the trust fund.—The following cases were cited—

Garratt v. Niblock, 1 Russ. & M. 629.

Parker v. Marchant, 1 You. & C. C. C. 290; s. c. 11 Law J. Rep. (N.S.) Chanc. 223, and 12 Law J. Rep. (N.S.) Chanc. 385.

Mr. Grenside, for the representatives of J. Strutt, contended that the testatrix meant to designate any person standing in the conjugal relation to her daughters at the death of Mary Dudley.

KINDERSLEY, V. C. — I cannot say I think the case of *Garratt v. Niblock* governs this case necessarily, because there was an express indication that the testator had in view a particular individual: if he meant any wife he would not have said "his beloved wife." The expressions "my wife" and "my beloved wife" are certainly not synonymous. The question here is, whether the testatrix meant a

class of persons or certain individuals. She has used no expression to indicate which she intended. She says "to be divided between the husbands of my daughters and my son, or to such of them as may be living at the death of my daughter Mary." Now, it appears that the testatrix had before mentioned her son John, and that she had but one son; therefore I think it clear that in using the expression "my son" she meant to designate her son John, and not any son she might have or might be living at her decease. Now, the husbands of her daughters, whom the testatrix knew as well as her son John, would naturally be objects of her bounty; and as she designates her son as an individual and not a class, I think the same construction ought to apply throughout the clause, that is, that all the husbands mentioned by the expression, "the husbands of my daughters," meant the individuals whom she knew as the then husbands. I am therefore of opinion that Mr. Darnborough, the petitioner, the only husband of those living at the death of the testatrix who survived Mary Dudley, the tenant for life, is entitled to the whole fund, to the exclusion of Mr. Strutt. I think, however, that this was a fair question, arising from the language of the testatrix; and therefore that both parties should have their costs.

PARKER, V.C. }
Nov. 6, 8. } WILLIAMS v. CHARD.

Revivor—Administration Suit—Legatee.

A bill was filed by certain persons, as plaintiffs, for the administration of the personal estate of a testator, and the usual decree for accounts was taken, the Master's report was made, and a decree was made on further directions. The suit having been neglected, the Master committed the prosecution of the decree to a party who had been found by the report to be a legatee. The suit afterwards abated by the marriage of one of the female plaintiffs. The plaintiffs having declined to take any proceedings to revive, the legatee filed a bill of revivor. A demurrer to this bill by the plaintiffs in the original suit, was allowed.

NEW SERIES, XXI.—CHANC.

A bill was filed, by James and Elizabeth Forsyth and their children against W. Chard and E. Chard, the executors of J. C. Forsyth, deceased, for the administration of his estate. The usual decree for accounts and inquiries was made in this suit, the Master made his report, and there was a decree made on further directions.

The Master, by his report, had found that Elizabeth Williams was a legatee of the testator. The suit being neglected, the Master, under the 56th Order of the 3rd of April 1828 (1), gave the prosecution of the decree to E. Williams. After this, one of the female plaintiffs married, which caused an abatement of the suit. E. Williams, having applied to the plaintiffs to revive the suit, and they having declined to do so, filed a bill of revivor.

To this bill the plaintiffs in the original suit demurred. The demurrer now came on to be heard.

Mr. Cairns, for the demurrer.

Mr. Glasse, for the bill.

The following authorities were cited:—

Dixon v. Wyatt, 4 Madd. 392.

Houlditch v. the Marquis of Donegall,
1 Sim. & S. 491; s. c. 2 Law J.
Rep. Chanc. 53.

Whitehead v. North, Cr. & Ph. 78.

PARKER, V.C. — This is a demurrer to a bill of revivor in a suit for the administration of a testator's estate. After the decree on further directions the suit abated by the marriage of a female plaintiff. E. Williams, the plaintiff in this bill of revivor, was a pecuniary legatee, and found so by the Master, so that she had a substantial interest in the suit. The prosecution of the suit having been neglected, the Master recommended the further prosecution to be committed to her. The abatement having occurred, E. Williams applied to the plaintiffs in the original suit to revive, and they having refused to do so, she filed the present bill of revivor in her own name. To this bill the plaintiffs in the original suit demurred. It has been

(1) Ord. Can. 23.

admitted that there is no precedent for such a bill. On principle I think that this bill cannot be sustained. The object of the bill is beyond the office of a bill of revivor. Lord Redesdale, at p. 69. of his *Treatise on Pleading*, (4th edit.) says, "Wherever a suit abates by death, and the interest of the person whose death has caused the abatement is transmitted to that representative which the law gives or ascertains, as an heir-at-law, executor or administrator, so that the title cannot be disputed, at least in the Court of Chancery, but the person in whom the title is vested is alone to be ascertained, the suit may be continued by bill of revivor merely. If a suit abates by marriage of a female plaintiff, and no act is done to affect the rights of the party but the marriage, no title can be disputed; the person of the husband is the sole fact to be ascertained, and therefore the suit may be continued in this case likewise by bill of revivor merely." The present plaintiff fills no such character as is mentioned in this passage. The Master had committed to her the further prosecution of the decree, and this enabled her to prosecute it in the plaintiffs' name. She seeks, however, by this bill, to prosecute the suit in her own name, and this is an object beyond revivor. The Master's order is confined to proceedings in his own office, and the present plaintiff cannot revive the suit without the adjudication of the Court—*Whitehead v. North*.

I have been referred to a passage in Lord Redesdale's *Treatise on Pleading*, (p. 79,) where he says, "In the case of a bill by creditors on behalf of themselves and other creditors, any creditor is entitled to revive." The difference, however, is obvious between a creditor, on whose behalf the original suit was instituted, and the present plaintiff, who was in no sense a party to the original suit—*Dixon v. Wyatt* and *Houl-ditch v. the Marquis of Donegall*. I consider, that any order to revive made on this bill will be an abortive proceeding, and the demurrer must be allowed.

PARKER, V.C. }
Nov. 8. } GORE v. HARRIS.

Solicitor and Client—Privileged Communications.

A party assigned his property for the benefit of his creditors, one of whom filed a bill to set aside the deed, and insisted that a particular clause inserted in it had been concealed from him. The assignor, in his answer, stated that the creditor had known of the insertion of the clause, and in support of his case proposed to examine the solicitor of the creditor, as to what took place on a certain interview between the solicitor and the assignor with reference to the deed. The solicitor demurred to the interrogatory on the ground that it inquired respecting matters which he only knew from confidential communications made to him by or in his agency for his client while he was acting as his solicitor. The demurrer was overruled.

Mr. Saunders, by deed, assigned all his property to trustees for the benefit of his creditors. A bill was filed by a creditor against Saunders and others to set aside this deed, one of the grounds being that Mr. Saunders had furnished the plaintiff with a copy of the deed which did not contain a clause, subsequently inserted, by which considerable benefits were given to a Mr. Harris. The defendant Saunders in his answer stated that this clause had been inserted with the knowledge of the plaintiff.

The case is reported on the question of parties in 20 *Law J. Rep.* (N.S.) Chanc. 74.

In support of his case the defendant Saunders proposed to examine a Mr. Goode, the plaintiff's solicitor, as to an interview which took place between him and Saunders with reference to the deed. Mr. Goode demurred on the ground that the interrogatory inquired respecting matters upon which he had only obtained information by means of confidential communications made to him by, or in the course of his agency for, his client during the period he was acting for him in this cause as his solicitor. This demurrer now came on to be argued.

Mr. Swanston and Mr. Moxon, in sup-

port of the demurrer, cited *Greenough v. Gaskill* (1).

Mr. Wigram and Mr. Shapter, for Mr. Goode, cited—

Desborough v. Rawlins, 3 Myl. & Cr. 515; s. c. 7 Law J. Rep. (N.S.) Chanc. 171.

Spenceley v. Schulenburg, 7 East, 357.
Parkhurst v. Lowten, 2 Swanst. 194.

PARKER, V.C.—In this case the defendant Saunders proposed to examine Goode as a witness. Goode was a solicitor and concerned, in that character, for one of the plaintiffs. Goode demurred to the interrogatory on the ground that it related to matters about which he had only obtained information by means of confidential communications made to him by, or in the course of his agency for, his client, during the time he was acting for him in his capacity as a solicitor. One of the objects of the suit was to set aside a certain deed on the ground of fraud, it being alleged that a material clause contained in that deed had not been communicated to the plaintiff until a recent period. The defendant Saunders alleged that the existence of the clause was known to the plaintiffs much earlier, and that, at an interview between him and Mr. Goode, a copy of the deed containing the clause in question had been produced. By the interrogatory to which Goode demurred, Saunders proposed to examine him as to what took place at that interview. I cannot doubt that Goode was bound to answer the interrogatory. In the transaction in question the plaintiff had employed his solicitor as his agent to communicate with the opposite party. I cannot see how that communication can be regarded as either privileged or confidential, and I think that the solicitor must be examined as to what the communication really was. It is of every-day practice that communications of this nature pass between the solicitors for opposite parties, and orders are often made for the production of letters which pass between solicitors and parties on opposite sides. The demurrer must be overruled.

(1) 1 Myl. & K. 98.

LOARDS JUSTICES. }
Nov. 21. } POTTER v. BAKER.

Will—Construction—Perpetual Annuity.

A testator, by his will, gave to E. L. "50l. per year for she and her children, and after her decease the money shall be paid to each of them as they attain the age of one and twenty; but if either of them die, to be paid to the survivor":—Held, affirming a decision of the Master of the Rolls, that the bequest was of a perpetual annuity.

The testator in this cause, William Hawkins, by his will, dated the 11th of April 1822, bequeathed as follows:—"I appoint Mr. Thomas Baker and Mr. Edward Wallis my executors, that as soon as possible after my decease that my freehold house known by 'The Red Lion,' in Parliament Street, Westminster, in the county of Middlesex, to be let on lease at the option of my executors for the space of twenty-one years or thirty-one, which may be able in proportion to get the most money for. In the next place, I leave each of them my executors 10l.: and all the money arising from good-will, fixtures, plate, china, glass, and all other effects producing from my said freehold, and after all my just debts and funeral expenses are paid, then my executors shall put the money into the funds to the best advantage for those who I shall hereafter name. The first is my daughter Mary Ann Wiseheart, I give to her 50l., and to be paid to her half-yearly as long as she lives, and her receipt only shall be a discharge to my executors; and after her decease then that 50l. per year shall go one half to Elizabeth Luckhurst, and the other half to Mary Ann Ballard, who now resides with me here, who I shall name after. In the next place, my executors will give, as a token of respect to my late wife, to L. Bromley 10l. for mourning. In the next place I give to John Lemon my silver tortoiseshell snuff-box, but if he should die before me, I then give it to Henry Steeres. In the next place I give to Elizabeth Luckhurst of No. 10, Brook Street, Lambeth, 50l. per year for she and her children, and after her decease the money shall be paid to each of them as they attain the age of one and twenty, but if either of them die, to

be paid to the survivor. In the next place I give all my remaining property to Mary Ann Ballard, whatever it might produce, either from the rent of the house, or money in the funds, and she shall remain in the house till it is let if she thinks proper, and after one year I wish the house to be sold to the best bidder, and the money to be put in the funds, and Mary Ann Ballard to receive the produce of it, and the money to be divided, after her decease, amongst her four children or any more she may have in my lifetime, share and share alike as they come to the age of twenty-one."

The suit was instituted for the administration of the testator's estate, and by a decree of Lord Brougham, dated in 1831, the legacies were declared to be well charged on the freehold estates of the testator. The three children of the legatee, Elizabeth Luckhurst, assigned their several interests to Mr. Scarth, and Elizabeth Luckhurst having died, the three children and their assignee presented a petition in the cause, praying that it might be declared that the annuity of 50*l.* was a perpetual annuity, and (as the produce of the freehold estates had been paid into court) that the sum of 1,666*l.* 13*s.* 4*d.* consols might be raised thereout, and be transferred to Mr. Scarth. Lord Langdale made the order as prayed. The persons representing Mary Ann Ballard and her children, the residuary legatees, appealed.

Mr. Follett and *Mr. Osborne*, for the appeal, cited—

Innes v. Mitchell, 6 Ves. 464 ; s. c. 9 Ves. 212.

Blewitt v. Roberts, Cr. & Ph. 274 ; s. c. 10 Law J. Rep. (N.S.) Chanc. 342.

Yates v. Maddan, 16 Sim. 613 ; s. c. 18 Law J. Rep. (N.S.) Chanc. 310.

Stokes v. Heron, 12 Cl. & F. 161.

Hedges v. Harpur, 9 Beav. 479.

Mr. Rolt and *Mr. Selwyn*, for the respondent, the assignee of the children of Elizabeth Luckhurst.

• *Mr. Lloyd* and *Mr. Hardy*, for the executors.

LORD JUSTICE LORD CRANWORTH.—I have no doubt whatever upon this will,

and therefore proceed at once to declare that I am clearly of opinion that the Master of the Rolls was right. Although an obscurely worded will, the production of an illiterate person, is always in the predicament that it may strike different minds in different ways, yet I think when this will is investigated, the construction which ought to be put upon it is tolerably free from doubt.

The general rule no doubt is, that where an annuity is given to a person by name, and there is nothing more, that is only an annuity for the life of the donee. But, then, this must be coupled with the observation that being a general rule it must yield to the force of particular expressions, if any, to be found in the will. Are there then any such particular expressions to be found in this will? On looking into the nature of the property, and the manner in which the testator deals with it, I think there are. I agree that it is doubtful with respect to the public-house being let on lease whether "the most money" mentioned by the testator is intended to apply to premium or rent. I think, however, it means the former:—that the house was to be let in this manner for as large a premium as could be obtained, and then sold, and the property to be put in the funds. Then comes an annuity to Mary Ann Wiseheart. It is to be observed there is no provision made for her children, and after her decease that annuity, or an annuity of similar amount, is given, one moiety to Elizabeth Luckhurst, and the other moiety to Mary Ann Ballard. These two women were probably both cohabiting with the testator; at any rate they both had children, and the testator afterwards proceeds to make provision for those children. I say nothing, because no question is now raised, as to what Elizabeth Luckhurst and Mary Ann Ballard take under this bequest. I only observe that the language of this gift is very different from that afterwards employed in making provision for their families.

The testator, after certain pecuniary legacies, then proceeds as follows:—"I give to Elizabeth Luckhurst 50*l.* for she and her three children, and after her decease the money shall be paid to each of them as they attain the age of one and

twenty, but if either of them die to be paid to the survivor." The question is, what does the testator here mean by "money"? Does he mean the capital representing the annuity, or an annuity only? In my opinion he clearly means the corpus from which the annuity in question would be derived. I base this opinion on two grounds: first, because I think that by the word "money" an ignorant person in the testator's situation clearly means something different from the provision which he had before made. "If either of them die" must mean die before that period at which he is to receive it, that is, before twenty-one. This, therefore, is a gift to the mother for her life, with remainder to the children absolutely, payable on their attaining twenty-one. The second circumstance on which I rely is from the terms of the residuary gift to Mary Ann Ballard, "I give my remaining property to Mary Ann Ballard whatever it might produce, either from the rent of the house, or money in the funds," and so on, and the house to be sold, "and the money to be put in the funds, and Mary Ann Ballard to receive the produce of it, and the money to be divided after her decease amongst her four children, and any more she may have." It is suggested that this means that Mary Ann Ballard is to take, after the decease of Elizabeth Luckhurst and her children, the annual produce of the property which is given to Elizabeth Luckhurst and her children, at any rate during their lives. I admit the words are large enough legally to bear this signification, but I do not think the testator used them in such a sense; for the subject of this residuary bequest is to be put in the funds, and Mary Ann Ballard is to have the produce during her life, and then at her decease the "money" is to be divided among her children. What "money" is this? Not the money, the annual interest of which Elizabeth Luckhurst and her children were to enjoy, because that was to be enjoyed by them, at all events, for their lives; and, therefore, that fund would not be divisible at the time appointed for the division in the residuary bequest, viz., the decease of Mary Ann Ballard. I think, therefore, that the judgment of the Master of the Rolls was right.

LORD JUSTICE KNIGHT BRUCE.—The impression upon my mind at the opening was different from that which I afterwards felt. The will is open to some unanswerable observations inconsistent with the notion that the children of Elizabeth Luckhurst take only for life. In my own opinion the clauses of this will cannot, for the purposes of construction, usefully be read in the strict order in which they occur. We must look at the entire system of the will, and so viewing it I am satisfied that by the gift of "the money" to the three children the testator intended a gift of the whole fund producing 50*l.* per annum, which in this case I suppose has been rightly estimated at the sum of 1,666*l.* 13*s.* 4*d.* 3*l.* per cents. As the appellants are the residuary legatees, let the costs come out of the estate; but so far as they have been increased, if at all, by Mr. Scarth being a party to the appeal, or of having taken the assignment, we make no order.

LORDS JUSTICES.

1851.

Nov. 20.

REYNELL v. SPRYE.

Production of Documents, Motion for.

The defendant, by his answer, denied the possession of certain documents. The answer was admitted to be sufficient. The plaintiff alleging by affidavit that the denial of possession was untrue, and that the particular documents were wilfully suppressed, moved for their production:—Held, that assuming fraud, falsehood and misrepresentation to be proved, the plaintiff was not entitled to move for production, but must file a bill.

This was a motion made in two suits for the production of documents. The first suit was that of *Reynell v. Sprye*, for the purpose of setting aside a sale on the ground of fraud and concealment which was decreed by the late Vice Chancellor Wigram. The other suit was of *Sprye v. Reynell* (1) for specific performance of the agreement. The answer of the defendant

(1) These suits are partially reported in 16 Law J. Rep. (N.S.) Chanc.; the former, on a motion for production, at p. 117; and the latter, on a point of practice, at p. 286.

in the second suit was sufficient, and that answer denied the possession of certain documents mentioned in the bill; it however admitted the possession of documents enumerated in the schedule. The defendant in the first suit appealed; and he now moved for the production of documents which he alleged were in the possession of the defendant (Reynell) in the second suit (2). Other matters were included in the notice of motion.

The Solicitor General, Mr. Bethell and Mr. Terrell, for the motion.

Sir Fitzroy Kelly and Mr. Shapter appeared to oppose, but were not called on.

Many affidavits were filed, those in support of the motion alleging as facts matters which were one and all positively denied by the affidavits filed in opposition. As soon as the motion had been heard,

LORD JUSTICE KNIGHT BRUCE said—This is a motion by the defendant Mr. Sprye,—first, for the production of certain documents; secondly, which amounts to the same thing, that the hearing of the appeal may be postponed until the documents in question shall be produced, and thirdly, that the defendant shall be at liberty to file such supplemental bill or to take such other proceedings as he may be advised. The grounds upon which this motion is made are a case of fraud, and wilful suppression of certain documents, and misrepresentation to the Court itself on the part of a general officer and Commander of the Bath, a solicitor of long standing and of eminent respectability, and a barrister, of whom the least that can be said would amount to the same thing. A case of conspiracy in fact between these three persons. I mention the description of persons against whom these things are alleged, not as intimating that previous character can for an instant be put in evidence against established facts. All the allegations are in fact denied in gross and in detail. That is admitted by counsel for the motion. Into the evidence for and

against them, the affidavits that is, we do not think it necessary to enter; for, assuming for the purposes of argument every one of the allegations to be true, can we accede to this application, which is a mere motion for the production of documents, the possession of which is denied by the defendant in the cross-suit in his answer, which answer cannot be now impeached for insufficiency or anything of that sort? Supposing, for the sake of argument, that the defendant to the cross-bill had in his answer untruly sworn that he had not, and had never seen, documents which at the very time he so swore, were in the possession of himself or his solicitor:—which he was well acquainted with:—which he had shewn to his counsel and had by his advice suppressed:—and upon the supposed ignorance of which, on the part of the plaintiff, the judgment of the Court below was based—(and I do not know that I can put a case higher than that)—all that may form very proper matter for some criminal proceeding; for an indictment for perjury, or a motion for removing the name of the solicitor from off the rolls, or for a new bill; but how can we, on motion, assuming for a moment (but of course I need hardly say merely for the sake of argument) everything stated in support of the motion to be true,—how can we, I say, order the production of documents, the possession of which the defendant to the cross-bill has by his answer to that bill denied? The plaintiff in the cross-suit is entitled to a full and complete answer to every interrogatory in his bill; when that is satisfactory, you are entitled to the production of all documents which the defendant admits in the usual way, but he cannot go beyond this. The motion must be refused.

LORD JUSTICE LORD CRANWORTH entirely concurred in the opinion that the motion must be refused, and with costs.

An order was ultimately made by consent and arrangement as to production, inspection and deposit in the office of certain specified papers, and for the postponement of the appeal, and for leave to file a bill.

(2) The motion raised a charge of fraud and concealment against the solicitors of Sir Thomas Reynell and of wilful misrepresentation against his counsel at the hearing before Sir James Wigram. The point, however, decided on this motion is sufficiently stated.

PARKER, V.C. }
Dec. 3. } MATHER v. NORTON.

*Will—Construction—Power of Sale—
Charge of Debts.*

A testator, by his will, appointed A, B, and C. to be his executors, in trust to dispose of his property in the following way: He then directed that all his debts should be discharged by his executors, and that the residue of his property, real and personal, should be disposed of by them at the time therein mentioned, save and except his estate at M, which he gave to A. for life, and at A.'s death to be disposed of as aforesaid:—Held, that A, B, and C. had a power of sale of the estate at M: and that it was not necessary for them to shew that there were any of the testator's debts left unpaid.

Thomas Rylance made his will, dated the 29th of January 1827, in the following terms:—

"In the name of God, Amen. I, Thomas Rylance, do declare this to be my last will and testament, and dispose of my property in the manner following, viz.—First, I appoint Francis Mather, of Bury, and William Bowker, of Hyde Hall, Denton, to be my executors, and my wife, Mary Rylance, my executrix, in trust to dispose of my property in the following manner, viz., I direct that all my just debts and funeral expenses be discharged by my executors and executrix, and the residue of my property, both real and personal, to be held by my executors and executrix for the sole benefit and use of maintaining and educating my children until my youngest child arrives at the age of twenty-one years. At such time it shall arrive at the age aforesaid, then all my property, both real and personal, whatsoever and where-soever, to be disposed of by my executors and executrix and divided amongst my children, equal share and share alike. If in case any of my children die leaving issue, then to take their father's or mother's share as if they were then living, save and except my estate in Mellor, in the county of Derby, which said estate I give to my wife, Mary Rylance, to hold and enjoy

during her natural life, and, at her decease, to be sold and disposed of by my executors, and divided amongst my children or their issues as aforesaid."

The testator died in October 1838. Mr. Bowker, one of the trustees, died soon after the death of the testator. Mrs. Rylance, the widow, married Mr. Shepherd. Mr. and Mrs. Shepherd and Mr. Mather entered into an agreement with Mr. Norton to sell him the estate at Mellor, mentioned in the will. Mr. Norton having declined to complete the purchase, a claim was filed against him for a specific performance of the agreement. The only question in the case was, whether Mr. and Mrs. Shepherd and Mr. Mather had, under the will, a power of sale.

Mr. Malins and Mr. H. Humphreys, for the plaintiffs, contended that all the real estate had been devised to Mr. Mather and Mrs. Shepherd in fee, and that the real estate had been charged with the payment of debts. The executors and devisees in trust then had a complete power of sale, and the circumstance that the estate in question had been made the subject of a subsequent disposition was immaterial—*Shaw v. Borrer* (1).

Mr. Bird and Mr. Berkeley, for the defendant, contended that the fee of the estate in question had not vested in the executors, and that the words "save and except," in the latter part of the will, must be read as qualifying the more general expressions in the earlier part—*Doe v. Hughes* (2). At any rate, it had not been proved in this case that there were debts of the testator unpaid. Satisfactory proof that there were debts unpaid ought to be afforded to the defendant—*Gosling v. Carter* (3).

Mr. Malins, in reply, contended that it was not necessary to give any proof that there were any debts unpaid.

PARKER, V.C. said that, although there was no direct devise to the trustees, there

(1) 1 Keen, 559; a. c. 5 Law J. Rep. (n.s.) Chanc. 364.

(2) 20 Law J. Rep. (n.s.) Exch. 148.

(3) 1 Coll. 644; a. c. 14 Law J. Rep. (n.s.) Chanc. 218.

was a good present devise to them by implication. This devise included the real estate, and the whole real estate. He thought also that there was a charge of debts on the whole real estate. With a devise, then, to the trustees of the whole real estate, and a charge of debts on the whole real estate, the trustees had the power to dispose of it for the payment of the debts. He thought that there was no doubt that the clause "save and except my estate in Mellor," &c. ought to be taken as qualifying "the residue of my property, both real and personal," after the payment of the debts, and not as affecting the devise to the trustees in the earlier part of the will. There must then be a decree for specific performance.

Mr. Malins asked for the costs.

Mr. Bird contended that there was sufficient doubt in the case to induce the Court not to give costs.

PARKER, V.C. said that he had so little doubt as to the construction of the will, that if pressed he must give the plaintiffs their costs.

PARKER, V.C. } THISTLETHWAYTE v.
Nov. 20. } GARMER.

Practice—Special Case.

After a special case under Sir G. Turner's Act had been set down for hearing, a party interested in the question was born. Practice in such a case as to the amendment of the case and the setting it down again.

This was a special case under Sir George Turner's Act, which had been ordered to be set down for hearing. After this order, a tenant in tail of an estate in question in the case was born. This was an application for the purpose of having the case amended and restored to its place in the paper.

Mr. Freeling, for the application.

PARKER, V.C. said that he thought that

the regular course would be to discharge the order setting down the original case, and then to give leave, on proper affidavits, that the amended case should be set down, and should occupy the place in the paper of the original case, and fresh appearances must be entered for all the parties.

PARKER, V.C. } *In the matter of TYLER'S*
Nov. 21. } TRUSTS.

Trustee Act, 1850—Disclaimer.

The 32nd section of the Trustee Act, 1850—held, applicable to the case where all the original trustees had disclaimed.

A testator appointed three persons to be the trustees and executors of his will. All these persons renounced the probate and disclaimed the trusts of the will.

This was a petition for the appointment of new trustees.

By the 32nd section of the Trustee Act, 1850, (13 & 14 Vict. c. 60) it is enacted that "whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for, or in addition to, any existing trustee or trustees."

Mr. C. Hall read the above-mentioned section, and raised the question whether the act applied to the case before the Court. All the trustees had disclaimed, and there never had, therefore, been any existing trustee or trustees.

PARKER, V.C. said, that he thought it would be a narrow construction of the act to say that trustees could not be appointed in the place of these disclaiming trustees. He thought that the order should be to appoint the new trustees in substitution for the trustees who disclaimed.

LORDS JUSTICES.
 1851.
 Nov. 13.

HODGSON v. EARL OF
 POWIS.

Railway Company—Injunction.

A company was authorized by three acts of parliament to make three distinct railways, (not forming one line) with separate amount of capital for each. Another railway company was, by a fourth act of parliament, authorized to take a lease of the three lines, and did so; and the whole undertaking was placed under the controul of a joint committee of directors of all the companies. One of the three lines was sufficiently completed to be, and was, opened, and the directors made calls for the purpose of entirely finishing the opened line, the other two being abandoned. An injunction was granted at the Rolls, restraining the application of money and the making of calls for any purposes not authorized by the three acts, excepting only for the purposes of ordinary repair:—Held, on appeal, that on an interlocutory application, in the absence of the lessee company, the opened line being worked under the direction of the joint committee, the injunction must be dissolved.

This was an appeal motion from an order for an injunction made by the late Master of the Rolls, Lord Langdale. A full detail of the facts of the case and the judgment of Lord Langdale are reported in 19 *Law J. Rep.* (N.S.) Chanc. 356, 418. In order to render the grounds of the judgment on the appeal apparent, it will only be necessary now to state that the Shropshire Union Railways and Canal Company (that being one company,) was empowered to make three distinct railways, the first from Shrewsbury to Stafford, the second from Newtown to Crewe, and the third from Calverley to Wolverhampton. In the following session of parliament a fourth act was passed, by which the Shropshire Union Railways and Canal Company was empowered and required to grant, and the London and North-Western Railway Company to accept a lease of those railways, when completed, on certain specified terms; and it was directed that the whole should be placed under a committee of management, composed of directors of each of the

companies. By the first act 800,000*l.* was to be raised, by the second 1,500,000*l.*, and by the third 1,000,000*l.* Shares were issued to raise the sums in 165,000 shares of 20*l.* each, and calls were made. An action was brought against Mr. Hodgson, in July 1850, for a third call. Mr. Hodgson filed his bill on behalf of himself and the other 20*l.* shareholders, against the company, which, after alleging that the only part of the three lines which had been constructed was a portion of the Shrewsbury and Stafford line, which had been opened, but that the other two lines were to be abandoned, the directors determining to apply to parliament for authority for so doing; and after insisting that the directors had no power to construct the Shrewsbury and Stafford line only, prayed a declaration that it was not in the power of the directors to apply the monies raised under the several acts, or any of them, for this exclusive purpose, and for an injunction to restrain it, and to prevent the enforcing calls except for the purpose of all the acts. Lord Langdale held that the company had no right to apply the funds in making one only of the three railways, but there being no allegation in the bill that the directors intended to apply the funds exclusively to the formation of one only of the three lines, a demurrer to the bill was allowed on that ground. The Court gave leave to the plaintiff to amend. The bill was accordingly amended, and the affidavits having been re-sworn, with some few variations, the injunction was moved for and granted, not extending to the restraint upon making calls, and permitting the application of the money for ordinary repairs. From this order the appeal was made.

From the evidence, which was very long and very conflicting, it appeared that the line opened was worked by the London and North-Western Railway Company, under the direction of the joint committee; that the plaintiff knew of the intended abandonment of the two lines upwards of a year before the filing of the bill, and that there was no intention or wish to stop the working of the completed line. The London and North-Western Railway Company (the lessees) were not represented on the motion. The arguments on the appeal

were, in most respects, a repetition of those used in the court below.

Mr. Rolt, Mr. Willcock, and Mr. Speed, for the appellants, argued that the effect of the injunction was to prevent the defendants from doing anything whatsoever, even from doing what they were not only enabled, but were bound to do under the terms of the Leasing Act. The company were authorized to make three lines, and they had made one, which they wished to complete; the reason for abandoning the other two was, that they would not be profitable. If the money were paid as they wished, the one line would be rendered profitable, while, if the injunction were continued, all the money already expended would be thrown away.

Mr. Roundell Palmer contended that the company had no right to apply any part of the capital authorized to be raised for either of the two lines now abandoned in the completion and extension of that which was opened. Each capital was applicable to the formation of each line, and each line only. The principle governing such a case was fully laid down in the case of *Cohen v. Wilkinson* (1); it was held that a company could not apply an entire fund for the completion only of a part of an undertaking.

Mr. Speed, in reply.—This company ought not to be restrained from making and completing the Shrewsbury and Stafford line, they not being able, with any prospect of profit, to form the other two. The case of *Cohen v. Wilkinson* is obviously distinguishable from this, and its principle does not apply. To abandon one part of a long and continuous line is very different from making one line of three. At any rate, the London and North-Western Railway Company ought to have been represented on this motion, they having a very material interest in the question, and they being, as lessees, actually working the line from Shrewsbury to Stafford, under the direction of the joint committee. The evidence, also, is clear to shew that the plaintiff must have known long before the filing of the bill of the intended aban-

donment of the two other lines, and, therefore, he must be taken to have acquiesced in what has been determined on.

LORD JUSTICE KNIGHT BRUCE.—As to this injunction, we have arrived at the same conclusion, whether precisely by the same course of reasoning is not very important to inquire. However, I wish the observations I am about to make to be taken as coming from me alone. I view this injunction as preventing in effect the defendants from applying a single shilling of the corporate money unless for the purpose of paying debts or liabilities which were in existence at the date of the notice of motion at the Rolls, and unless for the current expenses of the railway or canals; which, of course, prevents them from laying out a single shilling in improving the railway or adding to the works or conveniences connected with it, as I understand the order. But to what state of things do these observations apply? They apply to a case where, in the first place, a railway company which is importantly interested in the order sought is absent; a company which has, under a lease, possession of, and the working of the railway; which has the very management of the concern under the superintendence of a joint committee composed of members of this railway company and the absent company. But this is not all. One line of the system of railways in question, namely, that from Stafford to Shrewsbury being in actual operation, the continuance of such operation is not attempted to be stopped. The plaintiff accedes to the proposition, that in the actual state of things, this line must proceed and must go on. Indeed no other proposition can be accepted as reasonable, otherwise a very large amount of property would be doomed to destruction. In such a case, where the plaintiff makes such admissions, and where absent parties are importantly interested, he desires an injunction to prevent the application of a single shilling in additional buildings and improvements to make the outlay which has been already incurred profitable to himself and his partners.

It may be that these remarks are sufficient to dispose of the case, but this is not all. It has been assumed that this case is

(1) 1 Hall & Twells, 554; a. c. 18 Law J. Rep. (n.s.) Chanc. 378, 411.

equivalent to that of *Cohen v. Wilkinson*, since here several acts of parliament are made and formed into one act, having reference to the same subject matter, with one capital stock, although to be carried into execution by the construction of various lines of railroad; and it has been assumed that because some part of the undertaking has been abandoned and some part retained, therefore a separate and distinct line cannot be made. But it is made and in operation, and if it were not, I am not persuaded that the principle of *Cohen v. Wilkinson* applies here. But more, —as a Judge, I am bound from the facts before the Court, to make the unavoidable inference that for more than twelve months before the bill was filed, the plaintiff must have known that the abandoned lines would be abandoned, and that there was no substantial chance of making either of them within the time fixed by parliament, and yet there was no bill filed until the month of November 1849. As a matter of fact, I believe that for more than twelve months, Mr. Hodgson knew that these lines could not and would not be proceeded with, and that there was no intention existing anywhere to attempt to proceed with them or either of them. Besides all this, I observe that this is an interlocutory application for an injunction, as to which the Court has always exercised a discretion, balancing and considering whether greater mischief would follow the granting or refusing of the injunction. The plaintiff comes here with a doubtful equity, and I am disposed to think that if his equity were clear, greater mischief would be done by granting than by refusing this injunction, and this even to his own property. I find that there has been here an acquiescence of a more than ordinary amount and of a very plain description. My Lord Cranworth agrees with me:—we have arrived at the same conclusion, although, perhaps, not exactly by the same process. We therefore dissolve the injunction. But it is said, that this will leave the defendants at liberty to make the Stone and Shallowford branch line. Perhaps this may be so. I am not sure that what is true of one line is not true of the two branches. But these two branches are not yet begun. If they shall be begun,

and the plaintiff shall think himself entitled to complain, he may come here and complain and he shall be heard. We do not wish to prejudice any question that may arise, but at present it is extremely doubtful whether these two branch lines will be touched. The order we shall make is to discharge the order and dissolve the injunction, without prejudice to any future application, and without prejudice to any question. Reserve the costs of this motion and of the motion before the Rolls.

LORD JUSTICE LORD CRANWORTH.—I entirely concur in the order which has just been pronounced. I have come to the same conclusion as Lord Justice Knight Bruce, and perhaps by nearly the same reasoning. I confess I had some difficulty in seeing any distinction between the effect of three acts of parliament authorizing three lines forming a cluster as it were, and one act authorizing one line. The principle appears to be exactly the same. But although when parliament has authorized one line or one cluster of lines, the parties must execute the whole, and, therefore, are acting in violation of the act unless they execute the whole, yet this Court has always exercised some discretion in matters of injunction,—especially when an injunction is sought, as in the present case, on an interlocutory application; and I confess that when one line only has been authorized to be made, I should feel less unwilling to exercise that discretion than when several lines are authorized to be made, because when one line of several is completed, this, though not all which is authorized by the act, is yet a substantial whole in itself, and this is not the case when a part only of a single line is in operation. For the exercise of this discretion of interposition by injunction there is plenty of authority; and I confess that if there were neither precedent nor authority, I should not be in any degree reluctant to make one. In this case, the facts are clear. Putting aside the consideration of the two branches to Stone and Shallowford, proposed to be added to the present line, one line is completed, but considerable additional expense may be usefully incurred in rendering the outlay already made, profitable. Now the

effect of this injunction is, that not a single shilling can be expended in this manner. Early in the argument, I was struck with a passage in the order appealed from, in which Lord Langdale qualified his injunction by the explanation that he did not mean to include ordinary repairs. Now the necessity for introducing this qualification led me to doubt whether the injunction could be right in its integrity. Other like modifications suggested themselves to my mind, so as to leave some matters which clearly ought to be left in the discretion of the committee of management (if they were to have any management at all) untouched by the injunction, and I found that I must extend the qualifications to such an extent as to work a complete modification of the injunction. I was, therefore, convinced that an injunction was not the right course, for in fact the Court cannot anticipate everything which would be required. The necessity for any qualification at all satisfies me that this is not a proper case for an injunction at all. With respect to the argument of acquiescence, I fully coincide with what has been said by the Lord Justice Knight Bruce, so that I need say nothing more on that head. So much has been done, and so much more remains to be done in order to render the expenditure which has been already incurred useful or profitable, that it would be unwise to fetter the discretion of the directors by continuing this injunction, and, therefore, it must be dissolved in the terms which my Lord Justice Knight Bruce has already mentioned.

LORDS JUSTICES. }
 1851. } *In re CLARKE.*
 Nov. 15, 17, 22. }

Costs, Taxation of—Attornies and Solicitors Act—Authority of the Taxing Masters—Costs of Appeal—Statute 14 & 15 Vict. c. 83.

In the taxation of costs the taxing Master has authority under the statute 6 & 7 Vict. c. 73, to disallow the charges for an action which he in his discretion considers to have been improperly brought.

The statute 14 & 15 Vict. c. 83, consti-

tuting the Court of Appeal, not pointing out what is to be done as to costs, where, in consequence of the Judges differing in opinion, the decision of the Court below is affirmed, such costs follow the result of the appeal.

This was an appeal from a decision of the late Master of the Rolls (Lord Langdale) made on a petition presented under the statute 6 & 7 Vict. c. 73. In the taxation of a bill of costs the taxing Master, Mr. Martineau, disallowed all the charges relating to an action of replevin, and he also disallowed the discharge of the solicitor (by payments alleged to have been made by him of debts due from his client) of the sum of 243*l.* 10*s.* admitted to have been received by him belonging to his client. The taxing Master did not consider that there was sufficient evidence of retainer as to the action, or of authority as to the application of the 243*l.* 10*s.* The Master of the Rolls confirmed the decision of the taxing Master. The evidence was exceedingly long and very conflicting. During the argument Lord Justice Knight Bruce put questions to Mr. Follett, the taxing Master, in answer to which that gentleman said, if the bill had been before him he should have followed the same course as Mr. Martineau, supposing he was of the same opinion as to the question of retainer, the impropriety of the action, and the want of authority.

Mr. Rolt and Mr. Miller were for the appellants.

Mr. Roundell Palmer and Mr. Southgate, for the respondent.

LORD JUSTICE KNIGHT BRUCE.—My learned Brother has authorized me, in the event which has happened, of my mind being satisfied at the conclusion of the argument against the appeal, to declare at once my opinion upon it, whatever his Lordship's view may be. Accordingly, acting upon this permission, I do so. I repeat what I have already stated, that my mind has not a particle of doubt on the subject of this appeal. It is an appeal on the subject of a taxation of a bill of costs upon a long-considered decision of a taxing Master, confirmed in all points by a most careful and attentive Judge. The

taxing Master, from whose decision this question was taken before the Master of the Rolls, was in his day a solicitor of the first respectability and of most extensive practice. Upon such a concurrence of opinion on such a question, a court of appeal, constituted like the present, ought to be very clear before reversing the decision which has been arrived at below. But whatever the weight of the decision appealed from, if the court of appeal be clear on the point, it is bound not to retire from the expression of its opinion, but to give judgment in accordance with its own views. Now, in the first place, the subject of the present dispute is the costs of an action of replevin claimed against a gentleman as administrator of his late wife and of her sister or one of them. Neither wife nor sister was party to the action, and *prima facie*, therefore, neither of them is or ever was, liable. But then it is argued, the two ladies, or one of them, authorized or directed this action to be brought, or became liable for the costs of the action; and upon this argument evidence has been gone into on either side of a very voluminous and not very consistent nature. The evidence produced is very far from satisfying my mind that either sister authorized or sanctioned the action, or contracted or became liable to pay the costs of it. It is, in fact, I say, to my mind, very improbable that either sister ever did so; but assuming, for the sake of argument, that either sister had done so, I am of opinion that it is incumbent on the solicitor employed to shew that he gave the ladies proper advice and proper notions on such a subject, and that he had not allowed them blindly to give instructions on such a subject which he was bound to understand, and which they must be taken to have known nothing about. There is no evidence or suggestion that he ever did so. I agree that, notwithstanding the impropriety of bringing any action the client may be liable for the cost of it if he insufficiently or falsely inform his attorney on a matter of fact, or if being informed by his attorney of the utter madness and hopelessness of bringing such an action, he should require the attorney to proceed with the action whether he considered it wise or unwise. In such a case I agree that the client is bound. Here, however,

we have no such case. Every circumstance was known at the least as well to the attorney as to the client, and probably much better; and if the client had directed the attorney to proceed in such an action, it was the duty of the latter to have told him that the action was most absurd, that it was impossible to succeed. This is the language he ought to have held. There is not the smallest evidence to shew that he ever did hold such language or anything like it.

It is said that the attorney in bringing this action acted on the advice of counsel, and that an attorney is justified in acting on that advice, nay, is bound to act on it. On the general proposition we desire to say nothing. In this case it is sufficient to remark, that the only opinion of counsel which we have before us is against the action, as indeed must have been that of any person in the smallest degree conversant with the subject. There is nothing the other way, except the recollection of the solicitor conducting this case, that the opinion of two gentlemen of the equity bar had been taken in favour of the propriety of the action of replevin. However out of the usual course it may appear to have taken the opinion of gentlemen at the equity bar, on a point of pleading at common law, still, as I admit that every gentleman at that bar ought to have some, and that not a slight acquaintance with the principles and practice of special pleading, I might have allowed some weight to the circumstance if that opinion had been actually given and honestly acted on. But there is no evidence that such an opinion ever was given; there is not the smallest trace of its existence; there is no entry relating to it in the bill of costs, the subject of this appeal; no charge for it nor any attendance relating to it; and I think, therefore, that the recollection of this gentleman must have misled him, and that, at the most, it can only have been one of those opinions for which no payment is ever made, and which are proverbially known to be worth exactly what is given for them. Under every view of the case, I am of opinion that no charge as to the costs of this action of replevin can be maintained as against either of the ladies, nor contingently against the administrator as their representative.

The only other portion is as to a sum of 243*l.* 10*s.* belonging to these ladies or one of them, which found its way from the hands of the trustees into the hands of the solicitors, and from which they seek to discharge themselves by alleging that they disposed of it in payment of various sums of money claimed as due from the ladies. It is, under the circumstances, an unavoidable inference that the solicitors when they received this money from the hands of the trustees, had notice whose this money was, and therefore they became themselves in effect trustees of the money for those to whom they knew the money belonged, and directly indebted, that is equitably indebted, and chargeable in account with it upon the commonest principles of equity. No man has a right to pay my debt with my money without my consent, and if he do so, he is nevertheless answerable to me. It would, therefore, be impossible for me to concur in sending this case to law in the hope of there eliciting further evidence on the point of retainer, for my judgment does not go on the ground of non-retainer merely; and I think besides, it is extremely improbable that any adducible evidence has been omitted in this case, which, after having been upwards of three years before the Master, has now been twice examined in superior courts. I think the order appealed from wholly right, and, therefore, that the appeal should be dismissed. If my learned Brother should not coincide in opinion that the petition should be dismissed with costs, I do not at present know how we have authority to deal with the question of the costs of the appeal. That point, therefore, in that event had better stand over for a few days, that we may have the opportunity of considering it.

LORD JUSTICE LORD CRANWORTH.—The statute which places us here says, that if there be a difference of opinion between the Judges the result of that difference shall be that the judgment appealed from shall be affirmed (1). It is, therefore,

(1) The statute 14 & 15 Vict. c. 83, 'An Act to improve the administration of justice in the Court of Chancery, and in the Judicial Committee of the Privy Council.' The 9th section enacts, "That the decision of the majority of the Judges of the court of

unnecessary for me to enter at large into the opinion I should have given, since, in whatever respect that opinion might have differed from the lucid statement we have just heard, it could not alter the judgment. I quite accede to the expediency of the delay proposed by my learned Brother for considering how the costs of this appeal are to be dealt with. I quite agree with all that my learned Brother has said, yet there is some small difference in the results we have arrived at. If I were sitting here as a jurymen I should be bound to acquiesce in that opinion entirely on both points, namely, that no authority was given either to bring the action of replevin, independently of all considerations as to the propriety of the action, or to apply the 243*l.* 10*s.* in the manner described. If I were sitting here as a jurymen, I say, I admit that I should be bound to negative that authority, but sitting here as a Judge I am bound to say that I am not convinced that the effect of further investigation might not be to alter my opinion, and at least to establish the liability of these ladies to discharge the costs of the action of replevin. The proposition to be made out, in this view of the case, by the appellant is, his legal right to assert his claim to these costs by action. Now the statute under which the taxation takes place (6 & 7 Vict. c. 73.) only intended to provide a more convenient way of ascertaining the amount of the bill for which the action was to be brought. The legislature never intended to delegate to an officer of the court the question whether the attorney should ever have a right or not to bring an action at all, which would be the case if the taxing Master could disallow whole bills as he seems to have done here. Sitting here, therefore, not as a jurymen, but as a Judge, I should have said if there is doubt as to part of the bill, bring an action as to that part. But it is said, that this action is altogether so preposterous that it was the duty of an attorney not to be concerned in carrying it on, and that, therefore, if he be concerned

appeal shall be taken and deemed to be the decision of the said Court, and if the Judges of the court be equally divided in opinion on any cause or matter brought before the Court by way of appeal, the decree or order appealed from shall be taken and deemed to be affirmed by the court of appeal."

he cannot claim to be paid for doing so. But in spite of the weight due to the officer whose opinion we have heard in court this day, I very much doubt whether, when in taxing a bill of costs the client denies having authorized the action, the taxing Master can turn round and say that the attorney ought to have examined into the probable chances of success. If, indeed, this were within the province of the taxing Master, I quite agree that this is the most absurd action that could ever have been brought. So with regard to the discharge set up as to the sum of 243*l.* 10*s.* As a jurymen I admit that no sufficient evidence of authority for the alleged application of the money has been produced, but, as a Judge, I should feel disposed to try the effect of further investigation, and should, therefore, had I been sitting alone, have sent it to law. However, it is of little use to state what I might have felt myself bound as a Judge to do, had I been sitting alone. In consequence of the difference of opinion between Lord Justice Knight Bruce and myself the present appeal must be dismissed.

LORD JUSTICE KNIGHT BRUCE.—Cannot some arrangement be come to about the costs? If not, we must decide that point. The act of parliament says, that where the Judges of appeal differ in opinion the decision of the Court below shall be affirmed. If this depended on myself, had I been sitting alone, I should most certainly have dismissed the appeal, with costs. Counsel can now speak on the question of costs.

Mr. Rolt.—During the argument one of your Lordships threw out a suggestion that possibly an action at law might elicit further evidence on these disputed points, and an action the appellant is desirous of trying, and Lord Cranworth has already stated his opinion that were he sitting alone he should have directed an action to be tried. No action suggested itself to Lord Langdale; and therefore as the only ground for the appellant not having the benefit of the action arises from the affirmation of the Court below, by reason of the difference of opinion between your Lordships, it would only be just to dismiss the appeal, without costs.

Mr. Southgate.—This is a second unsuccessful appeal, first from the order of the taxing Master, and, secondly, from the decision of the Master of the Rolls affirming that order. Neither before the taxing Master nor the Master of the Rolls was any suggestion made of an action, or that any further evidence could be produced. This second appeal has been unsuccessful, and the costs ought, as they would at common law, to follow the event. Even supposing this were a case at common law in error in the Exchequer Chamber, and the Judges were equally divided in opinion, the appeal would fail, and the costs would be given against the appellant.

LORD JUSTICE LORD CRANWORTH.—At common law the costs follow the event; but the analogy to a court of error is not correct; for there, when the Judges are equally divided in opinion there is no judgment, and therefore of course there can be no costs. That analogy, therefore, fails the respondent. In this court, however, constituted as it is under the statute giving us jurisdiction, it is expressly enacted that a difference of opinion affirms the judgment below. But the statute is silent as to costs. Even the general analogy of the respondent's counsel to the practice at common law cannot safely be drawn, for there the rule of costs following the event is universal, while here, in equity, the rule admits of many exceptions. I again say I feel every inclination with my learned Brother to give the successful party the costs of the appeal, but I doubt our authority. We must take a day or two to consider.

Nov. 17.—**LORD JUSTICE LORD CRANWORTH.**—The appeal in this case having been dismissed in consequence of a difference in opinion between the Lord Chief Justice and myself, it will be dismissed with costs on two grounds: first, because the difference felt by myself from Lord Langdale's decision is, not because I think that decision wrong, but because I think that decision was perhaps premature, for if the question had been sent to law further information might have been obtained, which perhaps might, or perhaps might not, have induced a different decision; and secondly,

because, if deciding this appeal on the materials before Lord Langdale, had I been sitting alone, I have no doubt whatever I should have decided in the same manner as Lord Langdale. The appeal is dismissed, and the costs follow the result.

Nov. 22.—The case was by leave again mentioned on a supposed further discovery of authority to the solicitor by the client, but the order was not varied. The supposed new matter was discovered soon after the judgment was delivered, and the Court thereupon gave the leave. The order was directed to be drawn up as of this day.

L.C. }
Nov. 6. } YATES v. MADDAN.

Will—Construction—Perpetual Annuity.

A testator gave an annuity of 100l. to his son for life, and he died leaving a child him surviving; he continued the same annuity for such child's benefit, to be paid to his or her mother:—Held, upon appeal, reversing the decision of the Court below, that the son's child took an annuity for life only, to be paid during minority to the mother.

This was an appeal from so much of the decree of the Vice Chancellor of England (reported 18 *Law J. Rep.* (N.S.) Chanc. 310,) as declared that the plaintiff, Emma Yates, was entitled under the will of the testator in the cause to a perpetual annuity of 100l.

Mr. Stuart and Mr. Hardy appeared for the executors and trustees, appellants;

Mr. Speed, for a defendant in the same interest; and

Mr. Rolt and Mr. E. F. Smith, in support of the decree below.

The following additional authorities were cited on the appeal:—

Blewitt v. Roberts, Cr. & Ph. 280;
s. c. 10 *Law J. Rep.* (N.S.) Chanc. 343.

Hedges v. Harpur, 9 Beav. 479.

Philipps v. Chamberlaine, 4 Ves. 51.

Allan v. Backhouse, 2 Ves. & B. 75.

Samuda v. Lousada, 7 Beav. 243.

Williams on Executors, p. 1028.

Byng v. Lord Strafford, 5 Beav. 558;
s. c. 12 *Law J. Rep.* (N.S.) Chanc. 169.

Wilson v. Maddison, 2 You. & C. C. C. 372; s. c. 12 *Law J. Rep.* (N.S.) Chanc. 420.

The LORD CHANCELLOR.—In this case the Vice Chancellor of England decided that the plaintiff Emma Yates, under the will of the testator, was entitled to a perpetual annuity of 100l. The defendants appeal from that decision, contending that Emma Yates is only entitled to this annuity during her minority, or at the furthest, during her life. I am of opinion that she is entitled for life only.

In *Blewitt v. Roberts*, Lord Cottenham says, "There is a marked distinction between the gift of the produce of a fund without limit as to time, and a simple gift of an annuity." "To hold that a simple gift of an annuity to A. does not give an annuity beyond the life of A. is not inconsistent with holding that a gift of the produce of a fund, without limit as to time, gives the fund itself. If a testator were minded to give 10,000l., can it be supposed that he would set about effecting this object by giving 500l. per annum to the intended legatee, without making any mention of the 10,000l.?" In *Robinson v. Hunt* (1), the testator gave an annuity of 100l. to his brother, and after his decease he gave the same annuity to his sister-in-law and his nephew, to be equally divided between them, and to the survivor of them; and he directed that if his nephew should have any children, the said annuity should be equally divided between them, but if his nephew should die without issue, then the annuity should go to the testator's cousin and his heirs for ever. And it was held that the children of the nephew took absolute interests in a perpetual annuity. In *Stokes v. Heron* (2), the annuities given by the will were held to be perpetual annuities. In that case the whole fund was devoted to the payment of certain annuities. In the present case, the testator merely gives an annuity of a certain amount. In *Hedges v. Harpur*

(1) 4 Beav. 450.

(2) 12 Cl. & F. 161.

it was held that the children of the testator's daughters took only a life interest in their annuities. So, in *Innes v. Mitchell* (3) it was held that the annuities were for life only. All the decisions seem to me to be in accordance.

But it was stated that the fund which would produce the annuity, would be equivalent to the distributive share of Edward Yates in the testator's assets. The fundamental rule, however, is, that the intention must be collected from the words of the will; but, if it were otherwise, the argument is of small weight, as the testator had excluded Edward and his children from any share of his residuary estate. The antecedent probability is, that an annuity given indefinitely is for life only; and upon the authorities I must hold that the present case is not a gift of a perpetual annuity. The next question then is, whether it is for life or only during minority. I think the words "to be paid to his or her mother," are not sufficient to curtail the duration of the annuity; and that it will be more in accordance with the intention, to supply the words, "during the minority of such child." The declaration, therefore, will be, that the annuity is for life only, and that during minority it is to be paid to the mother.

TURNER, V.C.	} THE ATTORNEY GENERAL v. THE BISHOP OF WORCESTER.
1851.	
May 27, 28, 29,	
30, 31;	
June 2, 3;	
Nov. 8.	

Charity — Grammar School — Statutes, 52 Geo. 3. c. 101. (Sir Samuel Romilly's Act), 1 & 2 Geo. 4. c. 92. (Charity Commissioners' Act), 3 & 4 Vict. c. 77. (Sir Eardley Wilmot's Act) — Pleading — Jurisdiction — Religious Test — Costs.

By order made in 1844 on petition, and by a subsequent order made on petition, under Sir Samuel Romilly's Act, in 1848, the Court confirmed certain schemes regulating the management of the Free Grammar School at Kidderminster (founded by

inquisition taken in 9 Car. 1. to be then existing for the instruction of the children generally of the inhabitants in good literature and learning), and restricting it to forty free boys, from eight to fifteen years of age, of such inhabitants, with a preference to such as were members of the Church of England, and in case of deficiency to children of other persons, being members of the Church of England, to be instructed gratuitously in Latin and Greek, and for certain payments in other branches of education, giving the masters the privilege of taking boarders to compete with the free boys for the prizes, and power to the trustees to admit any additional number of boys at certain payments, requiring the masters to be members of the Church of England, and the head master to be a graduate of one of the English universities, and in holy orders, and allowing the latter to occupy a house exchanged for certain of the trust estates under Sir Eardley Wilmot's Act (3 & 4 Vict. c. 77). On information, filed in 1849, to vary the schemes in the above particulars, and to set aside the exchange, the Court varied the scheme as to the religious test (without costs) according to the decree in the Warwick School case (1), and dismissed the remainder of the information, with costs.

This was an information against the Bishop of Worcester, his Lordship's Chancellor, the Vicar of Kidderminster and others, the trustees and feoffees of the Free Grammar School at Kidderminster, in Worcestershire, filed in February 1849, and seeking to vary two existing schemes for the general regulation and management of the school, for discharging the orders of the Court respectively confirming those schemes, to refer it to the Master to settle a proper scheme, and to set aside an exchange which had been effected of a part of the school estates.

By inquisition and decree, of the 10th of October in 9 Car. 1. of the Commissioners appointed by a commission under the Great Seal of the 28th of the previous month of December (and which decree was subsequently ratified and confirmed, except as to certain items of account, by Lord Keeper

(1) In re the King's Grammar School, Warwick, 1 Phil. 564; s. c. 14 Law J. Rep. (N.S.) Chanc. 338.

(3) 6 Ves. 464; s. c. 9 Ves. 212.

Coventry in 13 Car. 1), it was *inter alia* found that divers lands and tenements in Kidderminster were theretofore conveyed to feoffees to the use and for and towards the purpose of the maintenance of a schoolmaster and a free school for the education of children and youth in Kidderminster in good literature and learning. And it was *inter alia* ordered and decreed that thenceforth the rents of the school estates should be bestowed in necessary reparations of the school, and in buying necessary books for the boys by 40s. per annum, and the rest upon the two masters after the rate of two parts to the high schoolmaster, and one part to the lower schoolmaster, such schoolmasters to devote themselves to teaching and instructing the youth and scholars coming to the school to be taught and instructed, without using, exercising or following any other vocation, profession or business.

By the report of Master Sir George Rose of the 19th of November 1844, pursuant to an order of the Vice Chancellor of England of the 15th of April 1842, and made on the petition of certain individuals, and intituled "In the matter of the Free Grammar School of Kidderminster," (and which report was subsequently confirmed by another order of His Honour of the 13th of December 1844), a scheme was settled and approved whereby it was provided *inter alia* that the head and under masters of the school should be always members of the Church of England, and the former a graduate of an English university, in holy orders; that the school should consist of forty boys, children of inhabitants of Kidderminster, members of the Church of England being entitled to the privilege of being named or chosen, but if such number should not at any time be made up, the deficiency to be supplied from children of persons, being members of the Church of England, not residing at Kidderminster; that such scholars should be considered as free boys, and instructed in Latin and Greek without charge or payment, and should be further instructed in history, geography and mathematics, writing and other useful branches of education on payment of 1*l.* each quarterly to the head master; that such additional scholars should be admitted as the feoffees should

nominate, being children of inhabitants of Kidderminster, and paying not less than 2*l.* each quarterly to the head master; that the schoolmasters should have the privilege of taking such boarders as the feoffees, with the approbation of the visitor, (the Bishop of Worcester) should permit, such boarders to receive their instruction with the free boys, and pay such sum as the feoffees should direct; and that those boys and scholars who were not then receiving any education in Latin and Greek, and who had been instructed in reading, writing and arithmetic without charge or payment, should continue until Lady-day then next, when the said school was to cease, but such scholars to have the privilege of becoming scholars of the Free Grammar School under the terms of the scheme.

In March 1848, the head master of the school (the defendant Cockin) and the vicar of Kidderminster presented a petition under Sir Samuel Romilly's Act (52 Geo. 3. c. 101.) in the matter of the school; and pursuant to an order thereon by the Vice Chancellor of England of the 10th of March 1848, the Master, by his report of the 4th of November 1848 (and which report was subsequently confirmed by another order of his Honour of the 17th of November 1848), settled and approved of a new scheme, whereby it was provided, *inter alia*, to the effect above stated of the previous scheme, but limiting the admission to boys between eight and fifteen years of age; and that the head master should have for his use Woodfield House and grounds which had been then recently exchanged for the Greenhill estates, part of the school property under the provisions of 3 & 4 Vict. c. 77. (the Grammar School Act.)

The school estates were stated to produce from 550*l.* to 750*l.* per annum.

These particulars and other details are minutely stated in the judgment below.

The grounds of objection to the above schemes on the part of the relators were, the introduction of the religious test, the restrictions of the number and ages of the free boys, the payments for other instruction than in Latin and Greek, the admission of boarders to compete for prizes, the introduction of paying and non-paying

classes of scholars, the want of jurisdiction of the Court to direct the schemes on petition, and (as to the exchange) the improper situation of Woodfield House, its bad access to the town and inadequacy of consideration compared with the improveable value of the Greenhill estates.

Mr. Bethell, Mr. Rolt and Mr. Charles Hall appeared for the relators.

Mr. R. Palmer and Mr. Bigg, for the visitor (the Bishop of Worcester), the chancellor of the diocese, the vicar of Kidderminster and others, the trustees and feoffees of the Kidderminster Grammar School and its estates.

The Solicitor General (Sir W. P. Wood) and *Mr. Craig*, for the Rev. William Cockin and the Rev. Edward Brine, the present head and under masters of the school; and

Mr. Rendall, for W. Fawkes, a retired under master, to whom the trustees had granted a pension of 100*l.* for life, under Sir Eardley Wilmot's Act, 3 & 4 Vict. c. 77.

The following cases and authorities were cited. For the relators,—

Windsor v. the Inhabitants of Farnham, Cro. Car. 40; s. c. Duke, 634.

The Attorney General v. the Earl of Stamford (the Manchester School case), 1 Ph. 737; s. c. 10 Law J. Rep. (N.S.) Chanc. 58 and 172.

The Attorney General v. the Earl of Mansfield (the Highgate School case), 2 Russ. 501.

The Attorney General v. Hartley (the Bingley School case), 2 J. & W. 353.

In re Dean Clarke's Charity, 8 Sim. 34.

The Attorney General v. the Earl of Devon (the Tiverton School case), 15 Sim. 193; s. c. 16 Law J. Rep. (N.S.) Chanc. 34.

In re the King's Grammar School, Warwick (the Warwick School case), 1 Ph. 564; s. c. 14 Law J. Rep. (N.S.) Chanc. 338.

The Attorney General v. Jackson, 2 Keen, 541.

The Attorney General v. the Coopers' Company, 19 Ves. 187.

In re the Rugby School, 1 Beav. 457.

For the defendants,—

Hyde v. Edwards, 1 Mac. & Gor. 410; s. c. 1 Hall & Twells, 552.

In re the Shrewsbury Grammar School, 1 Mac. & Gor. 324; s. c. 1 Hall & Twells, 204, 401; 19 Law J. Rep. (N.S.) Chanc. 287.

The Attorney General v. Green, 1 J. & W. 303.

The Attorney General v. Bovill, 1 Phil. 762.

The Attorney General v. Cullum, 1 You. & C. C.C. 411.

The Attorney General v. the Earl of Clarendon (the Harrow School case), 17 Ves. 491.

The Marquis of Breadalbane v. the Marquis of Chandos, 2 Myl. & Cr. 711; s. c. 7 Law J. Rep. (N.S.) Chanc. 28; 4 Cl. & F. 43.

Thompson v. Derham, 1 Hare, 358; s. c. 13 Law J. Rep. (N.S.) Chanc. 354.

Henderson v. Henderson, 3 Hare, 100.

And in reply,—

The Corporation of Ludlow v. Greenhouse, 1 Bligh, N.S. 66.

Nov. 8.—TURNER, V.C.—This information relates to the school at Kidderminster, and it prays that it may be declared that the whole income is for the benefit of the school; and that all the benefits of, and arising from, the school ought to be confined to free scholars only; and that the masters of the school ought not to be allowed boarders, and that the free scholars to the school ought not to be required to make any payment for their education; and that, in the administration of the charity, children who or whose parents are members of the Church of England ought not to have any advantage or privilege over children who or whose parents are not members of the Church of England, and that all boys who can read and write are proper objects of the charity; and that several orders which have been made by the Court in relation to the school may be discharged, and that it may be referred to the Master to settle a proper scheme for the general regulation and management of the charity, having regard to the above declarations, and that an exchange of an estate belonging to the charity called the Greenhill estate for a

house and estate called Woodfield may be set aside and proper proceedings taken for that purpose. That the defendant Cockin, who is the master of the school, may be decreed to make good to the charity the damage occasioned thereto by the exchange.

No trace is now to be found of the deeds or instruments by which the school was founded; but it appears by an inquisition taken in the ninth year of the reign of Charles I. upon a commission issued under the statute of Eliz., that various parcels of land had been theretofore conveyed to the use and for and towards the maintenance of schoolmasters and a free school for the education of children and youth in Kidderminster in good literature and learning, and it appears that upon this inquisition the Commissioners made a decree whereby, after various provisions relating to the letting, and the misemployment of the rents of the land which were described as belonging to the free school, they ordered and decreed that no person or persons should be admitted, elected, chosen, allowed or approved of to be schoolmaster or schoolmasters of the Free School in Kidderminster aforesaid, nor have any benefit, profit, wages or stipend belonging to the said school or master or masters of the same, but such person and persons should wholly and altogether employ him and themselves as schoolmasters of the said school, and not employ him or themselves in any manner of other professions or businesses which might or should hinder or any way take away the continual attendance and diligence of such schoolmaster or schoolmasters upon the said school and the scholars therein; but that if any such schoolmaster should in any way or at any time neglect the said school and their duty therein, and also upon any other reasonable cause, such schoolmaster or schoolmasters should be removed and discharged from being further schoolmaster or schoolmasters of the said school, and be deprived of all future profit, benefit, wages or stipend belonging unto the said school or schoolmasters. They further ordered and decreed that all the rents thenceforth to become due for the premises should be employed and bestowed in the necessary expenses of the school, and in buying necessary books for the schoolboys 40s. per annum; or so

much thereof as need should require, and the rest upon the schoolmasters for the time being for their wages and stipend for their pains and diligence in the duties of their several places in teaching and instructing the youth and scholars there coming to be taught and instructed; the payments to the schoolmasters to be at the rate of two parts to the high schoolmaster and one part to the low schoolmaster. They also ordered and decreed that no person or persons whatsoever should from thenceforth be nominated, elected, chosen, appointed or approved to be high or low schoolmaster or schoolmasters of the said school, but by the high bailiff of Kidderminster aforesaid for the time being, and certain of the feoffees of the premises for the time being, with the consent and approbation of the Bishop of Worcester for the time being, or of the Chancellor for the time being; and that such person or persons so to be nominated, elected, chosen, placed and approved to be schoolmaster of the same school should be of good and laudable life, gesture and conversation, painful, diligent and industrious in his or their place and places of schoolmaster and schoolmasters as aforesaid, and should continue no longer schoolmaster or schoolmasters of the same school than he or they should so demean and behave themselves as aforesaid in painful diligence and industrious manner in teaching and instructing the youth and scholars coming to the said school to be taught and instructed without using or exercising or following any other vocation, profession or business. And the decree also contained provisions as to letting and rents, and appointed new feoffees, and gave directions for the continuance of the trustees, and provided that the Bishop for the time being and his chancellor and the high bailiff of Kidderminster for the time being should be three of the trustees.

It appears that some exceptions were taken to this decree, and were referred to the Commissioners for their consideration, and that the Commissioners certified in favour of some alterations in the decree as to several matters affecting the tenants; and that the case having then come before the Lord Chancellor, upon exceptions to the certificate, he, on the 12th of June in the thirteenth of Charles I, made a decree,

by which, according to the power and authority in that behalf given to him by the statute, he ordered that the decrees of the Commissioners and all the matters therein contained should be ratified and confirmed by the decree and authority of this Court according to the alterations in the said certificate.

The property of the charity appears to have been, from time to time, conveyed to new trustees; and in the year 1825 a scheme for the appointment of trustees of the charity was settled under an order of this Court; but the Bishop of Worcester, the Chancellor, and the high bailiff of Kidderminster have always been retained as trustees in conformity with the decree of the Commissioners; and no alteration in the trusts declared by the decree appears to have been attempted to be made down to the year 1842.

By an order of this Court, dated the 15th of April 1842, and made upon the petition of the then trustees, in the matter of the charity, under the title of "The Matter of the Free Grammar School of Kidderminster, in the county of Worcester," it was referred to the Master to approve of a scheme for the future regulation and government of the Free Grammar School, regard being had to the provisions of the act, 3 & 4 Vict. c. 77, the Grammar School Act; and the Attorney General, by his counsel or solicitor, was to be at liberty to attend the Master on the matter referred to him. In pursuance of this order, the Master made his report, dated the 19th of November 1844; by which, after certifying that he had been attended by the solicitors for the petitioners and for the Attorney General, and stating that it appeared, by an affidavit laid before him, that the yearly income of the charity estates was, in the year 1825, 491*l.* 19*s.* 1*d.*, or thereabouts, and that the then present yearly income of the charity amounted to 507*l.* 5*s.* or thereabouts, and that certain leases would shortly fall in, by which it was probable the income would increase considerably; and that the school was then divided into two departments, the upper school and the lower school, and that the number of free scholars attending the free school then amounted, in the upper school to eight and in the lower school to forty; and that the number of

free scholars for many years past had not exceeded that number, but that if the school was placed under improved management and regulations it was probable the number of scholars would be increased, and that the Rev. T. Morgan, the then head master of the Free Grammar School, was of the age of eighty years or thereabouts, and was willing to resign his office on having a retiring pension under the provisions of the Grammar School Act, and he found that Mr. W. Fawkes, the late under master of the school, was in the 70th year of his age, and had resigned his office, upon an understanding that he should be allowed a retiring pension of 100*l.* a-year for life, under the provisions of the said act; and he set forth in the second schedule to the report the scheme which he approved for the future regulation and government of the free school.

The provisions of the scheme set forth in the second schedule to this report, so far as they are material to be stated, were as follows:—Article 1. provided for a retiring pension of 150*l.* a year to the Rev. T. Morgan, the late head master of the Free Grammar School, who in the mean time had retired, and for a retiring pension of 100*l.* a year to Mr. Fawkes, the late under master. Article 2. provided that the Bishop of Worcester for the time being should be visitor of the Free Grammar School, and the vicar of Kidderminster for the time being should always be one of the trustees of the school. Articles 3. and 4. provided for the application of the rents of the estate, in the first place, in payment of repairs and of what should be necessary in the opinion of the trustees, or the majority of them, for books, not only for the service of the Free Grammar School, but also for prizes in books to be given at the yearly examination, with a proviso that the amount should not exceed 30*l.* per annum; and then in payment of the retiring pensions and of the salaries of the head and under masters, and of the clerk and collector, and other expenses: and it provided for and directed the surplus to be invested and accumulated, subject to any directions to be given by the Court upon a proper application for the purpose. Article 6. provided that the trustees or the majority of them should, with all conve-

nient speed, upon any vacancy, nominate, for the approbation of the visitor, an apt and able man in learning, manner, and discretion; and that upon the approbation of the visitor, the trustees should elect him to be schoolmaster of the said school, and that they and the visitor should also, in like manner, elect and choose another able and discreet person to be under master or usher of the said school; such masters to be always respectively members of the Church of England, and the head master to be a graduate of an English university and also admitted in holy orders. Article 7. provided that the school should consist of forty boys, to be nominated by the trustees, the children of the inhabitants of the borough and foreign of Kidderminster, members of the Church of England, being entitled to the privilege of being named or chosen; but that if, at any time, the number of forty boys should not be made up by application or nomination from the borough or foreign of Kidderminster, the deficiency might be made up from children of persons being of the Church of England not residing within the borough or foreign. Article 8. provided that such scholars, when chosen, should be considered as free boys and instructed in Latin and Greek without charge or payment, and that they should further be instructed in history, geography, mathematics, writing, and other usual branches of education, on payment of 1*l.* per quarter, the payments to be made to the head master. Article 9. provided that in addition to the forty boys so to be named and educated, there should be admitted into the school such other boys as the trustees should, from time to time, nominate, sanction and direct, being children of inhabitants of the borough and foreign of Kidderminster, who should receive the same education in all respects as the forty boys or scholars, such additional scholars not to pay less than the sum of 2*l.* per quarter to the head master in such manner as the trustees should direct. Article 10. provided that the head master should, as and when required by the trustees, and subject to their consent and approval, appoint one or more assistant or assistants other than the under master, who should, under the superintendence of the head master, instruct the scholars in his-

tory, geography, writing, arithmetic, mathematics and other usual branches of education, the head master to pay to such assistants such salaries as the trustees should deem reasonable. Article 11. provided that the schoolmasters should have the privilege of taking such a number of boarders into their houses for the purpose of receiving their education in the said school, as the trustees, with the approbation of the visitor, should permit and approve of, such boarders always to receive their instruction in common with the free boys, such boys paying such sum as the trustees should direct and approve, but no other distinction to be made between the boarders and free boys in school hours, or as to the privileges and enjoyments of the school, or in their discipline or treatment in any respect. Article 12. fixed the salaries of the schoolmaster and the under master at the following minimum rate, the schoolmaster 300*l.* a-year and a house, and the under master 100*l.* a-year and a house, and it assigned houses belonging to the school property to the schoolmaster and under master respectively for their respective uses: and after reciting that the house assigned to the schoolmaster was small and insufficient for the accommodation of boarders, it provided that it should be competent to the trustees at any time, with the approbation of the visitor, to allow the master to reside in any other house within the precincts of the borough of Kidderminster; and that in such case the trustees might let the master's house, and permit the master to receive the rents thereof to enable him the better to provide for himself and his boarders a larger house. Article 13. laid down the rules and regulations for the conduct of the school, amongst which were the following:—that the business of the day in the school should commence and end in the prescribed forms of prayer to be approved of by the visitor for the time being, and that such a portion of Saturday in each week as might seem proper to the master, should be devoted to the instruction of the respective scholars in the principles of the Christian religion and the doctrines and rites of the Church of England; that all the scholars, except as thereafter mentioned, should repair to the parish or some other church of Kidderminster twice every

Sunday, and on such of the days set apart for public worship as the trustees should from time to time direct; and that the head or under master should attend the boys at church on every occasion, with a proviso that the trustees might excuse, by a note in writing, any boy or boys from such attendance upon request made to them by the parents of any such boy or boys; and that such person so excused should not be compelled to attend at church morning or evening. That no boy should be admitted into the school who was less than eight or more than sixteen years of age. That there should be a yearly examination by an examiner appointed by the visitor, who should report to the trustees and also to the visitor the state of improvement and proficiency of the scholars, and the general state of the school, and also recommend such as were sufficiently advanced to be drafted into the upper school; and that in case the visitor should approve of the recommendation, the same should be forthwith adopted. Article 15. gave to the trustees power to appoint a clerk and a collector, with salaries. And Article 21. was as follows:—"That inasmuch as there had been previous to that time a number of boys or scholars not receiving any education in Latin and Greek, who had been instructed in reading, writing and arithmetic without charge or payment, and it was desirable that they should not be deprived of the advantage thus afforded them, the trustees should have the power to allow them to continue at the said school without any payment, except the mere payment quarterly for stationery, until the 25th of March 1845, when the said school was to cease, but the scholars thereof to have the privilege of becoming scholars of the Free Grammar School, under the terms of the scheme."

By an order of the Court, dated the 13th of December 1844, this report was confirmed and the scheme directed to be carried into effect. This order was made upon the petition of the then trustees in the matter of the charity under the same title as before of "The Matter of the Free Grammar School of Kidderminster, in the county of Worcester"; and the Attorney General appeared upon the petition. Upon the retirement of the Rev. Thos. Morgan

from the head mastership of the school pending the above proceedings, and on the 21st of February 1843, the Rev. W. Cockin was elected to be head master in his place; and in some circulars which appear to have been issued for the information of candidates with reference to the election, it was stated that the master would be allowed to take any number of boarders the house would accommodate. That the school was open to the parish at large, that there was no payment with scholars, and that the course of education was classical and mathematical. The number of free pupils in the school was also stated, and it was mentioned that there were no boarders.

Mr. Fawkes, the under master of the school, having also retired from his office, as stated in the report, on the 25th of March 1844 the Rev. E. Brine was appointed under master in his place. Soon after Mr. Cockin was appointed to be head master of the school, and in the month of September 1843 he purchased a house in the borough of Kidderminster, called Woodfield House, with about nine acres of land attached to it, and fitted up the house for boarders. It appears to have been made capable of accommodating about fifty boarders, and under the 12th article of the scheme Mr. Cockin was allowed to reside in this house, and has ever since resided in it and taken boarders there. The house and lands thus purchased by Mr. Cockin were in the year 1848 exchanged by him with the trustees of the charity for another estate, in the parish of Kidderminster, belonging to the charity, and called the Greenhill estate, containing about fifty acres. This exchange was effected under the powers of the act, 1 & 2 Geo. 4. c. 92, for authorizing the exchange of charity lands, and all the provisions of the act appear to have been duly observed, including the valuation required by it. The exchange was completed by a deed, dated the 3rd of February 1848, by which the Woodfield estate was conveyed to the trustees of the school, and the Greenhill estate to Mr. Cockin, and Mr. Cockin has since sold the Greenhill estate. It appears that although Mr. Cockin was thus permitted to reside in Woodfield House, the school continued down to this time to be carried on as it had before been in an old building adjoining

the parish church, and which was not included in any of the deeds by which the charity property was conveyed. In this state of circumstances, the Vicar of Kidderminster came to an agreement with his co-trustees, that the trustees should give up possession of the building adjoining the parish church, upon the terms of his erecting a new school-room, adjoining Woodfield House, at an expense of not less than 1,200*l.*; and thereupon, on the 7th of March 1848, Mr. Cockin and the vicar presented a petition in this court in the matter of the charity, under the same title as before, stating the exchange and the agreements; and that by reason thereof it was desirable that a reduction of the salary of the head master should be made, and that for that purpose an alteration of the scheme would become necessary, and praying that the agreement between the vicar and the trustees might be confirmed, and that it might be referred to the Master to examine and approve of a new scheme for the future regulation and government of the Free Grammar School, regard being had to the provisions of the grammar school.

By an order made upon this petition, and dated the 10th of March 1848, it was referred to the Master to inquire whether it would be fit and proper and for the benefit of the charity that the agreement should be carried into effect; and this order also referred it to the Master to approve of a new scheme in the terms prayed by the petition. In pursuance of this order the Master made a report, dated the 4th of November 1848, by which, after certifying that he had been attended by the solicitors for the petitioners and for the Attorney General, he approved of the agreement and of a new scheme for the regulation and government of the school. The scheme approved of by this report was in substance the same as that which the Master had approved by his former report, the only material variations being that the head master was to have 240*l.* a-year and Woodfield House and grounds instead of his salary of 300*l.* a-year; that the under master was to have, in addition to the house which had been before assigned to him, the house which by the former scheme had been assigned to the head master; and that the school was to be carried on at Woodfield House.

This report was confirmed by an order dated the 17th of November 1848.

The school has been conducted upon the footing of the schemes from the times they have respectively been in force. It had sunk to a low ebb at the time of Mr. Morgan's retirement, there being then only seven free boys in the upper school, and there were then no boarders. Upon the appointment of Mr. Cockin to the head mastership in 1843, it rose considerably, and when Mr. Fawkes retired at Lady-day 1844, there were sixty-three free boys in the school, of whom thirty were in the upper school where Greek and Latin were taught, and thirty-three in the lower school where the instruction was in English only. The number of free boys appears to have still further increased in the year 1844, as it is admitted that there were forty-four boys in the upper school at some time in that year. Since the year 1844, however, the number of free boys has gradually decreased, and at the time of the filing of this information there were only thirteen free boys in the school. The number of boarders, on the other hand, has gradually increased, and when this information was filed there were thirty-nine boarders in the school.

At the time when Mr. Cockin was appointed to the head-mastership, no payment was required from the free boys for their education, but from Michaelmas 1843 the free boys in the upper school were, by direction of the trustees, required to make a quarterly payment to the head master for instruction in English and other branches of education, Latin and Greek only being taught free of charge, and it is admitted by the information that before Mr. Cockin's appointment small payments varying from 2*s.* 6*d.* to 5*s.* a-quarter had sometimes been required to be made in respect of writing and arithmetic.

Many of the inhabitants of Kidderminster being dissatisfied with the scheme of 1844, a public meeting of the inhabitants was held on the 1st of December 1848, at which resolutions were passed condemning that scheme in the particulars complained of by the information and in other respects, and it was resolved to petition the Lord Chancellor and the Bishop of the diocese as visitors, and a committee was

appointed to watch the interests of the school, to take proceedings in equity or otherwise, and to dispose of the subscriptions of the parishioners to defray the expenses thereof. In pursuance of those resolutions, a memorial was presented to the Bishop of Worcester, as visitor, in which the principal grounds of complaint were the quarterly payments charged by the scheme upon the free boys, the non-exercise by the trustees of their power to limit the number of boarders, and the non-distribution of the 30*l.* a-year in books and prizes. The Bishop answered this memorial on the 13th of January 1849, to the effect that the quarterly payments being imposed by the scheme, the alleged grievance in that respect was not within his jurisdiction as visitor, that he should not feel himself justified in interfering as visitor with the discretionary power which by the scheme was reserved to the trustees of limiting the number of boarders, and that it having been proved before him that the funds of the school were not adequate to meet the 30*l.* per annum, the only direction he could give respecting it was, that it should be applied according to the scheme whenever there was a sufficient surplus, after paying the salaries of the masters and other school expenses. The Bishop's answer to the memorial went on to state that grammar schools such as that at Kidderminster were not intended for the general education of the inhabitants of towns, but were exclusively instituted for the purpose of affording opportunities for a good classical education to the sons of merchants, tradesmen and others evincing an aptitude for learning. That the scheme had conceded this privilege to the inhabitants of Kidderminster on payment of 1*l.* per quarter, which was a trifling charge for such an education, and that it was not for him as visitor to decide whether it would have been more advisable that such education should have been afforded to the inhabitants gratuitously, as the point was settled by the scheme. The application to the Bishop having thus failed of effect, this information was filed on the 6th of February 1849, against the trustees and against the present master and under master and Mr. Fawkes the late under master of the school. In

addition to the above-mentioned facts, in relation to the school, the information alleges that the rental of the charity has increased since it was reported, in 1844, to be 507*l.* 5*s.*, and that it is now of the value of 795*l.* per annum, and will, from the falling in of leases and other causes, be hereafter considerably increased; that at the time when the above petitions were presented it was known by the parties presenting them that many of the inhabitants of Kidderminster would not approve of the schemes set forth in the reports, and that the petitions were presented without the inhabitants being consulted in order if possible to prevent questions being made as to the propriety of the schemes; that it was the intention of the founders of the school, as set forth in the inquisition and decree; and was required by the decree, that the school should be a free school and that the benefits thereof should be enjoyed by free scholars only, and that it was contrary to the intentions of the founders that there should be any boys in the school whose parents should pay towards their education therein, and that no payment ought to be made by the free scholars for instruction in history, geography, and mathematics, writing and other branches of education, but that all such branches of education were comprised in and formed part of the good literature and learning for the instruction of boys in which the charity was founded, or at all events ought now to be included in the gratuitous education, which was an essential part of the charity. That the provisions contained in the scheme for the instruction of the boys in the doctrines and rites of the Church of England, and for the attendance of the boys at church and for giving a preference to boys being children of members of the Church of England, and for the non-admission of boys under eight years of age, and the payments required by the schemes to be made by the scholars called free scholars to the head master had prevented and would, unless the schemes were altered, continue to prevent many deserving and proper objects of the charity receiving the benefit thereof, and that, in fact, some boys who had applied for admission to the school had been rejected because their parents were not members of the Church of England, and other boys had, in consequence of the

payments required, been obliged to discontinue receiving the benefit of the charity, and to be sent to other schools supported by subscription.

The information further alleges that the boarders had been allowed to compete with the free scholars for the prizes which were annually distributed in conformity with the provisions of the scheme, and that in consequence of the greater time and care devoted to their education, they had succeeded in gaining nearly all the prizes, and that in the year 1848 they had obtained twenty-one out of twenty-four prizes. That the success of the boarders as to the prizes occasioned ill-feeling amongst the scholars, and was disliked by parents who had sent, or might be willing to send boys to the school. That the inhabitants of Kidderminster being nearly all persons in trade, were unable to send their boys to the school as boarders, not only on account of the expense, but because the head master considered a tradesman's son objectionable as a boarder, and that the revenue of the school exceeded 700*l.* a year, and was sufficient to provide good and efficient masters to instruct the free scholars in conformity with the decrees, without resort being had to the taking of boarders, and that the masters, by the taking of boarders, obtained a much larger income than was necessary for the masters of the school. The allegations of the information as to the exchange are, that it was made with a view to Mr. Cockin taking a larger number of boarders, and providing for him a larger house for that purpose, and that it was improvident, except upon the assumption that it was in furtherance of the intention of the founders of the charity, or that it was otherwise justifiable to provide for the head master out of the trust property a house sufficiently large to accommodate a large number of boarders. That by reason of the exchange the revenue derived from the charity estate would be permanently diminished, or at least rendered more precarious. That the charity estate given in exchange was land let for agricultural purposes, and much more desirable property for the charity than property consisting principally of a house; that it was land which, from its peculiar position, was likely to increase considerably

in value, and which it was known would, on the determination of the existing leases, produce a greatly increased rental. That the exchange never would have been made had not Mr. Cockin been desirous of having a large house, wherein he might take a large number of boarders; that the old house of the head master was sufficiently large for him and his family, and was then occupied by a large family, who had two boarders living with them, and that notices had been given in March 1843 and October 1847, that the exchange, if made, would be set aside. The information charges that the orders of April 1842 and March 1848, ought not, under the circumstances, and having regard to the decrees, to have been applied for on petition, and ought not to have been made; and that there was no jurisdiction in the Court to make such orders as the orders confirming the reports: and the prayer of the information is as I have already stated. There is a charge in the information as to the school being entitled to an exhibition to the University, but I lay it out of the case, as it is evidently of no value, and was not relied on in argument.

The defendants, the trustees, by their answer, state that the present annual rental of the charity estates is 579*l.* 18*s.* 6*d.*, and that they believe that by the falling in of leases the rental will be increased in 1851 and again in 1856. That they are advised and submit that the free school, according to its foundation, is not a school for the teaching of writing and arithmetic, but for educating scholars in the learned languages and grammar only; that it appears from orders and entries in ancient minute books in their possession, that payments or quarterages by scholars attending the free school have always been accustomed to be made in the school, but that such payments or quarterages have never been made for the education the boys were entitled to receive at the free school; that neither previously, nor at present, was or is any payment made by a free scholar for the teaching of Latin and Greek, but that the payments or quarterages have always been made, and now are made, solely and exclusively for instruction in writing, arithmetic, and English literature; and then they set forth the

following entry in an ancient minute-book of the school, purporting to be resolutions agreed to at a meeting of the trustees of the 2nd of October 1756:—"That the usher or low master of the school should be well qualified for teaching Latin and grammar in the school, according to the original institution thereof, and also writing and arithmetic therein in an accurate and competent manner. That the said usher or low master should not be obliged to teach writing and arithmetic in the said free school, unless the parent agreed, or the friend of the child or children there sent to be taught the same, should, previous to such instruction in writing and arithmetic, engage and promise to pay to such master, for such learning, as the original institution was only for teaching Latin and grammar in the said school, the sum of 5s. per quarter, including pens and ink, for the said scholars." And also another entry in the same book, and dated the 17th of December 1777, as follows:—"Entrance money of 5s. to be paid to the under master, and that he has a right to receive the same." And they say they believe the only gratuitous instruction ever given in the said free school consisted of instruction in Latin, Greek, and grammar only, and they deny that at the time mentioned in the information it was the existing practice, and to the best of their belief that it was at any time the ancient practice of the school to give to the scholars gratuitous instruction in reading, writing, and arithmetic.

With respect to the petitions, they admit that the inhabitants of Kidderminster were not consulted on the presentation of them, but they say that they were presented with the approval and by the direction of the trustees, and that the proceedings upon them were matters of notoriety in the town, and that the Attorney General attended by counsel on the proceedings before the Master for the settlement of the scheme. With respect to the religious qualification and the other provisions of the scheme relating to religious instruction, they say the Bishop of Worcester has always been the visitor of the school and one of the trustees. That the head master of the school has always been a clergyman of the Church of England, and that the free scholars of the school have always,

time out of mind, attended the parish church, and that from such circumstances they have always considered and believed that the free school was a charity in connexion with the Church of England, but that they did not propose or suggest before the Master that the free scholars should be confined to the children of the inhabitants of Kidderminster being members of the Church of England, but that the counsel of the Attorney General insisted, before the Master, that the free school was a Church of England foundation, and that the benefits of the school should be confined to the children of the inhabitants of Kidderminster being members of the Church of England, and that the Master was of the same opinion, and, consequently, approved of the scheme, with such limitation. They state, however, that they are anxious and willing to act as the Court shall direct, and that they are willing to consent to an alteration of the scheme, so that the benefits of the charity may be extended to the children of all the inhabitants of Kidderminster; but they submit that having regard to the ancient practice in the school, and to the constitution of the school, the boys attending the school ought to be instructed in the doctrines and rites of the Church of England, and ought, at the discretion of the head master, to attend at church, or at all events, that the religious instruction of the boys ought to be left to the head master.

With respect to the charges for education, they say that the school has always been and is now a free school for teaching the learned languages and grammar, and that no charge whatever has ever been or is now made for such instruction, and that from the inquisition and decree and the ancient usage of the school, they believe that it was the intention of the founders that the parents of the free scholars should not pay anything for their instruction in good literature and learning: by which they submit is meant and intended instruction in Greek, Latin and grammar, and they submit that the head master is not required according to the constitution of the school to give gratuitous instruction to the free boys in any other branch of education except Greek, Latin, and grammar, and

they say they are advised and submit that such is and always has been the practice in the said free school and in all other free schools similarly constituted ; and they therefore submit that payment ought to be made by or for the free scholars to the head master for instruction in history, geography, and mathematics, and all other branches of education, except Greek, Latin and grammar ; and they also say they are advised and submit that having regard to the ancient usages of the said school, and to the usage and practice of free schools similarly situated and founded at or about the same period, the branches of education in the information mentioned do not form part of good literature and learning for the instruction of boys on which the charity was founded.

With respect to the ages for admission, they submit that the school was intended for the purpose of affording a classical education, and that it would not be useful or advantageous to the principal objects of the charity to admit children of tender years ; that some age ought to be fixed for the admission of free boys, and that the age of eight years was a fair and proper age for such admission.

With respect to the prizes, they say that none have been distributed in conformity with the powers of the scheme, the income of the charity not having been sufficient to supply funds for the purpose, but that since the head master's appointment books as prizes have twice in every year been provided at the exclusive expense of the head master and the under master and two other persons who took an interest in the prosperity of the school, and that the free boys have always been permitted to compete with the boarders for such prizes, and that during the period that the prizes have been distributed, sixty-one of such prizes have been obtained by boarders, and fifty-one by free scholars ; and that although in the year 1848 the boarders obtained twenty-one out of twenty-four, yet that on many previous occasions the free scholars obtained the greater proportion of the prizes ; that the prizes have always been fairly distributed ; that the success of the boarders as to the prizes occasions no ill feeling among the scholars ; that no such ill feeling has existed or does exist, and that the great majority

of the parents of the free scholars approve the system of distributing prizes as promoting greater competition among all the boys attending the school.

With respect to the boarders, they say, that although masters of average ability might be obtained for the salaries provided by the scheme, yet that schoolmasters of high reputation and character would not be induced by such remuneration only to accept the office of head master of the free school, and that they believe that it is greatly for the advantage and interest of the charity that men of high character and reputation from one of the Universities should be induced to accept such office, and that the present head master would not have accepted such office upon the remuneration which would have been provided solely from the income of the charity, and they therefore believe that the revenue of the school is not sufficient to provide good and sufficient masters to instruct the free scholars in conformity with the decrees mentioned, without resort being had to the taking of boarders ; and they say that in their judgment and belief the taking of boarders by the master is greatly to the advantage and interest of the free school by exciting competition among the boys and raising the character and reputation of the school ; and for those reasons they submit that the masters should not be prohibited from taking boarders ; and in conclusion, as to the school, they say they are willing, if the Court shall think proper so to direct, that the existing scheme should be altered by admitting to the benefit of the free school children of the inhabitants of Kidderminster, whether members of the Church of England or not ; but except in that respect, they submit that the existing scheme, having been settled under the authority of the Court, and with the express sanction of the Attorney General, represented by the counsel attending for him before the Master, ought not to be altered.

And as to the exchange, they state that the old school-room, being an ancient building attached to the church, confined in space and quite unsuitable for the purpose of a school-room, not only being in a dilapidated state, but surrounded by a crowded churchyard, they considered as trustees of the school that it would be generally for the

advantage of the charity that a permanent and fit and proper residence for the head master of the school should be obtained by them, and that a new and commodious school-room should be built, which should be attached to the head schoolmaster's house. And then they go on to state in detail the proceedings relating to the exchange, and that it was completed under the provisions of the statute of 1 & 2 Geo. 4, and that a large and commodious school-room has been subsequently built adjoining Woodfield House, at a cost of upwards of 1,200*l.*, and that the room has been used for the purpose of the school since in or about June 1848. They further say, that it was in their judgment for the advantage of the charity that the house of the head master should be capable of accommodating boarders, and that they would not have effected the exchange unless the house had been suited for such purpose, but they deny that the exchange was improvident in any respect. And they set forth various particulars relating to the two properties, from which it appears that the income applicable for the purpose of the school was increased by the exchange. They also state, in relation to the exchange, that before it was effected they advertised the meeting held by the Commissioners under the act in the Kidderminster newspaper, for the express purpose of giving an opportunity to any inhabitant to attend and object. That the solicitor of the relators was the only inhabitant who attended; that he attended for several inhabitants, but refused to state for whom, and ultimately insisted on his right to attend in his own behalf, and that he protested against the exchange; and they say that the Commissioners then invited him to offer any evidence, or to make any statement he thought fit, but that he offered no evidence and gave no reason why the exchange should not be effected.

By their answer to the amended information the defendants, the trustees, state the present clear rental of the property, after deducting the former under master's pension, the salaries of officers, rates, taxes, repairs, and loss by tenants to be 351*l.* 12*s.* 1*d.*, and they set out a schedule of the prizes from which it appears that since 1846 by far the greater proportion of prizes has been obtained by the boarders.

The answers of the master and under master are to the same effect as those of the trustees. The answer of the master also states a further entry in the minute-book, under the date of the 6th of June 1768, limiting the number of boys to be taught by the second master to twenty, and another entry under the date of the 23rd of December 1773, prescribing the payment of an entrance fee to the under master of 5*s.* The master, by his answer, also states that the regulations of the scheme have not been enforced as against the children of parents dissenting from the doctrine of the Church of England, and that he is not desirous of excluding dissenters from the benefit of education at the school. And he submits that, at all events, he ought not to be prohibited from taking boarders, for he says that he became master on the understanding that he was entitled to take boarders, and that he has had such understanding twice assured to him by the schemes approved by the Court, and that he has on the faith of such his right incurred very considerable expense in providing for the reception of boarders. It also appears from the answer of the master that both Mr. Morgan and Mr. Fawkes had formerly taken boarders, although they had ceased to do so before they retired from their offices. And the master's answer states that he has sold the Greenhill estates. The under master's answer states his belief that many of the inhabitants of Kidderminster are dissatisfied with the schemes, and that the payments required to be made by the scholars prevent some of the objects of the charity receiving the benefit thereof. The answer of Mr. Fawkes contains nothing material to the questions in the cause.

A great deal of evidence has been gone into in the cause, both in support of the information and on the part of the defendants. In support of the information, it is proved that the meeting at which the resolutions were passed condemning the schemes was attended by about 1,500 persons, and evidence has been gone into as to the value of the charity property. Two surveyors, who have been examined, state that the net rental of the property, exclusive of the parts used as the school and the masters' houses, ought if well managed and let to the best advantage, to be 898*l.* 4*s.* 3*d.*; and with reference

to the exchange of Greenhill estate for the Woodfield House and land, they state that if taken as one estate for the other it was an improvident exchange for the trustees; that the Greenhill estate is eligibly situate for garden ground and villas, and was calculated to produce an increase of income to the trustees, and that the land was four times the quantity of the land at Woodfield, and that Woodfield House unless occupied by the master of the school would be difficult to let unless at a very moderate rent, and they set the Greenhill estate at 200*l.* a-year if occupied as garden ground, and 400*l.* a-year if let for building. Many witnesses have also been examined on the part of the information in relation to the school, and on carefully reading their evidence I think it satisfactorily proves that there have been at different times from forty to fifty, and even sixty boys receiving their education at the school; that the boys were the sons of the tradesmen and the shopkeepers in the town, and that until the scheme of 1844 came into operation boys were admissible into the school at any age if able to read, and that there was no distinction as to the children of dissenters; but many of these witnesses state that at different times the under master had a few boarders, not however at any time exceeding six in number. It also appears from the evidence of several of these witnesses that small payments were made by the boys for books, pens and ink, and other incidental matters, but they all concur in stating that until the scheme of 1844 no payment was made for education at the school. Several of them state that the number of boys attending the school increased upon Mr. Cockin being first appointed, but again diminished upon the scheme coming into operation, and they ascribe the change to the rules introduced by that scheme, particularly to the rules as to the age of boys and to the quarterly payments, and the religious qualification; several of them stating that they have been prevented by those rules from sending their children to the school, and some of them deposing that they have been compelled to withdraw their children from the school in consequence of the quarterly payments. One of the witnesses, in particular, states that his boy, who had been admitted to the

school at the age of seven, was refused admission after the scheme, because he was three weeks under eight years of age. Another, who is a dissenter, and had a boy at the school, states that about the time of Mr. Cockin's appointment she was told by the vicar that the school was intended for church boys and not for dissenters, and that her boy must leave unless he paid 2*l.* a quarter. And another states that the vicar told her that the school was made a grammar school, and advised her not to send her boy there as he was intended for trade. Several of the witnesses also state that the system of the masters taking boarders also operates to prevent the parishioners from sending their boys to the school, the parents considering that the boarders are better attended to than the free boys, that impression being increased by the boarders getting so many of the prizes. Two of the witnesses, indeed, go so far as to state that the free boys are not allowed to mix with the boarders, and one of them says that they were put to sit upon the form by themselves, and were not taught the same as the boarders, were kept to fewer books and had not the same treatment. And in connexion with this subject, the informants have proved a letter from Mr. Cockin to Mr. Griffith, one of the relators, with reference to his sending his son to the school as a boarder, in which Mr. Cockin in advising that the boy should not be sent as a boarder assigns as one of the grounds that Griffith being in business in the same town will he fears operate prejudicially to the boy amongst his companions. The informants have also proved notices to the trustees before the exchange was completed, and that proceedings would be taken to set it aside if carried out.

The evidence on the part of the defendants is, for the most part, documentary. It consists, first, of the minutes of the proceedings of the trustees from the year 1704. The school is, throughout those minutes, called the Free Grammar School. Amongst the entries in those minutes are those which are particularly mentioned in the answers; and it is observable that the entry of the 2nd of October 1756 contains, in addition to what is stated in the answer, the following provision, "That the person to be elected into the place of usher or

lower master shall, previous to his election therein, be bound in a bond of 500*l.* that he will as well teach Latin and grammar as also writing and arithmetic in the said school." And these minutes also contain the following orders, under the date of the 6th of June 1768: "Ordered that F. Hemsell, the usher of the said grammar school, shall receive into the said school twenty boys, inhabitants of the borough or foreign of Kidderminster; such boys to be elected by a majority of the said trustees, and whose respective ages shall not be less than seven years; and that the said F. Hemsell shall receive and continue the said boys in the said school, and there teach and instruct them in reading, writing, arithmetic and grammar, for any term or time not exceeding the term of two years, without demanding or receiving any reward or gratuity for the same," with provisions for keeping up this number of twenty boys. Under date the 23rd of December 1787, an order for the appointment of an under master, made at a meeting of the trustees, and which states as follows: "At the said meeting, it was also agreed by the under-mentioned feoffees that the sum of 5*s.* shall be taken by the said under or lower master, as entrance into the said school, for any boys sent there to be taught, and that the said under master has a right to require from each boy now being or coming to be taught in the said school the like sum of 5*s.*" Under the date of the 19th of June 1787, an order appointing an under master, on condition of his entering into a bond obliging himself to teach the scholars of the said school not only grammar, but writing and arithmetic, at the discretion of the trustees or feoffees; and under the date of the 26th of October 1796, an order, by which, after reciting a representation of the under master that his salary was insufficient for the support of his family, and that from the number of boys attending the school for instruction in writing and arithmetic and his diligence therein he deserved every proper encouragement the trustees could give him, they consented that he should receive of the parents of such boys as were sent to the school a quarterage of 2*s.* 6*d.* for such boys only as were instructed in writing and arithmetic, to continue till otherwise ordered

by the trustees. Secondly, several memoranda, signed by masters of the school upon their election and resignation, and dated in the years 1687, 1696 and 1697, in which the school is called the Free Grammar School; and thirdly, a great number of leases of property belonging to the school, from 1580 to 1809, in all of which, down to about 1704, the school is called "the Free School," except in two instances in 1675 and 1689, in which it is called "the Free Grammar School;" and in all of which, subsequent to 1704, the school is called "the Free Grammar School," except in four or five instances, between 1720 and 1730. This documentary evidence has been produced by the trustees, and they have also proved a copy of the Bishop's answer to the memorial; and they have examined their clerk as a witness, who proves that one of the relators in this information objected before the Bishop that the trustees, though prohibited by the scheme from so doing, had admitted children of dissenters to the school. This witness also proves that the gross income of the charity property, exclusive of the masters' houses, was, in the year 1848, 597*l.* 8*s.* 6*d.*, and in the year 1849, 579*l.* 18*s.* 6*d.*, and that the net income of the charity property applicable to the school, after deducting the late under master's pension, salaries of officers, repairs, insurance and loss of rent, was in 1848 430*l.* 0*s.* 8*d.* and in 1849 351*l.* 12*s.* 1*d.*, and that there was no surplus applicable to the prizes, the charity being in debt to its treasurer. He further proves the increased rental obtained by the charity by means of the exchange, as stated in the answer. And he states that 5*s.* a quarter was heretofore payable by each scholar for being taught writing and arithmetic, and that if more or less than that sum has been taken or required it has been done without the sanction of the trustees. The trustees have also examined another witness, who proves, that when he went to the school in 1787, 2*s.* 6*d.* or 5*s.* was paid as entrance-money, and that whilst he continued at the school 5*s.* a quarter was paid to the under master for his instruction in reading, writing and arithmetic, independent of charges for stationery, &c.; but that when he got into the upper school nothing was paid to the upper master for

his instruction in Latin and Greek; and he proves that the same payments as were made when he was at school have been paid by him for three of his sons, who went to the school in the years 1817, 1820 and 1826. The trustees have likewise examined Mr. Cockin as a witness on their behalf; and he proves that no part of the income of the charity has been applied in providing the prizes which have been distributed since he has been master. That there have been 172 prizes so distributed, of which 64 have been awarded to free scholars and 108 to boarders; that the course of education consists of instruction in the classics, mathematics, ancient and modern history, geography, and general branches of information; that this course is pursued throughout the school, the division into upper and lower schools having been abolished, and that no difference whatever is now or has been since the admission of boarders made between the education received in the school by the boarders and that received by the free scholars or town boys, all joining in the same classes according to their respective ages and attainments, and being taught together. It is also proved, on behalf of the trustees, that the words "being of the Church of England," which are contained in the scheme of 1844, and by which the children of dissenters are excluded from the school, were introduced by the Master, and that the introduction of them was objected to by the trustees; and it is also proved, on the part of Mr. Cockin, that he bought Woodfield House and land, in 1843 for 2,875*l.*, and that he expended upon the house, in permanent improvements, 300*l.* or 400*l.* in 1843 and about 850*l.* in 1846, and that the school buildings erected there have cost between 1,700*l.* and 1,800*l.*, and that he sold the Greenhill estate in 1848 for 4,200*l.*

The case standing thus upon the facts, it appears that the information seeks relief, first, as to the regulation of the school; secondly, as to the transaction of the exchange. I propose to consider the case first, with reference to the school.

Upon this part of the case, it was first argued, in support of the information, that the orders upon petition which have been made by the Court in relation to the school,

and the schemes which have been settled under them, ought for several reasons to be wholly disregarded, and that the case ought now to be determined as if no such orders had been made and no such schemes settled. The argument on this point was rested on three grounds: first, that the decree of the Court confirming with modifications the decree of the Commissioners of Charitable Uses precluded the Court from dealing with the case upon petition; secondly, that the case did not fall within the provisions of Sir Samuel Romilly's Act, 52 Geo. 3. c. 101, and thirdly, that it was not reached by the Grammar School Act, 3 & 4 Vict. c. 77. It was said as to the first of those grounds that the decree of the Court following upon the decree of the Commissioners of Charitable Uses was final and conclusive, and the case of *Windsor v. the Inhabitants of Farnham* was cited in support of the proposition. As to the second ground, it was said that Sir Samuel Romilly's Act did not extend to empower the Court in any manner to alter or affect what had been settled by the decree of the Court; and as to the third ground that the school was not a grammar school, and if it was, the same restriction as was applied to Sir Samuel Romilly's Act ought to be applied to the summary jurisdiction created by the Grammar School Act. I am of opinion that the orders and schemes in question cannot be thrown out of the case upon any of those grounds.

As to the first ground, the case referred to which was cited from *Cro. Car.* 40, but is better reported in *Duke*, p. 634, has indeed decided that the decree of the Chancellor following upon the decree of the Commissioners of Charitable Uses is not open to a bill of review, one reason assigned, which appears in both of the reports, being that the Chancellor's decree in such cases takes its authority from the statute, and that the statute mentions only one examination by the Chancellor; in effect, that the decree is under the statutory and not the ordinary jurisdiction: and another reason, which appears in the report in *Duke* only, being that the appeal to the Chancellor given by the statute, is in itself in the nature of a bill of review, and that there can be no bill of review upon a bill of review. The latter reason appears to

me the most satisfactory one, for it is difficult to see how upon any other ground it can be that the decree in such cases should not be subject to review, and yet should be open to appeal as the case itself decides it to be. But this case, although the facts of it do not appear, was evidently one in which the decree could not, according to the ordinary course of the court, have been altered except upon bill of review; and I see no ground for applying the same rules to cases in which according to the ordinary course of the Court no bill of review is necessary for enabling alterations to be made. The decree of the Commissioners in this case does not, I think, go further than to regulate the charity; the Lord Chancellor's decree does not even alter the regulations. This Court is in the constant habit of altering schemes which have been settled under its decrees as the alterations of times and circumstances have required; and it has frequently done so upon petition in the causes in which the decrees have been made, and I do not think that the power of the Court to make such alterations can depend upon the character in which the decree has been made by the Lord Chancellor. The Court does not appear in *The Attorney General v. Bovill* to have felt any difficulty in interfering with the Commissioners' decree; and although their decree in that case does not appear to have been brought under review by the Lord Chancellor, I think the same principle applies, and I have no difficulty in following the precedent.

As to the second ground, that the case did not fall within Sir Samuel Romilly's Act, I have referred to the act and the cases which have been decided upon it. The terms of the act are most general. It creates the summary jurisdiction in all cases of breach of trust or supposed breach of trust, and in all cases where the order or direction of the Court shall be deemed necessary for the administration of any trust for charitable purposes; but the decisions, I think, have settled that it does not apply between the trustees and strangers, that it applies only between the trustees and the objects of the trust, and it is in the discretion of the Court to what extent it ought as between them to be applied. The cases do not, I think, enable

any fixed rule to be laid down by which the Court can be governed in the exercise of that discretion. Lord Cottenham, in the *Tiverton School case* (2), is reported to have said that the act ought not to be applied in cases where the Court sees that the jurisdiction given by it cannot be exercised with justice to any parties or with benefit to the charity; and it appears that he considered that case not to be proper for the exercise of the jurisdiction, as it involved extensive and fundamental questions as to the principle on which the charity was to be administered. But these rules still leave it to be considered by the Court in each case whether the act can be applied with justice and benefit, and what are the extensive and fundamental questions of principle which ought to exclude its application. Perhaps the rule might well be laid down that the act, at all events, may be safely resorted to in all cases where the objects of the charity have no distinct interests, and where, therefore, the Attorney General properly represents them all, and in all cases where although there may be distinct interests, no substantial question of principle can arise between the several objects. This, however, is not the question in the present case. I cannot accede to the argument that because a scheme was settled by the decree of the Commissioners followed by the order of the Lord Chancellor; it was not in the power of the Court to alter it; and if it could be altered upon information, I think it could be altered upon petition under the act. The Court had a discretion whether it would interfere upon petition or not; it has exercised that discretion, and I do not think that I should be justified in wholly disregarding what has been done by the Court in the exercise of a jurisdiction given to it by the statute, although it was discretionary in the Court whether it would exercise that jurisdiction or not.

As to the third ground upon the question, whether this is a grammar school, I think no reasonable doubt can be entertained. It was held by Lord Langdale, in *The Attorney General v. Jackson*, that the term "free school" in the instrument then under his consideration, ought not to be con-

(2) 15 Sim. 259, 262.

strued "free grammar school"; and, I think the term "free school" is flexible in its meaning, and must be construed according to the context and the usage which has prevailed in the school. The term "free school" has no reference to the instruction given in the school, but refers to the terms on which the instruction was given, and if grammar be taught in a school free of charge, I think it may well be said to be a free school. This school appears by the inquisition to have been founded for the instruction of children and youth in good literature and learning,—terms which, having regard to the early period of the foundation, go far of themselves to shew that it was intended for instruction in the learned languages. In the early documents of 1687 and 1696, relating to the masters of the school, documents in which a true description of the character of the school was most likely to be found, it is called the Free Grammar School. It is uniformly so described in all the proceedings of the trustees from 1701, and in all the leases from 1704, and it appears that in 1756 the trustees not only described the original institution of the school to have been for teaching Latin and Greek, and required payments to be made for instruction in writing and arithmetic, but actually required the under master to enter into a bond conditioned for giving such instruction, a fact which appears to me to be of the utmost importance for determining the character of the school, for of course if it had been the duty of the under master to give such instruction, no such bond could have been required. On the other hand, I see no evidence to prove that the school was not a grammar school, except the equivocal description of it as a free school in the inquisition and in the early leases, and what is said by the witnesses in their depositions, which is of less weight as they admit some payments to have been made, and of course they cannot carry back the evidence to any very early period. Upon the balance of this evidence, I have no hesitation in concluding that this school was a grammar school, and therefore within the jurisdiction of the Court under Sir Eardley Wilmot's Act, and although I apprehend that the Court has the same discretion as to applying that act as it has

exercised as to Sir Samuel Romilly's Act, I think that the act having been applied, what has been done under it cannot be wholly disregarded.

It was said, however, on the part of the defendants, that if the Court should be of opinion that the proceedings upon the petition were within the jurisdiction, the case must be considered as concluded: that the orders upon the petition must then have the same effect as decrees of the Court, and could be altered only by a bill of review for error apparent, or upon the discovery of new facts: that it was not competent to the Attorney General to undo his own proceedings, and the case of *Hyde v. Edwards* was cited as to the effect of proceedings under the acts of parliament creating summary jurisdictions. I most fully agree in that decision, and concur in the general position advanced in the argument upon the part of the defendants, as to the effect of proceedings under such acts of parliament. Where a summary jurisdiction is created by parliament, the intent of the legislature must surely be that the proceedings under it, when resorted to, should have the same force and effect as the proceedings under the ordinary jurisdiction for which it is substituted; but this Court has not in cases of charity acted upon the strict principle by which it is governed in ordinary cases, and I am not prepared to hold that it is not competent to the Attorney General in a charity case to call upon the Court to review a scheme which had been settled under its decree, if he is satisfied that the scheme does not operate beneficially for the charity, and thinks that he can satisfy the Court that the interests of the charity can be better promoted by an altered scheme consistent with the foundation, the usage, and the law. In such a case, I think it is not only competent to the Attorney General, but it is his duty to apply to the Court for an alteration in the scheme. The Court, as I have already had occasion to observe, constantly alters schemes which have been settled under its decree as the changes of times and circumstances may require, and I see no reason why it may not equally alter them under such circumstances as I have pointed out. Lord Cottenham, in *The Attorney General v. Bovill*, differing

from Lord Langdale upon the point, held, that he was not precluded by a decree of Sir William Grant from doing what might be proper to be done for the due regulation of the charity, and I think that in principle that case governs the present upon the point now under consideration. The Attorney General, it must be remembered, acts in these cases on behalf of the Crown as *parens patriæ*, and represents all the objects of the charity. The Court in these cases cannot look to any right or interest of the relators, but can regard the suit only as instituted by the Attorney General, and all the objects of the charity are thus, in effect, plaintiffs through him,—a consideration which has probably in some degree led to the deviation from the ordinary rules of the court which have occurred in such cases. But although it is thus, in my opinion, competent to the Attorney General to apply to the Court for alterations in schemes which have been settled under its direction, it is obvious, I think, that the Court must proceed upon such application with the utmost possible caution: that what has been done by the Court must not be disturbed except upon the most substantial grounds, and the clearest evidence, not only that the scheme does not operate beneficially, but that it can by alteration be made to do so consistently with the object of the foundation. Incalculable mischief will ensue to all the charities in the kingdom if these rules be not strictly observed, and if the Court ventures in such cases to interfere upon speculative views as to the result of alterations or in matters of discretion or regulation, matters on which the opinion of each succeeding Attorney General and of each succeeding Judge may well be permitted to differ. I consider this case as casting upon me the duty of most carefully guarding myself against being led into adopting, in opposition to what has been already settled by the Court, any mere opinions which I may entertain as to what might be more or less beneficial for this charity. Looking at the evidence in this case, I can entertain no doubt that more boys would resort to this school if the scheme was altered, the scale of education reduced, and the payments for it abolished. But was not this the very question which the Court had to con-

sider when these schemes were settled? It was then a question between perfecting the education of those who were the objects of the foundation and extending the benefit of the foundation to those who were not objects of it, and the Court has exercised its discretion upon the subject. The inhabitants of Kidderminster have heretofore enjoyed a limited education for their children free of charge, or at all events upon a very trifling payment; it has appeared that they were not entitled to it, and they feel, and not unnaturally, disappointed at the discovery, but I cannot alter the foundation for them. I do not indeed see any mode by which the scheme could be altered with any certainty of benefiting them consistently with the regard which the Court is bound to pay to the interests of the primary objects of the foundation; and, I think, it is the duty of the Court to be more than ordinarily cautious in a case like the present where the scheme has been so recently settled, and popular feeling has evidently been excited against it. Regarding, as I do, most of the questions which are raised by this information as questions on which the Court has already exercised its discretion, I should perhaps be justified in giving no opinion upon them, but some of them are of such great importance to all the schools of this description throughout the kingdom that I feel bound to state the opinions which I entertain upon the subject.

As to the case of boarders, this information advances the general position that no boarders ought to be admitted into this school: that position is rested on the ground that the income of the charity is sufficient to provide competent masters for the instruction of the boys, and it is said, that in such cases boarders ought not to be admitted, and the cases of *The Attorney General v. the Earl of Devon*, and of *The Attorney General v. the Earl of Stamford*, were cited in support of the position. I do not understand those cases to have laid down a general rule against the admission of boarders in grammar schools, nor do I find any such general rule laid down in any case. In *The Attorney General v. the Earl of Devon*, the late Vice Chancellor of England appears to have proceeded upon the terms of the

endowment, and upon the opinion which he considered to have been expressed by Lord Cottenham in the *Manchester School case*, that the terms of the endowment of that school precluded the admission of boarders, and accordingly when that case itself came before him on further directions he decided that boarders ought not to be admitted into that school. Whether the late Vice Chancellor rightly construed the endowment in the one case, or rightly collected the opinion of Lord Cottenham in the other, is not for me to decide, and is not indeed material to the present case; but I confess that on very carefully considering the *Manchester School case*, I am unable to collect from it any such opinion as was considered by the late Vice Chancellor to have been expressed in it. That Lord Cottenham was adverse—most adverse—to the admission of boarders into these schools is clear from his judgment, not only in that case but in many other cases which were referred to in argument, but neither in that case nor any other cases do I find that he prohibited their admission. It is sufficient, however, for the present purpose to observe that the cases which have been cited proceeded upon the construction of particular endowments under particular cases; and that we have here to consider the construction of a different endowment under different circumstances; and I cannot therefore consider them as at all governing the present case. This endowment is for the education of children and youth in Kidderminster; not, as in the *Tiverton School case*, primarily of children born in the place. What, then, is there to prevent the inhabitants of Kidderminster from taking as boarders boys who may resort to the school for their education; and if it be competent for the inhabitants to do so, why are the masters to be precluded from the same privilege? Lord Eldon, in the *Bingley School case*, referring to this subject, says, "In the evidence I find no contradiction to the allegation that children boarding with inhabitants of Bingley have been admitted, and that obliges one to consider whether, if you destroy the right of the master to take boarders, you can leave untouched the ancient practice with respect to other

persons taking boarders. I think it probable, from the evidence, that the boarders were first introduced at an early period of the mastership of Mr. Hudson. What is the effect of the fact of the master not having taken boarders before that time is a question to be considered by and by; but if, even up to this time the master had received no boarders, there would be considerable difficulty in determining that, for that reason, he should not hereafter be permitted to have them" (3). And although it is true that Lord Eldon there refers to an ancient practice as having existed in that case, the same difficulty appears to me to present itself whether the practice has existed or not. It was said, in argument, that greater favour would of course be extended to the boarders, and that their superior condition in life must prevent association and produce discord in the school, and that those are evils the very danger of which ought to be avoided where the income of the charity is sufficient to maintain competent masters. It is, I think, a sufficient answer to the first objection, that it would be an abuse which the trustees and the Court would be bound instantly to correct; and that, supposing the admission of boarders to be of itself beneficial, it would hardly be refused upon the ground that abuses might arise from it; and to the second objection the answer appears to me to be that inequality of grade must necessarily exist in all these schools, and that if on the one side there be evils there are on the other side great advantages resulting from the admixture of the different classes. This is most admirably expressed by Lord Lyndhurst, in *The Attorney General v. the Earl of Stamford*, where he sums up that case, and uses this expression: "There is another consideration also connected with these establishments, that they are the avenues by which the humbler classes, by industry, activity and intelligence, can force their way into the highest situations of the state; and by furnishing the means of uniting at an early age the upper and lower classes, they tend to bind together by the strongest ties the whole system of society" (4). The

(3) 2 J. & W. 373.
(4) 1 Ph. 761.

observations which have been made upon the income of the charity being sufficient to maintain competent masters do not, in my opinion, present this case in its true point of view. All the cases establish that it is the duty of the Court to consult to the utmost the interests of the free scholars, the primary object of the testator's bounty; and the question, therefore, as I view it, is not, whether competent masters can be provided for a given income, but by what means the services of superior masters can be secured. It cannot, I think, be doubted that the admission of boarders to the school tends to accomplish this end; and when it is asked that the boarders may be excluded from it, it must be borne in mind that the probable, if not the necessary, consequence will be to lower the standard of the master. I must add, upon this point of the case, that there appears to have been some practice in this school of taking boarders, although to a limited extent only, and abandoned of late years in consequence of the advanced ages of the masters; and that whatever my opinion might have been, I could not, consistently with the authorities, have excluded boarders during the incumbency of Mr. Cockin. I must add, also, that it is the duty of the trustees to take care that the number of boarders admitted be not such as in any manner to affect the admission of free boys or the means of educating them to the best advantage according to the provisions of the scheme. I am of opinion that this part of the information could not, in any view of this case, have been maintained.

I have thought it right to enter more fully into this question as to boarders, because I find on referring to Mr. Carlyle's book 'On Endowed Schools' that there is scarcely one of these grammar schools in which boarders are not received; and I am fearful that great mischief would ensue if any countenance was given to the notion that this Court would exclude them in all cases where the income of the charity was sufficient for the maintenance of the masters: such a determination would, I think, lead to endless questions which could only be determined by this Court, as to what amount was to be considered sufficient for the master's maintenance. No rule laid down for one school could with

any justice be applied to another. It would be necessary to consider in each case the position and character of the school.

As to the question raised by the information upon the payments charged to the free scholars, I am of opinion that the information ought as to this also, in my view of the case, to be dismissed. There are also many branches of education provided by this scheme which do not fall within the ordinary range of the instruction which the masters of grammar schools are bound to give; and the income of the charity does not, in my opinion, afford an adequate remuneration for such extended instruction. The number of boarders of course could not be relied on as a provision for this instruction, and I do not see how it could be secured otherwise than by those payments. The question therefore appears to me to have been reduced to this—whether it was desirable that this instruction should be secured? And I am of opinion that it was: for it being necessary to keep up the grammar school, and to retain the superior education afforded by it, I think it could not be otherwise than desirable that that education should be made complete.

As to the minor points respecting the ages and number of the boys, I regard them so entirely as matters of discretion, involving no general principle, that I do not think it necessary to enter into them: and the facts do not raise the question as to the prizes.

There is, however, one question in this case which I feel bound to entertain, regarding it as a question, not of discretion, but of principle,—I mean the question as to the religious qualification of the boys required by this scheme, and as to the other provisions having reference to religious instruction. There is, I think, some reason to suspect that this school was in connexion with the Church of England, but the evidence shews that the usage has been to admit the children of dissenters; and in the absence of any positive evidence confining the benefit of the charity to members of the Church of England, I think the question must be governed by usage, and that the Attorney General therefore is entitled to have this

revision removed. I think also that this scheme, having been finally settled in 1848, after the decision in the *Warwick School case*, ought not to have contained the *object provisions* as to religious instruction which are inserted in it. The course pursued in the *Warwick School case* is, in my opinion, by far the best to be adopted, where dissenters are admitted to their schools, as it tends to prevent those feelings of offence which are too apt to arise on such a subject. I shall, therefore, direct that this scheme be reformed according to the precedent of the *Warwick School case*.

Then, the remaining question raised by the information is as to the exchange. Upon this point I feel no difficulty. It is not alleged that there was any fraud or concealment in the transaction, or that all the requisitions of the act were not duly observed, but it is said that the exchange was for the convenience of the master, and that it was not beneficial to the charity, except upon the footing of boarders being maintained. Those are questions with which, in my opinion, this Court has nothing to do. It was part of the duty of the Commissioners appointed under the act to ascertain whether the exchange was for the permanent benefit of the charity, and it was part of the duty of the Bishop, under the provisions of the act, to review their determination. The Commissioners and the Bishop have determined it to be beneficial, and I am aware of no power which this Court has to reverse their decision. It was said that the Bishop was himself a trustee; but it is not alleged that he had any personal interest in the matter, or that he had in any manner misconducted himself. To hold that the exchange could be affected upon such a ground would be to render the act inoperative in all cases where the Bishop happens to be a trustee of the charity, and this clearly could not have been the intention of the legislature, as the act contains express provisions applicable to the case where the party who takes in exchange happens to be a trustee.

The decree, therefore, which I shall make will be to alter the scheme as to matters of religious qualification and instruction in the mode which I have

pointed out, and to dismiss the rest of the information. So far as I dismiss it, I shall dismiss it with costs; as although no just complaint can be made of the pleadings in the cause, I most highly disapprove of charity informations got up by public meetings and supported by public subscription. I think there is just reason to complain of the enormous mass of evidence by which this information has been attempted to be supported, and of the character of some part of that evidence; I allude particularly to the evidence of the surveyors. So far as I give relief upon this information, I give it without costs, being fully satisfied from the conduct of one of these relators that the matter on which the relief is given was not the substantial ground on which this information was filed. I find one of the relators himself objected before the Bishop to the children of dissenters having been admitted to the school. The decree which I shall make will be to have the scheme revised according to the principles of the *Warwick School case*, and I dismiss the rest of the information, with costs. The defendants will take the extra costs out of the fund.

M.R. }
Nov. 10; } BLACKET v. LAMB.
Dec. 1. }

Will—Construction—Election—Appointment—Condition—Precatory Words.

A testator by will disposed of his own property, and then, by virtue of a power in his marriage settlement, appointed the trust property among six of his children, nominatim, in equal shares, and requested them "not to sink into or spend their respective shares, but to leave the same for the benefit of their respective children, and if any of them have no children then to leave the same so that their share may go in the same way as my general estate and effects are limited :"
—Held, that the words formed no part of the appointment; that they were inconsistent with the power; that no trust was raised for the grandchildren; that no case of election arose; and that the children were entitled to their shares absolutely.

This was a special case.

Upon the marriage of George Lamb and Lydia his wife in 1815, a policy of assurance for 3,000*l.*, payable upon the decease of George Lamb, was vested in trustees, who were to stand possessed of the proceeds for the benefit of his wife for life, and after her decease upon trust to pay and transfer the monies unto and amongst all and every or any one or more of the children of George Lamb and Lydia his wife, in such shares as George Lamb should, either by deed or will, appoint.

There were seven children of the marriage: Augustus Lamb, James Lamb, Dorothy Lamb, George Lamb, Eliza, the wife of Charles Buttler, Francis Lamb, and Selina, the wife of Norris Boag.

On the 21st of February 1844, George Lamb made his will, and gave his real and personal estate to John Blacket, Joseph Hadland and William Bell, their heirs, executors, administrators and assigns, upon trust, to convert certain parts into money, and stand possessed of the money, and other his estate and effects, upon trust, to invest the same and pay the dividends and interest unto his six youngest children, in equal shares; one-sixth to each for their respective lives; the shares of daughters to be for their separate use; and after the decease of any of his children that one-sixth of the capital was to be in trust for his or her child or children then living, and the issue then living of such of his or her child or children as should have died in his or her lifetime, such issue taking *per stirpes*, if more than one, equally to be divided between them as tenants in common, the income of which and of any accruing share was to be applied to their maintenance during their respective minorities. And in the event of any of his children dying without leaving any such child or children, or issue of such child or children as aforesaid, the testator directed that the interest and dividends of the sixth share of each such of his children so dying should be paid to the survivor and survivors of his children, and the issue of any of his deceased child or children who should have died leaving issue as aforesaid, such issue to take his, her, or their respective parent's share; and that on the death of

any surviving children the said accruing share of capital should be divisible amongst his or her child or children and issue of his deceased child or children, in the same way as the original sixth share was made divisible. The testator then recited the settlement made upon his marriage, and in execution of the power vested in him, appointed out of the monies to arise from the policy of assurance, the sum of 150*l.* to each of his seven children, and appointed the residue of the monies to be derived from the policy unto his six children, James Lamb, Dorothy Lamb, George Lamb, Eliza Buttler, Francis Lamb, and Selina Boag, equally to be divided between them in sixth shares, the shares of the daughters to be for their separate use, and said, "I especially request each of my said six children will not sink into or spend their respective shares thereof, but leave the same for the benefit of their respective children; and if any of them have no children, then to leave the same so that their shares may go in the same way as my general estate and effects are hereby limited."

The testator died on the 19th of June 1850; and the will was proved by Joseph Hadland and William Bell, two of the executors only, power for John Blacket to prove being reserved.

Mr. Roupell and *Mr. Bates* appeared for the trustees.

Mr. R. Palmer and *Mr. Nalder*, for the six children of the testator, contended that the testator, in exercising the power reserved to him by his settlement, had raised several questions;—First, whether an appointment had been made in favour of grandchildren. Secondly, whether they created a trust, and bound the children to elect between the gifts under the will and the appointment under the settlement. Thirdly, whether the words amounted to a condition, without being intended to operate as a portion of the appointment, in which case it would be void, and the children's shares would vest absolutely—*Knight v. Boughton* (1), *Meredith v. Heneage* (2), *Carver v. Bowles*

(1) 11 Cl. & F. 513.

(2) 1 Sim. 542; s. c. 10 Price, 306.

(3), *Sale v. Moore* (4), *Bardswell v. Bardswell* (5), *Winch v. Brutton* (6), *White v. Briggs* (7), *Johnston v. Rowlands* (8), *Williams v. Williams* (9), *Lewis v. King* (10) and *Kampf v. Jones* (11). The result, however, seemed to be that the children were entitled to vested interests under the appointment, and that the subsequent words amounted to nothing but a recommendation which possibly he hoped they would attend to; but that if they created a condition, it was inconsistent with the power, and could raise no case of election. It was, therefore, argued that the children were absolutely entitled under the appointment, and that the residuary estate of the testator might be enjoyed by them under the will.

Mr. Lloyd and *Mr. Brodrick*, for the grandchildren of the testator, contended that the words of the will created a trust and limited the previous gift—*Wynne v. Hawkins* (12), *Pierson v. Garnet* (13), *Eade v. Eade* (14), *Wood v. Cox* (15) and *Baker v. Mosley* (16). The testator, by these words, had imposed an election upon his children, and they must either subject the money arising from the policy to the provisions of the will or give up all claim to the testator's property; and *Whistler v. Webster* (17) shewed that the rule applied to parties who were not objects of the power. *Church v. Kemble* (18).

(3) 2 Russ. & M. 301; s. c. 9 Law J. Rep. Chanc. 91.

(4) 1 Sim. 534.

(5) 9 Ibid. 319; s. c. 7 Law J. Rep. (n.s.) Chanc. 268.

(6) 14 Sim. 379.

(7) 15 Ibid. 17, 33; s. c. 17 Law J. Rep. (n.s.) Chanc. 196.

(8) 2 De Gex & Sm. 356; s. c. 17 Law J. Rep. (n.s.) Chanc. 438.

(9) 1 Sim. N.S. 358; s. c. 20 Law J. Rep. (n.s.) Chanc. 280.

(10) 2 Bro. C.C. 600.

(11) 2 Keen, 756; s. c. 7 Law J. Rep. (n.s.) Chanc. 63.

(12) 1 Bro. C.C. 142, n., 179.

(13) 2 Ibid. 38, 226.

(14) 5 Madd. 118.

(15) 1 Keen, 317; s. c. 5 Law J. Rep. (n.s.) Chanc. 361; 2 M. & Cr. 684; 6 Law J. Rep. (n.s.) Chanc. 366.

(16) 12 Jur. 740.

(17) 2 Vea. jun. 367.

(18) 5 Sim. 525; s. c. 3 Law J. Rep. (n.s.) Chanc. 65.

Mr. R. Palmer, in reply.

Dec. 1.—THE MASTER OF THE ROLLS.—In carrying out this will of the testator, a doubt has arisen whether the words following the appointment have not imposed upon the children the necessity of electing whether they would take the property of the testator, and subject the settled property to the trusts of his will, and whether a trust has not been created, which equity will either compel the children to carry out in favour of the grandchildren, or if they do not choose to do so, compel them to make compensation to the grandchildren. The testator distinctly recites the terms of the power he was about to execute; it was present in his mind that he could not execute it in favour of his grandchildren, and having disposed of what he thought proper among his children, he made an appointment of what remained, and added those precatory words as a special request. The question to be determined appears to resolve itself into two points: first, whether the words amount to a direct appointment in favour of the grandchildren; if they do, there can be no doubt that a case of election has been raised: but if these precatory words are to be treated as anything short of an actual appointment, that is, if they do not form a part of the actual appointment then they constitute a super-added condition. In this view, the case of *Carver v. Bowles* is material. It was there held, that if the shares given by the appointment vest absolutely in the children, and the donee of the power in making the appointment adds a condition inconsistent with the power, that condition is absolutely void. This case is similar: the words of condition, therefore, must be treated as if they were not in the will, and it must be declared that the children of the testator are entitled absolutely to the fund the subject of the power, and that they are also entitled for their lives to the income of their shares under the will. The costs must come out of the residue.

M.R. }
Nov. 24. } LUSHINGTON v. BOLDERO.

Waste—Timber—Money in Court—Accumulations, Right to—Settled Estates.

*Several persons were entitled successively to life estates in real property limited in strict settlement: they became bankrupt, and their assignees cut down timber left for ornament and shelter. Upon a bill filed on behalf of H. L., the then first tenant in tail in existence, who was an infant, the assignees were ordered to bring the money into court; this, with the accumulations amounted to 26,133*l.* 2*s.* 10*d.* Two of the tenants for life died without issue; H. L. attained twenty-one, and being still the first tenant in tail, and entitled to the first estate of inheritance, he presented a petition for payment to him of the fund and the accumulations: which were ordered to be transferred to him.*

John Boldero, by his will, dated the 31st of December 1785, gave and devised certain real estates to trustees for the term of 1,000 years, and subject thereto unto and to the use of his son, Charles Boldero, and his assigns, for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of the said Charles Boldero successively in tail male; with remainder to the use of his son, William Boldero, and his assigns, for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to the use of the first and other sons of the said William Boldero successively in tail male; with remainder to the use of Henry Lushington, the eldest son of his daughter Hester Lushington, for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to the use of the first and other sons of the said Henry Lushington, successively in tail male; with remainder to Stephen Lushington, the second son of his daughter Hester, for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to the use of the first and other sons of the said Stephen Lushington successively in tail male; with divers remainders over.

NEW SERIES, XXI.—CHANC.

On the 22nd of August 1787, the testator, by a codicil to his will, directed the devisees to uses with all convenient speed after his death, for such time and so long as Charles Boldero should continue unmarried, from time to time to demise and lease the house called Aspeden Hall, with its appurtenances, and his park, called Aspeden Park, and the lands which should happen to be in his own actual occupation at the time of his death, with the household goods, &c. at the most improved yearly rent, for any term not exceeding twelve years, if the said Charles Boldero should so long live and continue unmarried, so as among other things no clause should be contained in such lease empowering such lessees to commit waste, and the testator directed that the rents should be invested and accumulated at compound interest, and laid out in the purchase of freehold or copyhold estates, and settled upon the uses declared by his will.

The testator died shortly after the execution of the codicil, leaving John Boldero his eldest son and heir-at-law, and leaving Charles Boldero, William Boldero, and Henry Lushington the tenants for life of the devised estates.

The testator to the day of his death had carried on the business of a banker in Cornhill in partnership with Charles Boldero, Edward Gale Boldero, and Sir Stephen Lushington, and subsequently thereto the business was continued by the surviving partners and by Henry, afterwards Sir Henry, Lushington, who was admitted a partner in the house.

On the 12th of January 1807, Sir Stephen Lushington died, and the remaining partners admitted Henry Boldero, the son of Edward Gale Boldero, a partner.

On the 2nd of January 1812 a commission of bankruptcy was issued against the firm. They were found bankrupts, and Messrs. Christopher Idle, William Timson, and Joseph Marryat were appointed assignees of the estate and effects.

This suit was instituted on the 11th of March 1813, and it stated that the assignees of the bankrupts had caused all the timber and timber-like trees upon the park and lands at Aspeden to be marked for the purpose of felling, with an intent to sell the same as part of the estate of Charles

H

Boldero; that the plaintiff was the eldest son of Sir Henry Lushington, and that Charles Boldero and William Boldero had not any issue, and that he, therefore, was the first tenant in tail *in esse* of the devised estates; and it prayed that the will and codicil of John Boldero might be established, and the trusts performed in respect of the devised real estates and the disposition of the rents; and that the assignees might be restrained from felling any of the timber and other trees then standing upon the premises, and from selling the same.

The assignees, however, pending the proceedings felled the timber, &c. and received the produce of the sale.

On the 22nd of March 1819 the Master, in pursuance of a reference made to him in 1815, certified that all the timber and other trees had been left for the ornament and shelter of the house called Aspeden Hall, and the park, pleasure-grounds, and lands; and that they, and especially the trees in the valley, overlooked by the drawing-room windows of the house, were left by the testator for ornament and shelter.

On the 14th of March 1822 the Master, in pursuance of a reference made to him, on the 26th of July 1819, certified that the removal of the trees felled was not essential to the purpose of ornament or shelter intended by the deviser; and that the timber and other trees cut and sold did not injure or impede the growth of any other trees adjoining, which were so important to the purpose of ornament and shelter, that the removal of such timber, &c. cut was essential to such purposes of ornament and shelter.

Upon these reports the assignees, in pursuance of several orders, paid into court the sum of 6,379*l.* 4*s.*, the amount for which the timber had been sold, to the credit of the cause to an account entitled "The account of timber felled by the assignees of the estate of Messrs. Boldero, Lushington & Co., bankrupts." They also subsequently paid into court to the like account the sum of 2,283*l.* 19*s.* 8*d.*, which was found due for interest upon that sum. Both these sums were laid out, and had ever since accumulated, and now amounted to the sum of 26,133*l.* 2*s.* 10*d.*

William Boldero died many years since

without having been married, and Charles Boldero, though married, died on the 10th of September 1851, without issue. Sir Henry Lushington was still living, and the plaintiff Henry Lushington having attained twenty-one, as being the person who at the time of the severance of the timber had and still had the first estate of inheritance in the estates, now asked that he might be declared entitled to the 26,133*l.* 2*s.* 10*d.* consols, and that the fund might be transferred to him.

Mr. Lloyd and Mr. Tripp, for the petitioner.—The timber improperly felled was ornamental timber. Had Charles Boldero cut the timber, he could not have taken advantage of his own wrong. The money was retained in court only on account of the infancy of the party entitled to the first-vested estate of inheritance; the property in the timber however vested at the time, and Sir Henry Lushington would have been excluded from taking it; but the case became much stronger as the same assignees were appointed for all the tenants for life, and the cutting the timber related to the whole of their interest.

Lewis Bowles' case, 11 Coke, 79, 7th Resolution.

Whitfield v. Bewit, 2 P. Wms. 240.

Bewick v. Whitfield, 3 P. Wms. 267.

Dare v. Hopkins, 2 Cox, 110.

Williams v. the Duke of Bolton, 1 Ibid. 72.

Powlett v. the Duchess of Bolton, 3 Ves. 374.

Delapole v. Delapole, 17 Ibid. 150.

Cases have arisen where timber had been cut on account of decay, and where it had been cut by order of the Court or by trustees, and also by the wrongful act of the tenant for life, but the precise point does not seem to have been decided—*Lushington v. Boldero* (1). If the assignees had been entitled to any portion of the money, they would have applied for it.

Lee v. Alston, 1 Ves. jun. 82; s. c. 3 Bro. C.C. 37.

Waldo v. Waldo, 7 Sim. 261; 12 Sim. 107; s. c. 10 Law J. Rep. (N.S.) Chanc. 312.

Wickham v. Wickham, 19 Ves. 419; s. c. G. Coop. 288.

(1) 6 Madd. 149.

Phillips v. Barlow, 14 Sim. 263; s. c. 14 Law J. Rep. (N.S.) Chanc. 35.

Tullit v. Tullit, Amb. 370; s. c. Dick. 322.

Garth v. Cotton, 3 Atk. 751; s. c. 1 Ves. sen. 524, 546, 555.

Tooker v. Annesley, 5 Sim. 235.

Mr. R. Palmer and Mr. Goldsmid, for the assignees.—Whenever any infraction of a settlement takes place, equity contents itself by restoring what has been improperly taken from its protection, and again bringing it within the limits laid down by the settlor—*The Duke of Leeds v. Lord Amherst* (2), *Mildmay v. Mildmay* (3). If the tenant for life was not entitled to the money which arose from the sale of the timber, it must then form a part of the settled estates, and the interests and accumulations would belong to the tenant for life for the time being, as a part of the income arising from the settled property. It was similar to the case of a tenant for life who had committed a breach of trust by a misapplication of the trust funds; the Court would order it to be restored, but when restored, he would not be deprived of his life estate. It was admitted that the assignees of Sir Henry Lushington were entitled to the income, but it was insisted that they had forfeited their right to the income of this fund, but that was to inflict upon him a wrong done by parties acting as the assignees of Charles Boldero; that, however, would operate unjustly; it would be to enter into the question of penalties, which this Court has no power to enter into.

THE MASTER OF THE ROLLS.—In deciding this case I shall consider what would have been the effect if Charles Boldero had himself done this act. Here was a tenant for life, without impeachment of waste, who cut ornamental timber; the Court compelled him to pay the amount for which the timber was sold into court; and, omitting all questions respecting intermediate life estates, the question now is, whether he or the reversioner was entitled to the income of that fund. The equitable doctrine which

applies to this and other cases is, that no person shall obtain any advantage by his own wrong. It is manifest that the tenant for life may obtain very considerable advantage from his own wrong, if he were to cut down timber and obtain the interest of the fund and thereby increase his income for life, which would not be the case if the timber were not cut. It has been observed that in all the reported cases it applies to the corpus of the fund; but that I think ought not to vary my judgment, because it depends upon an equitable and just principle. It says no man shall obtain a benefit by his own wrongful act, but he would obtain a benefit if he obtained the interest of the fund; and the cases which lay down the principle as having relation only to the corpus are equally applicable to any species of interest to be derived by reason of his own wilful act. It is then said, that this is a case in which the Court does not act in the way of penalty, but only by way of restitution, and that it would be a penalty upon the tenant for life, inasmuch as he has the advantage of the shade and mast of the timber, and which, if it had not been cut, he would have still enjoyed. The Court deprives him of that, or rather he deprives himself of it, and the Court deprives him of any substitution or remuneration for it. It is his own act. It is also material to bear in mind, that if the timber had not been cut it would have increased in value for the reversioner, but that has been made impossible by the tenant for life having cut it. If, therefore, it was totally impossible for the Court to ascertain what portion of the interest ought to be applied to the timber during the time when the reversion will fall into existence, and that portion which ought to be applied to the mast and shade of the trees which have been cut down, it is the tenant for life who has himself put the Court into that situation and makes it incapable of arriving at such a conclusion. It is not a case in which the Court speaks of the restitution of a fund. The case put, by way of analogy, of a tenant for life selling out the fund, and being compelled to restore it, is not here applicable, because the tenant for life cannot restore the subject-matter.

There may be a great number of cases in which the timber would become of great

(2) 13 Sim. 459; 14 Sim. 357; s. c. 14 Law J. Rep. (N.S.) Chanc. 73.

(3) 4 Bro. C.C. 76.

value when the reversion fell in, and it is impossible for the Court to ascertain what portion of that would have been applied towards the reversioner if the wrongful act had not been committed. And then undoubtedly this takes place, that if the tenant for life has not committed or joined in any wrongful act, and has had nothing at all to do with it, yet he does indirectly gain an advantage, but it is not by reason of any act of his. So if by the act of God, a large quantity of timber is destroyed by a storm, upon an estate, that would be laid out in the purchase of stock, and the interest of the fund would be paid to the successive tenants for life. So, upon the same principle, when there is a decay in timber. There the Court cuts it down, having ascertained that it is for the benefit of all parties: the timber continuing cannot benefit the reversioner in any respect whatever: and having ascertained the fact, the Court orders the interest of the fund to be paid to the tenants for life in succession.

When, however, the tenant for life has committed the wrongful act which produces the fund, the Court in that case will not allow him to gain any benefit from it; but the reversioner would take the benefit in that case arising from an accretion of the fund instead of an accretion of the timber. Can I look at this in any different point of view if assignees had done it? The assignees stand for these purposes exactly in the same place as the tenants for life; they are bound by the same equities, and are exactly in the same position and the same observations apply, nor am I able to separate the cases, or to distinguish between the cases of Sir Henry Lushington and Charles Boldero. Because, if the two tenants for life had concurred together, and had between themselves agreed that the one in possession should cut the timber, and that they should divide the produce in certain proportions, the Court would have prevented either of the tenants for life from gaining any benefit from the wrongful act which they concurred in performing. Here, they are the assignees of both; and I am not able to find any principle which says, that the assignees must not stand exactly in the same situation as the tenants for life

would stand, or be bound by exactly the same equities. If the tenants for life had succeeded in the matter, it might have happened that Charles Boldero might have died immediately afterwards, and that a very long estate for life of Sir Henry Lushington might have accrued, and the whole of the proceeds of that estate might have been applied in payment of the joint creditors. That would have been a great benefit to the creditors of the tenant for life, or, in other words, the tenant for life would have been in exactly the same position as if the wrongful act had been committed by himself alone, and he alone had been the person who had been living during the whole period of time. I cannot separate the characters of the two assignees; they are assignees for the joint creditors of the joint estate, and I consider that I must treat the case exactly in the same point of view as if the two tenants for life, though one was not in possession, had concurred in the wrongful act of cutting the timber. It was suggested, during the hearing, that I should suppose that the commission had been superseded, and I was asked whether the tenant for life, Sir Henry Lushington, who is perfectly innocent in the matter, was to be prejudiced by reason that the assignees had committed this wrongful act. It would be hard if it were to be so, but I do not consider that question at present, because it does not occur before me. But if the question did arise, it is manifest that it would apply just as much to the case of Mr. Charles Boldero's estate, as to that of Sir Henry Lushington, nor can I find anything whatever in the fiduciary character of the assignees, who stand, as far as the tenants for life are concerned in matters of this description, exactly in the same position as the tenants for life; nor can I find anything in their fiduciary relation whatever to prevent their being liable exactly in the same manner as the tenants for life were. This is a wrongful act which they have done. They cannot, nor can the persons for whom they are trustees, gain any advantage by reason of their wrongful act; I am of opinion, therefore, that I must make an order upon the petition, according to the prayer.

PARKER, V.C. { *In the matter of MASSELIN'S*
 Nov. 25. { TRUSTS.
 HARRISON v. MASSELIN.

Practice—Trustees Relief Act—Transfer.

A transfer of a fund paid into court under the Trustees Relief Act can only be directed by an order made on a petition.

A sum of stock had been transferred into the name of the Accountant General under the Trustees Relief Act in the first-mentioned matter.

It was desired that this sum should be transferred in trust in the above-mentioned cause.

The only question was, whether this could be done on motion, or whether a petition was necessary.

Mr. Lewin, for the application, referred to the 2nd section of the Trustees Relief Act, 10 & 11 Vict. c. 96.

PARKER, V.C. said, that he thought that the application ought to be made by petition, the act not authorizing an application of this kind by motion.

M.R. }
 Dec. 6. } BURGESS v. STURGIS.

Claim—Foreclosure—Parties—Mortgagees.

Upon a claim by an equitable mortgagee against a mortgagor, asking for a sale, and also that the several other mortgagees might be summoned before the Master, or that a decree might be made to ascertain what mortgages there were, and their priorities, the Court refused the order.

This was a claim by an equitable mortgagee of real estates against the official assignee of the mortgagor alone, to obtain a sale of the estate and payment of the money due. It was admitted that there were subsequent mortgagees.

Mr. Horsey asked for the usual decree, and for a direction to the Master to summon all the mortgagees—18th Order of the 22nd

of April 1850 (1); and contended that if this order was not made, the Court would make a decree, directing the Master to inquire what incumbrances there were and their priorities, as the 8th Order of the 22nd of April 1850 provided, and that the only person to be named in the writ of summons as defendant to the suit in the first instance was the person against whom direct relief was claimed.

The MASTER OF THE ROLLS.—The relief asked is direct against all the mortgagees. Were I to make the decree, it might affect several absent parties. I think, therefore, that I cannot in the presence of one defendant alone make any such order. The claim may be amended.

M.R. }
 Nov. 25; } PRICE v. PRICE.
 Dec. 2. }

Deed—Voluntary Conveyance—Gift—Baron and Feme—Constructive Trust.

G. P. executed a document, which was attested by two witnesses, giving and granting to E. P. his wife a freehold house in which they resided. G. P. afterwards died, without having made any will, and his heiress-at-law brought an action of ejectment to recover the possession of the house and premises from E. P. and obtained a verdict; upon which E. P. filed this bill. Upon a motion to dissolve an injunction which had been obtained,—Held, that the gift was incomplete; that the relationship of trustee and cestui que trust was not created; that this Court would not assist either party, but leave them as it found them; and that the injunction must be dissolved.

George Price, being seised of a messuage, in which he and his wife resided, duly executed the following instrument:—"July 8, 1849.—I hereby certify, that I, George Price, collier, of Whitcroft, in the township of West Dean and county of Gloucester, for and in consideration of the goodwill which I bear towards my wife Esther Price,

also of the same place, have given and granted, and do hereby freely give and grant to the said Esther Price, in the presence of my uncle Samuel Price, of the same place, all my land, house, and chattels; and I hereby again declare that I, George Price, have absolutely, and of my own accord, given and granted the same without any manner of condition to the aforesaid Esther Price, and it is her sole and absolute property henceforth for ever. In witness whereof I have this 8th day of July 1849 set my hand and seal." To this document George Price set his mark in the presence of William Tanner and Samuel Price.

The document was delivered to William Tanner, who was requested to take charge of the same for Esther Price.

On the 20th of April 1850 George Price died without having made any will, leaving his wife, the plaintiff, and Emma Price, the only child of his elder brother, his heiress-at-law.

Esther Price continued to hold the hereditaments under the deed-poll, and the defendant Emma Price, by her mother as guardian, brought an action of ejectment to recover possession of the premises, and obtained a verdict. Esther Price then filed this bill, praying that Emma Price might be declared a trustee of the legal estate for the plaintiff, her heirs and assigns, and asking that she might convey the same to the plaintiff, and deliver up the deeds in her possession. It also asked for an injunction to restrain all proceedings at law.

To this bill the defendant put in an answer, and moved to dissolve the injunction which had been obtained.

Mr. Eddis, in support of the motion.—The defendant, instead of putting in an answer, should have demurred to the bill. Had that been done, the defendant could have obtained a decision upon the equitable right. The testator's husband by executing the deed converted himself into a trustee: he had contemplated a permanent provision for his wife, and that was a duty which this Court would execute—*Walter v. Hodge* (1).

Mr. Sandys, contra.—The testator's widow

was a mere volunteer, and had no claim to be put in a better situation than a stranger. The deed contemplated a gift, which was imperfect, and had no legal operation. Effect has been given to imperfect documents in favour of a wife and children; but the policy of the law will not allow a man to deprive himself of everything in favour of his wife, or by that means he might defeat the claims of creditors; the wife, therefore, was a volunteer, and could have no claim under an imperfect deed against her husband or against the right of the heiress-at-law.

Mr. Eddis, in reply.

Dec. 2.—The MASTER OF THE ROLLS.—It is not disputed that the deed is wholly inoperative at law, but the plaintiff contends that this deed converted the husband into a trustee for the separate use of his wife, and that the heiress-at-law upon his death became also in like manner a trustee for the wife. On the hearing of the case I entertained a strong opinion that the deed in question created no trust which the Court could enforce, and that the heiress-at-law was not converted into a trustee for the wife, but as no cases were cited, I deferred my judgment to look at the authorities. This has confirmed me in my view.

The questions are two: first, whether the gift would have been valid if it was between two strangers; and, secondly, whether its being between husband and wife made any difference. Between strangers this deed would have been inoperative in equity as well as in law; I entertain no doubt on that point. On the other hand, if this deed is a gift, this Court will not convert a gift into a trust. If I were to decide that this deed would be good as between strangers, I should, in truth, be deciding that if a man executes a deed, simply declaring, "I hereby give and grant all my estate to another," and nothing more takes place, this Court would compel the delivery of the estate. This would be contrary to every authority.

The next question is, was this a transaction between husband and wife which the Court would carry out? A deed was executed for the benefit of the wife, it was intended to be for her separate use: do these circumstances give the transaction a different character from that which it would have

(1) 2 Swanst. 102.

had, if it had been one between strangers? Was there a trust created? In other words, could the wife, during the life of her husband, have maintained a bill in this court, by her next friend, against her husband, for the rents for her separate use? I am of opinion that no such suit could have been maintained. In *Ex parte Dubost* (2) Lord Eldon said, "It is clear that this Court will not assist a volunteer; yet, if the act is completed, though voluntary, the Court will act upon it. It has been decided, that upon an agreement to transfer stock this Court will not interpose; but if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more, and the Court will act upon it," but that would not be the case where a gift was intended. The obligee of a bond five days before her death, by a memorandum indorsed upon the bond, purporting to be an assignment without consideration to a person to whom the bond was at the same time delivered, was held to be an incomplete gift, and, as it was without consideration, that the Court could not give it effect—*Edwards v. Jones* (3) *Meek v. Kettlewell* (4). In this case there was no declaration of trust; it was either a gift, or it was inoperative, and the rule of this Court was, that it would not aid a volunteer to carry an imperfect gift into effect—*Colman v. Sarrel* (5), *Sloane v. Cadogan* (6), *Holloway v. Headington* (7) and *Jefferys v. Jefferys* (8). I am, therefore, of opinion that the relation of trustee and *cestui que trust* was not created in this case; that the whole was an imperfect gift, and that the transaction was one, in which equity will not interfere to assist either party, but will leave them as it found them, and that consequently this injunction must be dissolved.

(2) 18 Ves. 140, 149.

(3) 1 Myl. & Cr. 226; s. c. 5 Law J. Rep. (N.S.) Chanc. 194.

(4) 1 Hare, 464; s. c. 11 Law J. Rep. (N.S.) Chanc. 293; 1 Ph. 342; 13 Law J. Rep. (N.S.) Chanc. 28.

(5) 3 Bro. C.C. 12; s. c. 1 Ves. jun. 50.

(6) 3 Sugd. Vend. & Pur., App. 66.

(7) 8 Sim. 324; s. c. 6 Law J. Rep. (N.S.) Chanc. 199.

(8) Cr. & Ph. 138.

M.R. }
Dec. 11. } BAXTER v. LOSH.

Legacy—Lapse—Residuary Estate—Joint Bequest—Survivorship—Implication.

A testatrix gave her residuary estate, after the death of three persons, upon trust to pay and assign it equally between G.B. and E.B., their executors, administrators and assigns; but if neither of them should be living at the death of the survivor of the tenants for life, she gave the same to F.H. G.B. died in the lifetime of the testatrix, but E.B. survived the tenants for life.—Held, that the gift lapsed as to a moiety of the residuary estate; that no joint estate was created between G.B. and E.B.; that no right by survivorship arose by implication; that the event had not happened upon which the gift over was to take effect; and that one moiety of the residuary estate was undisposed of and belonged to the next-of-kin of the testatrix, and that the costs must be paid out of her estate.

This was a special case under the 13 & 14 Vict. c. 35.

Sweetenham Waters, by her will, dated in 1818, gave her residuary personal estate in trust for three persons for life, with survivorship, and after the decease of the survivor upon trusts, which were expressed as follows:—"Upon trust to pay, assign, or transfer the whole of the said stocks, funds, government securities, and all interest due thereon, unto and to the use of and equally between George Baxter and Eliza Baxter, children of my sister Ann Baxter, their executors, administrators and assigns, absolutely for ever; but in case it shall happen that the said George Baxter and Eliza Baxter shall neither of them be living at the time of the death of the survivor of the said [three tenants for life] then I give and bequeath the same to Francis Hutchinson, of Newcastle, if he shall be then living."

George Baxter died in 1821, in the lifetime of the testatrix.

The testatrix died in 1822.

The three tenants for life having died, the questions were, first, whether Eliza Baxter, the plaintiff, by the event which had happened, was absolutely entitled under the tenour of the will to the whole bene-

ficial interest in the residuary personal estate; and if she was not so entitled, secondly, were the defendants, Jemima Porteous and Susan Hussey Elizabeth Davidson, as legal personal representatives of the next-of-kin of the testatrix Sweetenham Waters, entitled to have one equal fourth part of the same stock transferred into each of their names.

Mr. Stratton, for the plaintiff.—The questions for consideration under this will are, whether Eliza Baxter, having survived her brother George, is entitled to the whole of the residuary estate; and if not, whether one moiety does not belong to the legal personal representatives of the next-of-kin of the testatrix. As to one moiety, there is little or no difficulty; but as to the other, it is submitted, that the legatees became entitled, under a joint-tenancy; or otherwise by a necessary implication, as by the limitation over, the testatrix contemplated a survivorship between George and Eliza Baxter, which was equivalent to creating a joint tenancy, especially as the gift over to Francis Hutchinson was in the event of both being dead at the death of the last tenant for life.

Armstrong v. Eldridge, 3 Bro. C.C. 215.

Scott v. Bargeman, 2 P. Wms. 68.

Mackell v. Winter, 3 Ves. 236, 536.

Beauman v. Stock, 2 Ball & B. 406.

Townley v. Bolton, 1 Myl. & K. 148 ;

s. c. 2 Law J. Rep. (N.S.) Chanc. 25.

Davies v. Hopkins, 2 Beav. 276.

Mr. Toller, for the defendants, was not heard.

THE MASTER OF THE ROLLS.—The Court can only put a construction upon the words of the will; it cannot make a will for the testatrix, or take into consideration whether she would have deemed it prudent to make such a disposition of her property, had she foreseen the events that have taken place. She gave her residuary personal estate to three persons, and the survivor for life. She proceeds, "and from and after their decease the stock shall be paid and transferred to George Baxter and Eliza Baxter, absolutely," with a limitation over in case of their deaths before that of the survivor of the tenants for life. George Baxter died

before the testatrix; his share, therefore, lapsed, and remained undisposed of. The bequest was to the two as tenants in common; cases, however, have been referred to, in which, notwithstanding words creating a tenancy in common, a joint-tenancy, or what was equivalent to a joint tenancy, was considered to have arisen. A tenancy in common may be created between two persons, and words may be added declaring that on the death of one, his interest should pass to the other. That would, in some respects be similar to a joint-tenancy, but I know of no case in which the words "equally between" have created anything else than a tenancy in common; and that was the interest which these parties would have taken; but as one of them died in the lifetime of the testatrix, that share had lapsed, and being a moiety of a residuary estate, it did not fall into the residuary estate, but was undisposed of, and passed to the next-of-kin of the testatrix. But the will contained a gift over to Francis Hutchinson in the event of the death of George Baxter and Eliza Baxter, in the lifetime of the tenants for life. If any was wanted, *Scott v. Bargeman* was a direct authority to shew that a gift over could not take effect unless the event upon which the property was to go over happened. There a man, having a wife and three daughters, bequeathed 900*l.* to the three daughters equally, payable at their respective ages of twenty-one, or marriage, and if all should die before their legacies became payable, then the whole was to go to the mother. Two of the daughters died before their shares became due, and the surviving daughter was held entitled to the whole. In this case the event, on which the gift was to take effect, has not happened; neither are there any words by which Eliza Baxter can be considered as taking by implication. There are cases upon the subject, but no general rule has proceeded from them; every case must, therefore, depend upon the whole of the words used taken together: and in this case I consider that Eliza Baxter is entitled to one moiety of the fund, and that the next-of-kin of the testatrix are entitled to the other. The costs must be paid out of the estate.

LD. CRANWORTH, }
V.C. } STEVENS v. WILLIAMS.
1851. }
April 30. }

Baron and Feme—Feme Covert—Next Friend—Security for Costs.

A married woman cannot be allowed to sue by a next friend who is incapable of giving security for costs.

In this case a motion was made, on behalf of the defendant, that the next friend of the plaintiff, who was a married woman, might be ordered to give security for costs. The next friend was the husband of the plaintiff's aunt, and it was in evidence that he was a labourer; that he lived in a house the rent of which was only 2*l.* 10*s.* per annum, and that he was not of ability to pay the costs.

Mr. Bethell and Mr. Glasse appeared in support of the motion.

Mr. Rolt and Mr. Renshaw, in opposition to the motion, said the plaintiff was herself a poor woman, and it was very natural that she should be unable to procure any one but a poor man to be her next friend. It was true that this man was a labourer, but he had sworn that he did not owe 5*l.* The Court would not allow a married woman to sue without a next friend, but if a woman in this rank of life was compelled to obtain a rich man to be her next friend, it would virtually be a denial of justice. It was not necessary that a next friend should be a person capable of giving security for costs. The question was simply whether a woman was to be precluded from suing because she could find no next friend who was satisfactory to the defendant.

The following cases were cited—

Pennington v. Alvin, 1 Sim. & S. 264; s. c. 1 Law J. Rep. Chanc. 202.

Dowden v. Hook, 8 Beav. 399; s. c. 14 Law J. Rep. (N.S.) Chanc. 383.

Fellows v. Barrett, 1 Keen, 119; s. c. 5 Law J. Rep. (N.S.) Chanc. 204.

Drinan v. Mannix, 3 Dr. & War. 154.

LORD CRANWORTH, V.C.—Suppose this lady had a large property of her own, and
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her relation whom she appointed her next friend was incapable of paying the costs, in that case she would be suing in velvet; she would be putting a poor man forward who could not be made liable, and thereby save herself. The cases which have been cited relate to the next friend of an infant. Now, I see a great distinction between the next friend of a married woman and the next friend of an infant. Any one may sue for an infant without giving security. In that case it is the suit of the next friend; but with regard to a married woman it is mere machinery; the suit is hers, and there would be great danger in allowing her to sue by an insolvent person. In this case it is the same thing, for it is sworn that this man is a labourer out of work, and lives in a house of 2*l.* 10*s.* per annum. I cannot look at the relationship. If she were in a position to sue *in forma pauperis* that would be different, but otherwise she must abide by the practice of the Court; and it appears to me I am bound by the authorities, particularly that of *Drinan v. Mannix*, decided by Sir E. Sugden, to direct that the usual security should be entered into. The costs of this application to be costs in the cause.

LD. CRANWORTH, }
V.C. } NAVULSHAW v. BROWN-
1851. } RIGG.
June 11, 16. }

Principal and Agent—Factors' Acts—Validity of Pledges.

The plaintiff consigned goods to a Liverpool merchant for sale, and drew bills upon him to the amount of the value of the goods. The Liverpool merchant then handed the goods to his London agent to be sold, and drew bills upon him, as an advance, upon account of the goods. The London agent accepted the bills, having notice that they were consigned by the plaintiff for sale. The Liverpool merchant became insolvent, and the bills drawn upon him by the plaintiff were not paid. The London agent sold the goods to recoup himself the amount of the bills drawn upon him by the Liverpool merchant. The plaintiff then filed a bill against both firms for an account, alleging collusion, and

praying that the London agent might be decreed to pay him the amount produced by the sale of the goods:—Held, that the Factors Acts applied to cases where goods were pledged; that there was no mala fides in this transaction, and that it was one expressly intended to be protected by the acts.

Held also, that a bill for an account by a principal against his agent cannot be sustained in equity where the transaction is a single transaction, and not tainted with fraud, the plaintiff in such case having his remedy by an action at law. Bill dismissed, with costs.

In this case the plaintiff was a merchant resident in India, and in the month of March 1847 he consigned two boxes of pearls to the defendants, Messrs. Brownrigg & Co., who were merchants at Liverpool, and drew bills for 2,466*l.* on them, which they accepted. On the 26th of May the pearls having arrived, the defendants sent them to their London agents, Messrs. Collett & Co., for the purpose of ascertaining their value, and they valued them at 2,050*l.* Messrs. Brownrigg & Co. then directed Messrs. Collett & Co. to sell the pearls, and drew bills on them for 2,000*l.*, which they accepted. In June following Messrs. Brownrigg & Co. sent the invoice of the pearls, signed by the plaintiff, to Messrs. Collett & Co., which was the first intimation they received of the pearls being the same as Messrs. Brownrigg & Co. had some months previously advised them of, nor were they aware of the fact of Messrs. Brownrigg & Co. having accepted bills upon the pearls. In July 1847 the pearls were put up to auction by Messrs. Collett & Co., but the greater portion were bought in; 320*l.* worth only being sold. On the 28th of August the bill for 2,000*l.* accepted by Messrs. Collett & Co. became due, and Messrs. Collett & Co., at the request of Messrs. Brownrigg & Co., who did not find it convenient to meet it, accepted a bill for 1,680*l.* which Messrs. Brownrigg & Co. procured to be discounted; and when that bill became due, the same course was pursued, the original object being to make up the 2,000*l.* In November the defendants became insolvent, and Messrs. Collett & Co. were obliged to pay the holders of the 1,680*l.* bill. The bills

drawn upon Messrs. Brownrigg & Co. and accepted by them were dishonoured, except one. The plaintiff having sent a power of attorney to Messrs. Forbes & Co. to receive the pearls, they on the 4th of March 1848 applied to Messrs. Brownrigg & Co. for them, and they, three days subsequently returned for answer that they were in the hands of Messrs. Collett & Co., to whom Messrs. Brownrigg & Co. were indebted. This produced a correspondence, in which it appeared that Messrs. Collett & Co. had sold the residue of the pearls for 1,300*l.*, after the plaintiff had sent the power of attorney to Messrs. Forbes & Co. The plaintiff's solicitor then wrote to Messrs. Collett & Co. on the subject, and they replied, that having accepted bills on the pearls, they had placed the proceeds against such claim. The plaintiff then filed the present bill for an account, and for the payment of the money produced by the sale of the pearls; the bill likewise charged fraud against the defendants in the transaction.

Mr. Bethell and Mr. Lewis, for the plaintiff, contended that Messrs. Collett & Co. had notice that Messrs. Brownrigg & Co. were only the agents for the sale of the pearls, by the inquiry previously made, and before the acceptance by them of the bills for 1,680*l.* distinct notice being given by the invoice. The sale of the remainder taking place immediately after, or indeed during the correspondence with Messrs. Forbes & Co. on the plaintiff's behalf, made it clear that there was collusion between Brownrigg & Co. and Collett & Co., and that the whole transaction was *mala fide*. This gave the plaintiff a right to proceed in equity, and file a bill against his agent also for an account. By the 4 Geo. 4. c. 83, the 6 Geo. 4. c. 94. and the 5 & 6 Vict. c. 39. validity was given to contracts with an agent, notwithstanding the purchaser was aware of that fact, and the last act gave the same validity to pledges as were given to sales by the two former. But this only applied to *bona fide* transactions without notice of the absence of due authority. The words of the preamble of the latter act were these: "Provided such contract or payment be made in the usual and ordinary course of business, and

that such person shall not, when such contract is entered into or payment made, have notice that such agent is not authorized to sell the same, or to receive the said purchase-money." Then followed an extension of the validity theretofore given to sales, to pledges also, but the advances and exchange of securities were to be *bond fide*. By the 3rd section it was enacted, that the act should be deemed to give validity to such contracts and agreements only, and to protect only such loans, advances, and exchanges, as should be made *bond fide*, and without notice that the agent making such contracts or agreements had not authority to make the same, or was acting *malá fide* in respect thereof against the owner of such goods and merchandise; and nothing in the act contained should be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt owing from any agent to any person with or to whom such lien or pledge should be given, nor to authorize any agent intrusted as aforesaid in deviating from any express orders or authority received from the owner; but that, for protecting all such *bond fide* loans, advances, and exchanges (though made with notice of such agent not being the owner, but without any notice of the agent's acting without authority) and to no other purpose, such contract, &c. should be binding on the owner, and those interested in the goods.

Martini v. Coles, 1 M. & S. 140.

Evans v. Truman, 2 B. & Ad. 886.

Mason v. Lickbarrow, 1 H. Black. 362.

Blain v. Agar, 1 Sim. 37; s. c. 5 Law J. Rep. Chanc. 1.

Mr. Malins and *Mr. C. Hall* appeared for Messrs. Brownrigg & Co.

Mr. James Parker, *Mr. Rolt* and *Mr. Goldsmid* appeared for Messrs. Collett & Co., and a large mass of evidence was read to shew that Messrs. Collett & Co. had acted *bond fide*, and in perfect ignorance of the want of authority to pledge, or of the actual ownership of the pearls.

Mr. Bethell was heard in reply.

LORD CRANWORTH, V.C.—I feel myself warranted in giving my judgment immediately upon this case, although it is an important one, because, as a good many

days have elapsed since the matter was first considered, I have had the opportunity of turning it in my mind, and I confess I arrive at the conclusion without any doubt upon the subject. In my opinion the plaintiff wholly fails to make out any title to relief whatever. I should quite go along with the view that has been pressed upon the Court for the plaintiff, if I adopted that which is the main foundation on which the argument rests, namely, that there is any inconsistency in the fact of goods being deposited with a factor for sale, and his having authority to pledge; I see no such inconsistency. I think that there was probably that which would have satisfied me that there was notice before the bill for 2,000*l.* was accepted, that the goods were in the hands of Messrs. Brownrigg & Co. for sale; I do not make up my mind upon that, because it does not appear to me to be very important. I think that whether there was notice or not before the first transaction, there certainly was before the subsequent transactions. And one part of the opinion I had formed I confess the plaintiff's counsel has a good deal shaken me about, namely, whether it would necessarily follow that if the transaction was sustainable as to the 2,000*l.*, it was also sustainable as to the 1,680*l.* I give no opinion upon that subject, for this reason: it appears to me that there was no notice whatever that could by reasonable intentment lead Messrs. Collett & Co. to suppose that Brownrigg & Co. had not authority to pledge before they accepted the bill for 2,000*l.*, or either of the bills for 1,680*l.* There certainly, as to the two last, was distinct notice that they were agents for sale, but in my opinion that does not give them anything like notice that they had not authority to pledge; and I come to that conclusion for this reason—I believe that I should be putting upon this act a conclusion totally different from that which the legislature intended, if I were to hold that it meant to deal with two classes of deposits by the owners of goods with factors in London or other places; namely, one an authority to sell, and another an authority to pledge. I believe that it is a very rare transaction indeed to consign goods to a party merely that they may pledge them; it is not the course of dealing at all.

What was in the habit of taking place was this: goods were consigned to factors for sale, the factors then became largely in advance to the owners of the goods, and before the act authorized it they used to recoup themselves as well as they could by pledging. These were not valid transactions; there was no authority by law to do so. To meet that case this statute was passed, and in my opinion, when the act speaks of the ordinary practice, what is meant is the ordinary practice of parties having goods for sale raising money upon them by deposits. The act says, "whereas advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safer facilities should be afforded thereto, and that the same protection and validity should be extended to *bond fide* advances upon goods and merchandise as by the said recited act is given to sales, and that owners intrusting agents with the possession of goods should be bound by a contract of pledge for any advances *bond fide* made on the security thereof"—then these enactments are made.

Now the transaction that gives rise to the present suit is this. The plaintiff consigns to Brownrigg & Co. a shipment of pearls; the moment he consigns them, he draws for 2,400*l.*,—and I say the moment, because it is quite clear that bills to that amount had been accepted before the 2,000*l.* was accepted by Collett & Co.; it is so stated. Therefore the position of Brownrigg & Co. was this: they had in their hands pearls to be sold for Navulshaw; they had rendered themselves liable to the amount of 2,400*l.* supposed to be something within what would be produced by the sale of pearls; in this state of things they, not being themselves parties to sell the pearls, send them in due and regular course of business to Messrs. Collett & Co. that they might do what was regular, and thereupon Messrs. Collett & Co. having got them, make the advances. Now, in my opinion (and if I am wrong in that, I am quite wrong throughout), that is the very case which this statute was meant to meet. The party had rendered himself liable,—it is true that he had not paid it, and it turned out afterwards that he became

insolvent, and therefore never did pay this 2,400*l.*,—but he had rendered himself liable for that sum; therefore, putting the goods into the hands of the party who is to sell and receive the proceeds, he gets what is, in fact, an advance to him on account of these goods. In my opinion that was the precise case which the statute was meant to meet; therefore if I am right in that view of the case there is nothing of *mala fides* in it; there is notice that the party held these goods for sale, that is, notice that he was a factor; every factor holds them for sale, at least, in ninety-nine cases out of a hundred. Goods put into the hands of factors are put into their hands for the purpose of sale, not for the purpose of raising money by way of pledge or deposit. He knows they are to be sold, and the party who puts them into his hands raises money upon them, which I conceive to be a raising of money protected by this statute; consequently there was nothing like fraud or *mala fides* in the transaction from the beginning to the end. I have already stated that I am inclined to think there was sufficient notice to fix Messrs. Collett & Co. before they accepted the 2,000*l.* bill, with the knowledge that these were pearls of a merchant in India to be sold. It is true that it was not stated they were the same, but there was quite enough to put them upon inquiry; therefore if the plaintiff's case depended on whether Messrs. Collett & Co. knew the goods were in the hands of Brownrigg & Co. for sale, I think the original vice would taint the whole transaction; but as I think there was no vice in it, it does not appear to me that I need go into the question of what is the effect upon the other bills; because there is no doubt that afterwards, before the other bills were accepted, there was notice. As I am of opinion there was no *mala fides*, that inquiry, therefore, becomes unimportant.

That being so, the only other question is, whether there is a case for an account. What was argued was that there was a case for an account independent of this transaction, for that Messrs. Brownrigg & Co. either alone or with Messrs. Collett & Co. were agents; and that this Court gives relief in the suit of a principal against his agent. If there had been any-

thing of fraud that certainly would have been so; but, although it is said that this Court gives relief where a principal is proceeding against his agent, I think, upon all the authorities,—I do not mean merely the one or two handed up to me, but the text books and many other authorities if one were to search the books,—that that proposition must depend upon this, that it is a question not capable of being conveniently inquired into in a court of law. But this is really only one single transaction. Mr. Navulshaw sends a box of pearls or two boxes of pearls to Brownrigg & Co. to sell them. They have sold them, and there is nothing in the evidence to shew they have not sold them fairly. Probably they were to sell, either by public auction or private sale, as they thought best. They were put up to public auction, and only a portion of them were sold. Afterwards they did their best with the rest, and realized all that it was possible to realize. Therefore it is money had and received by them to the use of Navulshaw, and may be recovered in an action at law. Upon that ground also I think that the bill fails; and the consequence is, that the bill as against both sets of defendants must be dismissed, with costs.

Mr. Bethell then submitted, on the question of costs, that there had been separate answers put in by every member of the firm of Brownrigg & Co., and there were several of them in partnership together.

Mr. Hall said, the plaintiff had been applied to, to waive the oath of the messenger, which he would not do, and it therefore became necessary to put in separate answers in consequence of the parties living in different parts of the country, one living in Devonshire, one in Scotland, and one in Liverpool.

LORD CRANWORTH, V. C.—These are most disagreeable questions to deal with. Undoubtedly, where parties put in three answers where one would suffice, it looks very like incurring unnecessary expense, unless there is something to justify it. All I can do is to dismiss the bill, with costs; and with regard to the costs of the defendants who have put in separate answers, let the

taxing Master inquire whether it was necessary that there should have been more than one answer, and he will deal with the case accordingly.

LD. CRANWORTH,
V. C.
1851.
June 7, 26.

{ PRESTON v. THE LIVER-
POOL, MANCHESTER,
AND NEWCASTLE-UP-
ON TYNE JUNCTION
RAILWAY COMPANY.

Railway Company—Specific Performance of Agreement—Residential Injury.

*The plaintiff agreed with a railway company that, on the following conditions, he would assent to the railway being made through his property:—that if the company should obtain their act they should pay him 1,000*l.* for all lands required for making the railway, and the further sum of 4,000*l.* for residential injury to the estate and hall of the plaintiff. The company amalgamated with another company, who formed the railway in another direction and did not pass through the plaintiff's property:—Held, upon demurrer to a bill for specific performance of the agreement, that there was sufficient evidence to shew that the defendants represented the persons who originally contracted with the plaintiff, and although no land was taken in pursuance of the agreement, the defendants were bound to pay the 4,000*l.* which must be considered as agreed to be paid for the plaintiff's assent to the undertaking.*

This bill was filed by Mr. Cooper Preston, of Flasby Hall, in Yorkshire, against the above company for specific performance of an agreement, dated in February 1846, which was to the following effect: "It is agreed that, on the following conditions, the said Cooper Preston will and does assent to the railway being made through his property at Flasby, as laid down in the deposited plans of the company: first, that in case the company shall in this or any subsequent session obtain an act of incorporation, the said company shall pay to the said Cooper Preston, his heirs and assigns, the sum of 1,000*l.* for all lands required by the company for the due making of the railway, and the further sum of

4,000*l.* for residential injury to the estate and hall of the said Cooper Preston." It was also agreed that the charges of the plaintiff's solicitor should be paid, and the sum of 25*l.* for his personal expenses. It appeared that when the agreement was entered into there were two companies proposing to make the line in contemplation, and the company with which the plaintiff contracted, which was entitled the Lancashire and North Yorkshire Railway Company, represented by two persons named Harper and Yates, amalgamated with another set of persons, by whom the undertaking was eventually carried out, the latter persons taking upon themselves the whole of the liabilities entered into by both parties. It also appeared that the company had given the plaintiff the usual notice of their intention to enter upon his land and take surveys and levels, and that they had entered in pursuance of the notice and staked out the land according to the agreement. This company obtained their act, but having subsequently become amalgamated with the company under whose name they were now sued, the line originally intended to be taken was given up and another adopted, so that they had not occasion to pass through or take any portion of the plaintiff's land, and therefore refused to pay the 4,000*l.* mentioned in the agreement or to perform it in any way. The plaintiff then filed his bill stating the above facts, and more particularly communications with him and his solicitor on the part of the company, whereby the agreement in question was clearly recognized and referred to, and charging that it was binding upon them and ought to be performed; that the withdrawal of his opposition to the bill was obtained upon the faith of the performance of the agreement, the failure of which would be a fraud upon him. That the railway was in progress, and that the company had obtained an extension of time for compulsory purchases, which had not yet expired. The bill then prayed a declaration that the agreement might be declared binding upon the company, and that they might be decreed to pay the sums of 1,000*l.* and 4,000*l.* therein agreed to be paid, and the expenses of the plaintiff's solicitor, and to enter into possession of the land.

The case came on upon a demurrer for want of equity put in by the railway company.

Mr. Bethell and *Mr. Humphreys*, in support of the demurrer, contended, that the company was not bound to fulfil the agreement. The persons with whom the plaintiff contracted failed to obtain their act of parliament, and the undertaking was carried out by another set of persons. The line did not pass through the plaintiff's land, and therefore no damage was done to him or his property, and the company could not be compelled to pay him compensation for an injury which he had not suffered, nor for land which was not required. It was true that notice had been served upon the plaintiff of the intention of the company to enter upon his land, but this was merely the usual entry for surveying and taking levels—

Columbine v. Chichester, 2 Ph. 27; s. c. 15 Law J. Rep. (N.S.) Chanc. 408.

Edwards v. the Grand Junction Railway Company, 1 Myl. & Cr. 650; s. c. 6 Law J. Rep. (N.S.) Chanc. 47.

Stanley v. the Chester and Birkenhead Railway Company, 9 Sim. 264; s. c. 3 Myl. & Cr. 773.

Simpson v. Lord Howden, 3 Myl. & Cr. 97; s. c. 6 Law J. Rep. (N.S.) Chanc. 315.

The Solicitor General, Mr. Southgate and *Mr. Preston*, for the plaintiff, contended, that the company ought to pay the 4,000*l.* mentioned in the agreement, whether they took the land or not, that sum being partly intended to secure the plaintiff's assent to the act of parliament which the promoters of the undertaking were seeking to obtain. The present company represented those who contracted with the plaintiff to all intents and purposes, and were as much bound as the actual parties to that agreement themselves.

LORD CRANWORTH, V.C.—This was a bill filed to enforce, against the defendants, the Liverpool, Manchester and Newcastle-upon-Tyne Junction Railway Company, an agreement, dated the 5th of February 1846, between the plaintiff and two gentlemen named Harper and Yates. It appears

by the bill, that in 1845 Harper and Yates and others projected a railway to be called the Lancashire and North Yorkshire Railway, and required lands of the plaintiff, and that line was intended to pass near his residence of Flaaby Hall. In 1846 they introduced a bill into parliament to make this railway and the plaintiff prepared to oppose it, and in order to avert the plaintiff's opposition, the agreement in question was entered into. In the same session certain other persons introduced a bill into parliament for a rival line, to be called the Liverpool, Manchester and Newcastle Junction, and a third set of proprietors introduced another bill for another rival line, to be called the Northumberland and Lancashire Junction Railway Company, but nothing turns upon that third line. The first two sets of projectors agreed to unite and form a line, to follow the line, so far as the plaintiff is concerned, of the Lancashire and North Yorkshire Railway, and they expressly agreed to adopt the contract of the 5th of February 1846, on the faith of which the plaintiff withdrew his opposition. All this appears on the bill. On the 26th of June 1846 the act passed, for incorporating the company by the name of the Liverpool, Manchester and Newcastle-upon-Tyne Junction Railway Company. The books deposited with the clerk of the peace and referred to in the act enumerate several fields of the plaintiff's through which the line was to pass. The defendants, after the passing, set out the line over the plaintiff's lands, and gave notice that they should require the same; but they have never taken possession thereof, though the plaintiff has always been ready to give up the same. The object of the present bill is to enforce performance of the agreement and to obtain payment of the 1,000*l.* and 4,000*l.* The plaintiff says that the contract of Harper and Yates is binding in equity on the defendants. The doctrine of the Court is that where projectors of a company enter into contracts on behalf of a body not then existing but afterwards called into being, if so coming into existence they take the benefit of that contract, they cannot do so without performing that part of it which such projectors undertook to perform, that is, the Court treats such pro-

jectors as agents of the company so afterwards called into existence. The plaintiff says that according to this doctrine, the agreement is binding on the defendants. The defendants object on two grounds: first, that they are not the parties for whom Harper and Yates were acting; and secondly, that they did not take the benefit of the contract.

First, I think the defendants clearly are the parties, within the principle of the rule of equity, on whose behalf Harper and Yates must be taken to have made the contract. It is true it was originally made on behalf of a different body, but the promoters of the two rival lines afterwards coalesced and agreed to concur in obtaining an act for a line which should adopt that part of the line which traversed the plaintiff's land, and for that purpose adopt (*inter alia*) the contract of Harper and Yates, and the plaintiff on the faith of that withdrew his opposition, and I think this puts matters in exactly the same position as if the contract had been between the plaintiff of the one part and Harper and Yates as agents for the company which was afterwards amalgamated, that is, the defendants, of the other part. The same persons who agreed with him as projectors obtained the act; it is true others concurred with them, and the name of the company was changed, but as far as the plaintiff was concerned that made no difference; and then the united projectors adopted the original contract. I think this clearly entitled the plaintiff to look to the defendants as the parties liable to him. The case of *Stanley v. the Chester and Birkenhead Railway Company* is directly in point, if authority is necessary.

The real difficulty is on the second point, whether the defendants have taken the benefit of the contract. This depends upon its construction. If the meaning of the contract is, that in consideration of the plaintiff assenting to the bill, the defendants, on obtaining their act, were to pay him 1,000*l.* and 4,000*l.*, they have had the benefit of the contract, for they have bought off the plaintiff's opposition. If the meaning is, that in case the defendants should obtain their act, and also require the plaintiff's land, the plaintiff should sell to them what they

might require at the price and on the terms stipulated in the contract, then the defendants have not the benefit of the contract, for they have taken no lands. But I think that this is not the meaning. It could hardly be that if the company took anything, however small, they were to pay 5,000*l.*; they were to pay 5,000*l.* as the consideration for what they took, otherwise nothing: whereas there is no inconsistency in supposing that the defendants agreed to pay the 5,000*l.* in case the act passed, in consideration of the plaintiff's consent, and as the price of the land required. The language, it is true, is not precisely the same as in the late case of *Bland v. Crowley* (1), in the Exchequer, but in substance it means the consideration to be in part the consent of the landholder to the passing of the act. The value of the assent could not be nicely calculated. There was, therefore nothing anomalous in fixing a sum, including matter of lesser moment, namely, the price of the land through which the railway was to pass, whether for that purpose more or less might be required. But it could hardly have been intended that, without reference to the advantage of obtaining the plaintiff's assent to the bill, the company should before they got their act have stipulated to pay 5,000*l.* for any portion of the plaintiff's land, whether the quantity was small or to the whole extent on the map; but if, instead of taking any of his land they should just go on the boundary and create just as much annoyance to him, they should pay nothing. This could not, I think, have been intended. The contract, therefore, must be read as a contract to pay 1,000*l.* and 4,000*l.* as the price of the plaintiff's assent and of so much of his land as should be required for the time, including compensation for what is called residential injury. It follows, therefore, that the demurrer must be overruled. The defendants are bound by the contract of Harper and Yates, and have in part had the benefit of it.

But the question on the contract is a mere legal one, and therefore I shall not overrule the demurrer without giving the defendants the opportunity, if they wish it,

of taking the opinion of a court of law. If I am right in my construction of the contract, the plaintiff has a present right of action against Harper and Yates. I do not mean that an action should be brought, but that a case should be stated, the question being, whether, the act having passed, and the defendants having done the acts stated in the bill, the plaintiff has any present right of action against Harper and Yates. On this view of the contract, I am not obliged to decide on the question of the solicitor's bill, for there is no averment of the account, delivery, or refusal to pay: this was essential. The statute requires the delivery of a signed bill; but it would be oppressive to hold parties liable to pay costs, a bill for which has not been delivered.

It was then agreed that a case should be taken to the Court of Queen's Bench, and his Lordship's order for overruling the demurrer was suspended until the decision at law should be known.

M.R. }
Nov. 8, 10. } CREASOR v. ROBINSON.

Administrator de son tort—Assets—Debt—Intestate Debtor—Personal Representative—Party.

The widow of a deceased debtor, without taking out letters of administration, got in all the assets of her husband and compounded with his creditors. Upon a claim by a creditor to obtain payment of a debt due to him in full,—Held, that a legal personal representative of the intestate ought to be made a party, and leave was given to amend.

This was a claim by William Creasor against Mary the widow of John Robinson to obtain payment of principal and interest upon a debt of 31*l.* 2*s.* and 9*l.* 16*s.* for costs of an action.

John Robinson, saddler, died intestate in August 1849, indebted. His widow, without taking out letters of administration to her husband, called his creditors together, and with their approbation got in the whole of her husband's estate with the exception of a few small sums, and applied the pro-

(1) 20 Law J. Rep. (N.S.) Exch. 218.

ceeds towards the satisfaction of his debts. William Creasor was a creditor of the deceased upon a bill of exchange dated the 22nd of May 1849, for 20*l.* 14*s.* 6*d.*, and he was also a creditor for a further sum of 10*l.* 7*s.* 6*d.* for goods sold and delivered, making together the 31*l.* 2*s.* for which he brought an action against the defendant Mary Robinson, who pleaded *plene administravit*; but without joining issue William Creasor signed judgment against Mary Robinson in respect of assets of her husband *quando acciderint* as to the rest of the declaration; and he then filed this claim.

Mr. Osler, for Mary Robinson, objected that the proceeding was imperfect as there was no personal representative of John Robinson before the Court.

Mr. Martindale, for the plaintiff, contended that this claim was filed against an administratrix *de son tort*. She admitted having got in assets, and having placed herself in an accountable position, she could not now object to the responsibility of the character she had assumed, and insist upon the legal appointment of a personal representative. She was the party entitled to take out the letters of administration, and as she had acted as administratrix and received and disposed of the property of the deceased, she was liable to account, and it was not necessary to bring any other party before the Court—*Dan. Chanc. Prac.* 421, 1st ed. In *Cleland v. Cleland* (1) an objection was taken for want of parties on the ground that there was no administrator before the Court, but it was overruled, because the widow of the deceased, who was the person by law entitled to the administration, and who had possessed herself of her husband's personal estate, and disposed of it, was a party, though, by her answer, she denied having taken out administration, which the bill alleged she had done. In this case the plaintiff asked for payment out of the assets, and as it was admitted that assets had been received, the defendant was liable to account for the money.

THE MASTER OF THE ROLLS.—I am not prepared to follow the case of *Cleland v.*

Cleland; I do not consider it the practice; and I shall decline to make a decree in respect of the assets received only; I will, however, look to the authorities.

Nov. 10.—THE MASTER OF THE ROLLS.—I have looked at the cases, but I do not find any in support of the plaintiff's claim except the one cited, and upon that alone I cannot make the order asked, especially as *Tyler v. Bell* (2), *Humphreys v. Humphreys* (3), *Madox v. Jackson* (4), and the general stream of authorities require that a personal representative should be before the Court, and differ from that cited. The plaintiff, however, may amend the claim—*Eccles v. Cheyne* (5).

M.R. }
Nov. 17. } MULLOCK v. JENKINS.

Benefit Building Societies—Purchaser—Agent—Real Estate—Illegal Contract—Investment of Money—Jurisdiction.

The trustees of a benefit building society having, through a shareholder as their agent, purchased an estate out of the funds of the society, and paid a sum of money on account of the deposit, filed their bill against their agent, who had himself obtained a conveyance of the estate, which he refused to convey to the trustees of the society, to compel him to convey the estate to them upon the trusts and for the purposes of the society. Upon a demurrer for want of equity and for want of parties,—Held, that the trustees had power to institute this suit to obtain a conveyance, though the purchase which had been made was alleged to be illegal and contrary to the act of parliament and the rules of the society; and that a suit instituted by the trustees authorizing the purchase, on behalf of themselves and all the other members and shareholders of the society, was sufficient; that it was not necessary to bring all the members before the Court to consent to the purchase, and that the jurisdiction of this Court was not

(2) 2 Myl. & Cr. 89, 109; s. c. 6 Law J. Rep. (N.S.) Chanc. 169.

(3) 3 P. Wms. 395.

(4) 3 Atk. 406.

(5) 20 Law J. Rep. (N.S.) Chanc. 631.

(1) Prec. Chanc. 64.

NEW SERIES, XXI.—CHANC.

ousted by the appointment of a separate jurisdiction for the regulation of the affairs of these societies.

This bill was filed by Richard Mullock, Edward Wills, Edward Thomas, Philip Thomas and John Richards, trustees, members and shareholders in the Newport District Benefit Building Society, on behalf of themselves and all other members and shareholders of the society, to obtain a declaration, that an estate, purchased in the name of Ebenezer Vaughan Jenkins, was the property of the Newport District Benefit Building Society, and that he and his mortgagee might convey the same to the plaintiffs, as trustees, according to the rules of the society; and that he might pay off the mortgage and deliver up the deeds, and that the mortgage might be declared void against the society. It also asked for an injunction to restrain the defendant from disposing of or incumbering the estate and property, or parting with the title deeds, or receiving the rents. It also asked that the accounts might be taken and a receiver appointed.

The bill stated that this society was formed in 1850, under its present style, and that rules for regulating the society were duly framed, certified and enrolled, pursuant to the statute in that behalf; and that such rules had been duly printed and circulated amongst the members; and that the first rule stated that the object of the society was to enable each member to receive out of the funds of the society the amount or value of his share or shares therein (each share not to exceed the sum of 50*l.*,) to erect or purchase one or more dwelling-house or houses, or other real or leasehold estate; to be secured by way of mortgage to the society, until the amount or value of his share or shares should have been fully repaid to such society, with the interest thereon, and all fines and other payments incurred in respect thereof. The second rule provided for persons becoming members; and the third rule provided that the society should be governed by a committee, consisting of a president, vice-president, five trustees, and fifteen members; and by the fourth rule that the subscriptions to the society should be paid weekly. Provision was also made for

annual and other meetings of the society, and for the weekly and other payments to be made by members, and also for the payment of all money into the bank in the name of the trustees; and that shares in the society should be allotted to members according to seniority of membership; and that any member, by giving notice, might take the whole or any part of the shares he subscribed for in one allotment. The ninth rule provided that any member, upon receiving the share advanced, should execute to the trustees for the time being such mortgage as therein mentioned; and the same rule also provided that all monies to be received and retained by the trustees, under or by virtue of any such mortgage, were to be immediately placed with the society's bankers, to its account and for its use. The eleventh rule provided that the trustees and committee should be at liberty, as often as they should deem it advisable, to apply for and obtain from the bankers or other persons, at such rate of interest as they might determine, such sums of money as they should think proper, in order to advance the same to members. The twelfth rule declared that on the death of a member there should be no right of survivorship, and the shares should be personal estate. The seventeenth rule provided that the trustees should be intrusted with the funds and securities belonging to the society; that the banking account should be in their names; and all money received should be placed to their account with the West of England and South Wales Banking Company, or any other bankers the members or committee might agree to. All proceedings, whether civil or criminal, were to be commenced, prosecuted and defended by and in their names, and all expenses, costs and charges, and damages incurred were to be borne and paid by and out of the funds of the society. The rules also contained other provisions for vesting the property of the society in the trustees for the time being. They also contained provisions for referring to arbitration any disputes between members or the trustees or committee.

The bill then stated that divers persons, together with the plaintiffs, had subscribed and had become and were members and shareholders in the society, which consisted

of upwards of 300 persons, who formed a fluctuating body and were too numerous to be named individually as parties plaintiffs or defendants, and could not be made parties without manifestly preventing the prosecution of the suit.

That the defendant E. V. Jenkins lately acted as one of the vice-presidents, and is or was or claimed to be a member or shareholder of the society. That the plaintiffs were the trustees of the society; and as such were duly authorized to commence and prosecute this suit on behalf of the society.

That in August 1850 an estate, called the Maindee estate, in the neighbourhood of Newport, was advertised for sale, and as it was considered advantageous to the society, it was resolved, at a meeting at which the defendant was present and presided, that he should be deputed to purchase that portion of the estate called the Fair Oak estate for the society, to which he consented.

On the 28th of August 1850 the defendant attended the sale, as the agent for and on behalf of the society, and purchased a certain portion of the estate, being lot 22, consisting of seventy-six acres, for the sum of 5,680*l.*, exclusive of timber of the value of 325*l.*

On the 30th of August 1850, at a meeting of the committee, the defendant reported to the meeting that he had purchased the land in lot 22 for the society; and for the purpose of the defendant paying a deposit, in part of the purchase-money, according to the conditions of sale, a sum of 600*l.* 10*s.* was paid by the trustees of the society to the defendant, who accordingly paid the deposit.

That proceedings were taken to appropriate the property purchased for the purposes of the society, and also for the investigation of the title and obtaining the proper conveyances; and that they were entered on the minutes and signed by the defendant E. V. Jenkins; and on the 5th of September 1850 the report of the purchase was confirmed, in the presence of the defendant, at a general committee of the society. At that time there was about 4,000*l.* belonging to the society in the bankers' hands, applicable to the payment of the purchase-money; and arrangements

had been made to obtain a loan from them of about 2,000*l.*, at interest, to enable the society to complete the purchase; but it was alleged that the defendant E. V. Jenkins had, without any authority, procured the land purchased to be conveyed to him, and that he had borrowed a large sum of money from some person not a member of the society, and had, it was believed, secured the same with interest by way of equitable mortgage and deposit of the title-deeds.

The bill then charged that the person who had advanced the money had notice that the purchase was made for the plaintiffs, and that the defendant E. V. Jenkins had expressly at times dealt with the property as belonging to the society; but that he had recently attempted to set on foot a rival building society at Newport, and had issued a printed prospectus or advertisement of such proposed society, to which a note was appended, stating "that in consequence of recent disturbances it was anticipated that several eligible allotments on the Fair Oak estate would not be purchased or taken up; it was therefore intended that they should be ballotted for at the earliest opportunity, when all members not interested in the estate and who should have paid up to that time might participate in the ballot"; that this was at variance with the rights of the Newport District Benefit Building Society and of the plaintiffs and other members.

To this bill the defendant put in a general demurrer, for want of equity, and also because the committee and the several shareholders other than the defendant and the plaintiffs were not made parties.

Mr. Roupell and *Mr. Miller*, in support of the demurrer.—Building societies cannot purchase real estate either for investment or for their own purposes; though if real estate is purchased by a member, the society may take and hold it, by way of mortgage, as a security for money advanced to that member out of the funds of the society, but in no other way can it deal with real property. Some of the members had thought it beneficial to the society to purchase this estate with a view to deal it out in lots that members might build; a sub-committee, and not a committee, of the society had consequently resolved to appoint the defendant their agent to pur-

chase the estate. A committee of the society met after the sale, and to them the defendant reported the purchase, and upon this it was insisted by the plaintiffs that the defendant purchased for the society at large; that he was a trustee for the members, and that he holds the estate for them: but this was contrary both to the rules of the society and to the 6 & 7 Will. 4. c. 32, under which it was founded. This act contains no powers enabling building societies to purchase land for investment. The money they were empowered to raise was to be advanced as money to be repaid by instalments, the property of the individual member being mortgaged to secure it; it cannot be said that land was advanced within the meaning of the act. The society was not even formed with any apparent view to speculate in the purchase of land to be transferred in lots to its members: it is therefore unnecessary to consider that point. The purchase, therefore, of land was altogether at variance with the objects of the society; and were it not so, the governing body of the society neither sanctioned it, nor did the society adopt the purchase. It was said that the trustees advanced money to pay the deposit, and they, and not the governing body of the society, or the committee and members, filed this bill to obtain the benefit of a purchase which was made contrary to the rules of the society and the purpose of its formation. But if the purchase did fall within the objects of the society, every member ought to be before the Court, that he might have an opportunity of stating any objections he might have both to the purchase and the proceedings, which did not even originate with the governing body. It might be said that the defendant, who was a member of the society, entered into a contract to purchase for the society; but then, as it was illegal, and he had committed a breach of trust, he stopped. The only object of these societies was, a combination to insure small loans to members, that they might complete the purchase of small plots of land or houses, the purchase-money for which was to be secured to the society by mortgage; but in the present case members were necessitated to purchase the land however disadvantageous to them; they were left no option. The plaintiffs

also were wrong in filing this bill; they had mistaken their jurisdiction, and ought, under the 10 Geo. 4. c. 26. s. 27, to have applied for redress to a Justice of the Peace. It was, therefore, most material to consider whether this suit was for the benefit of the society, as it would lock up the whole of its funds.

1 *Daniell's Ch. Prac.* 2nd edit. 240.

Bainbridge v. Burton, 2 Beav. 539.

Evans v. Stokes, 1 Keen, 24; s. c. 5 Law J. Rep. (N.S.) Chanc. 145.

Mr. R. Palmer, Mr. Rogers and Mr. Walford appeared in support of the bill, but were not heard.

THE MASTER OF THE ROLLS.—In this case the trustees of a building society have instituted this suit on behalf of themselves and all other members, except this single defendant, and he had been appointed their agent to purchase an estate for the society. He accordingly purchased the estate, and received money from the society to pay the deposit. If the trustees were competent to authorize the defendant to purchase, they, without doubt, were competent to sue on behalf of the society, as in any ordinary suit for the specific performance of a contract by a vendor, where the Court considered that parties, having power to purchase, sufficiently represented those who were beneficially interested, and who consequently need not be parties. But, assuming that the suit was properly constituted in respect of parties, could relief be given in this state of the record? A member and vice-president of the committee buys the estate, and acknowledges he has done so for the society, and that he has received a part of the purchase-money, and taken the conveyance to himself for his own use, and then refused to convey to the parties for whom he purchased. I assume the facts to be true and correctly stated; the transaction, however, has been called illegal, and it is said that there was no power to make such a purchase; but that the object of the society was to enable persons having land to build houses, or to acquire land, or means to borrow money to acquire land for that purpose: such was the object of the society contemplated both by the act of parliament and by the rules

which had been framed. But assuming that the society had any surplus funds, was there anything to prevent it from investing them in real estate? It appears, though not clearly stated, that the defendant was present at the time when the resolution was passed deputing him to purchase the estate, and that he purchased accordingly, yet now he insists upon keeping both estate and deposit-money, which certainly cannot be allowed. It differs from those cases where the Court will not uphold the contract on the ground of its being contrary to law; but even in those cases, for instance in a case of usury, the Court always compels the party to do equity. I shall express no opinion upon what the result may be ultimately; but it is not competent for the defendant, who, by his demurrer, admits the facts alleged, to withhold the estate from the plaintiffs, or to hold it for his own use.

It is said that this Court has not jurisdiction to consider this question, that it belongs to the Justices of the Peace; but this Court has interfered where a particular jurisdiction has been created, and it must do so in this case, unless, which is not the case, the jurisdiction of this Court is expressly taken away. I must, therefore, overrule this demurrer.

TURNER, V.C.

1851.

Nov. 18, 19;

Dec. 2.

HEWITT v. LOOSEMORE.

Solicitor and Client—Constructive Notice—Mortgage—Deposit of Title Deeds—Equitable and legal Mortgages—Priority.

Where a mortgagor, a solicitor, prepares the mortgage deed, the mortgagee not employing another solicitor, the mortgagor will be considered to be the solicitor of the mortgagee in the transaction of the mortgage; but the latter will not therefore be deemed to have notice of a prior deposit of the title-deeds by the mortgagor, or of any uncommunicated fact which it was the interest of the mortgagor to conceal from the mortgagee.

Constructive notice is knowledge imputed by the Court on presumption, too strong to be

rebutted, that the knowledge must have been communicated.

A legal mortgagee will not be postponed to a prior equitable one, on the ground of not having got in the title deeds, unless there has been fraud or gross or wilful negligence on the part of the legal mortgagee.

Fraud or gross or wilful negligence will not be imputed to a mortgagee who has made bonâ fide an inquiry for the title deeds, and a reasonable excuse has been given for the non-delivery of them to him. Secus, if he has not made any inquiry after the deeds.

This was a suit by an equitable mortgagee by deposit of title deeds for foreclosure, and for redemption against a subsequent legal mortgagee.

In 1834 Robert Loosemore, a solicitor, at Tiverton, deposited the lease of certain leasehold property with the plaintiff, accompanied by a memorandum for the purpose of securing to the latter the repayment of 1,700*l.* and interest.

By indenture of the 17th of November 1838, Robert Loosemore assigned the leaseholds to the defendant John Loosemore, a farmer in the neighbourhood of Tiverton, to secure to him the repayment of 300*l.* and interest, at 4*l.* 10*s.* per cent. per annum. The mortgagor prepared the deed of assignment at his own expense, and promised, at the request of the defendant, John Loosemore (who did not employ any solicitor in the transaction) to deliver to him the lease of the mortgaged property, but excused himself from time to time for not doing so upon various grounds, and principally upon the ground of being busy when applied to on the subject. In 1842 the mortgagor became bankrupt, and the defendant John Loosemore then for the first time ascertained that the lease had been deposited, previously to his mortgage, with the plaintiff.

The bill charged *inter alia* that the defendant J. Loosemore had, at the time of his assignment, actual notice of the plaintiff's charge and the deposit of the lease and memorandum; that he did not use due caution or diligence in inquiring for the title deeds; that he had then notice that the mortgagor was in embarrassed circumstances, and had parted with his title deeds; that the defendant ought to

have required the production and inspection of the lease; that he had been guilty of gross negligence and want of caution, and therefore not entitled to the benefit of his assignment as against the plaintiff; that the mortgagor was the solicitor of the defendant in the transaction of the mortgage, and that the latter had therefore constructive notice of the mortgagor's previous dealings with the mortgaged property as if he had had actual notice of the plaintiff's charge and the deposit; and that the plaintiff, if not entitled to priority, was entitled to redeem the defendant. The bill also prayed for a receiver.

The plaintiff rested his case upon the above facts, and relied upon the following passage, read as evidence from the defendant's answer:—"That in or about the month of October 1838, the defendant was possessed of the sum of 300*l.*, which he was desirous of investing upon mortgage or other sufficient security at interest, and accordingly applied to the said Robert Loosemore, who then and had for many years carried on an extensive business as an attorney and solicitor at Tiverton, in the county of Devon, to know if he had any client desirous of borrowing that sum upon a security which he could recommend; that he replied he had not then any client who wanted such a sum, but if he should hear of such a security as the defendant required he would inform him of it; that shortly afterwards, in the beginning of November 1838, he received a letter from the mortgagor requesting him to come to Tiverton, as he could then give him a good security for his money, and accordingly he went and had an interview with the mortgagor, who proposed to borrow the sum of 300*l.* for himself, and to assign a certain leasehold estate called Rosehouse, situate in Knowstone, in the said county, being the leasehold premises in the bill mentioned, to which the mortgagor Robert Loosemore was entitled under an indenture of lease, dated the 2nd of December 1833, for the residue of a term of ninety-nine years determinable on the deaths of himself and Robert Loosemore, and of Frances Sarah Loosemore and Robert Wood Loosemore his children, and the survivor of them, to the defendant as a security for the repayment of the said sum of 300*l.*, together with in-

terest thereon at the rate of 4*l.* 10*s.* per cent. per annum; that the defendant knowing the said leasehold premises to be an ample security, accepted such proposal and agreed to lend the sum of 300*l.* to the mortgagor upon the security aforesaid, and the 17th of November 1838 was appointed to carry the agreement into effect; that on that day the defendant attended at the office of the mortgagor in Tiverton and advanced to him the sum of 300*l.*, and the mortgagor then duly executed and delivered to the defendant an indenture of assignment and mortgage of the leasehold premises to the defendant, and which indenture was dated the 17th of November 1838, and expressed to be made between the mortgagor of the one part and the defendant of the other part."

The defendant denied by his answer all notice whatever, express or implied, of the above-mentioned memorandum, charge or deposit, and stated that when the assignment and mortgage was handed to him he inquired whether the lease ought not to be delivered to him, and that the mortgagor replied it should, but as he was rather busy then he would look for it and give it to the defendant when he next came to market; that at that time the mortgagor had the reputation of being and was believed by the defendant to be a wealthy man and was much respected in the neighbourhood; that the defendant, having no reason to doubt that such lease was in the possession of the said mortgagor and would be looked for and delivered to him on the next market day, promised to call for it and took away the assignment; that on a subsequent market day and at several times afterwards, the defendant called upon the mortgagor for the lease, but the latter always made some excuse for not delivering it to the defendant, generally observing that he had been so busy he had not had time to look it out; that on the last occasion when the defendant called for the lease the mortgagor appeared to be rather angry with him for coming so often about it, and said, "I hope you don't mistrust me for so paltry a sum as 300*l.*"; that the defendant having in common with all his neighbours great confidence in the mortgagor and a high opin-

ion of his integrity, and fully believing that he had only been prevented by the pressure of business from looking out the lease, made no further application upon the subject; that in or about July 1842, the defendant heard to his great surprise that the mortgagor had become bankrupt, and that he had pledged the lease to some other person.

Mr. Rolt and *Mr. Giffard* appeared for the plaintiff; and,

The Solicitor General and *Mr. Speed*, for the defendant John Loosemore.

For the plaintiff it was argued, first, that under the circumstances above stated, Robert Loosemore, the mortgagor, was the agent and solicitor of the defendant, John Loosemore, and therefore that the latter had through him notice of the deposit of the lease with the plaintiff—*Sheldon v. Cox* (1), *Le Neve v. Le Neve* (2), *Dryden v. Frost* (3): and secondly, that the defendant having taken the assignment without the lease or further inquiry than appeared by his answer, the plaintiff's equitable title ought to prevail against the defendant's legal interest, and that the non-delivery of the lease and the absence of inquiry constituted constructive notice of the plaintiff's claim—

Jackson v. Rowe, 2 Sim. & S. 472; s. c. 4 Law J. Rep. Chanc. 118.

Tylee v. Webb, 6 Beav. 552.

Jones v. Smith, 1 Hare, 43; s. c. 1 Ph. 244; 11 Law J. Rep. (N.S.) Chanc. 83; 12 Ibid. 381.

Worthington v. Morgan, 16 Sim. 547; s. c. 18 Law J. Rep. (N.S.) Chanc. 233.

For the defendant, John Loosemore, it was contended, first, that the mortgagor had not acted as his solicitor or agent, and had not been retained or paid by him; but that if he could be considered to be his solicitor or agent, a client would not be held to have had constructive notice of a fraud committed by his solicitor and agent, and concealed from his knowledge—*Kennedy v. Green* (4); and secondly, that

a mortgagee was not bound to take all the precaution of a wary and prudent purchaser, and that the defendant, having inquired for the lease and received a satisfactory reason for its non-production, would not be postponed to the plaintiff. *Allen v. Knight* (5) and the cases above cited on the point of constructive notice.

Dec. 2.—TURNER, V.C., after stating the above facts, said—Two points were argued at the bar: first, that Robert Loosemore must be taken to have acted as the solicitor of the defendant in the transaction of the mortgage, and that the defendant, therefore, had notice through him of the lease having been deposited with the plaintiff; and secondly, that the defendant having taken the legal mortgage without the lease, or making further inquiry than appears upon his answer, the plaintiff's equitable title by deposit ought to prevail against the legal interest of the defendant, and that the non-delivery of the lease and the absence of inquiry constituted constructive notice.

As to the first point, I think that where the mortgagor is himself a solicitor and prepares the mortgage deed, the mortgagee employing no other solicitor, the mortgagor must be considered to be the agent or solicitor of the mortgagee in the transaction of the mortgage. The mortgagee in such a case trusts the mortgagor to discharge duties which his own solicitor would have discharged if he had thought fit to employ one. It can make no difference that the mortgagor is not paid by the mortgagee, for the nature of the transaction is this, that all expenses are to be borne by the mortgagor. I am of opinion, therefore, that Robert Loosemore must be considered to have been the agent or solicitor of the defendant in the transaction.

I do not, however, think that the defendant is therefore to be considered as having had notice of the plaintiff's deposit. Such notice would be constructive merely, and constructive notice is a knowledge which the Court imputes to the party on a presumption so strong that it cannot be rebutted, that the knowledge must have been

(1) Ambl. 624; s. c. 2 Eden, 228.

(2) 3 Atk. 646; s. c. 1 Vea. sen. 64.

(3) 3 Myl. & Cr. 670; s. c. 8 Law J. Rep. (N.S.) Chanc. 235.

(4) 3 Myl. & K. 699.

(5) 5 Hare, 272; s. c. 15 Law J. Rep. (N.S.) Chanc. 430; 16 Ibid. 370 (on appeal).

communicated. I could not act on such a presumption in the face of the evidence which the plaintiff himself has adduced.

In determining this point in favour of the plaintiff, I desire it to be understood that I do not proceed on the case of *Kennedy v. Green*. The doctrine of constructive notice established by that case does not apply to the present case. Where there has been no fraud in the original deposit with the plaintiff, and no fraud in the mortgage to the defendant, if the fact of the deposit with the plaintiff is to be taken to have been communicated to the defendant, it would be a misapplication of the case of *Kennedy v. Green* to hold that the fact of the deposit must be taken to have been communicated because it was a fraud to conceal it. It would be to assume that there was fraud in bringing the question, whether there was knowledge or not.

The first point being thus disposed of, I proceed to consider the second question, (which is one of very great and general importance) whether an equitable mortgagee by deposit of title deeds is entitled to priority over a subsequent legal mortgagee of the property comprised in the deeds, who has not made all the inquiries after the deeds which he could or might have obtained. It is first to be considered how this question stands upon the authorities; for if there is a settled rule on the subject I cannot certainly venture to alter it, nor should I be disposed to do so, as I am fully satisfied that the advantage derived from adhering to settled rules of law greatly overbalances the mischief with which adherence to those rules may in particular cases be attended. Without referring to the authorities anterior to the case of *Plumb v. Fluit* (6) (many of which were favourable to the doctrine there laid down), it will be sufficient to state that it was there held that nothing but fraud or gross and voluntary negligence in leaving the title deeds will oust the priority of the legal mortgagee; and that where the legal mortgagee had applied for the deeds, and had relied on the promise of the mortgagor to send them, it was held that that was not such a fraud or gross or wilful negligence as would postpone the legal mortgagee to

a prior equitable one. The doctrine thus laid down was re-asserted by Lord Eldon, in *Evans v. Bicknell* (7), and again in *Martinez v. Cooper* (8); by Sir William Grant, in *Barnett v. Weston* (9); by Sir John Leach, in *Harper v. Faulder* (10); by Lord Langdale, in *Farrow v. Rees* (11), and by Lord Cottenham, in *Allen v. Knight* (*supra*). This must, therefore, be taken to be the doctrine of the Court, unless there were other authorities which could be brought contesting it. It was said in argument in the present case, that the doctrine in the authorities just referred to could not be reconciled with the decisions in *Jackson v. Rowe*, *Dryden v. Frost*, *Tylee v. Webb*, and *Worthington v. Morgan*; but, on examination, I do not think it will be found that those cases are inconsistent with *Plumb v. Fluit*. In *Jackson v. Rowe* the question was, not whether a prior equitable title should prevail against a subsequent legal one, but whether the party had a legal or equitable defence against a prior legal title; and it does not appear whether any inquiry had been made about the title. In *Dryden v. Frost*, though the facts of the case do not appear from the report, it may be inferred from the reference in the judgment to the case of *Hiern v. Mill* (12), that the defendant had notice that the deeds were in the hands of the plaintiff. In *Tylee v. Webb* there was no question about the legal estate, but both the plaintiff and the defendant Hinton were equitable mortgagees by deposit; and, lastly, in *Worthington v. Morgan* there was no inquiry as to the title deeds.

The law, therefore, as I collect it from the authorities, stands thus: that a legal mortgage is not to be postponed to a prior equitable one, on the ground of not having got in the title deeds, unless there has been fraud or gross and wilful negligence on the part of the legal mortgagee; and that the Court will not impute such fraud or negligence to him if there has been a *bond fide* inquiry after the deeds, and a reasonable excuse given for non-

(6) 2 Anstr. 438.

(7) 6 Ves. 174.

(8) 2 Russ. 198.

(9) 12 Ves. 133.

(10) 4 Mad. 129.

(11) 4 Beav. 18.

(12) 13 Ves. 114.

delivery of them; but that the Court will impute fraud or gross and wilful negligence to him if he omits all inquiry as to the deeds. I am of opinion that there is much principle both in the rule and the decisions upon it. When the Court is called on to postpone a legal mortgage, its powers are invoked to take away a legal right, and it says that there is no ground on which it will act, except that of fraud, or of wilful neglect of a kind amounting to fraud. I think in transactions of sale and mortgage, if no inquiry is made as to deeds which constitute the title to the property, the Court is justified in assuming that the purchaser abstains from making the inquiry from a suspicion that the title will be affected by the inquiry, if made, and that it is, therefore, bound to impute to the purchaser, or mortgagee, a knowledge of the facts which would have been disclosed on inquiry; but where an inquiry is made, and a reasonable excuse given, and there is no ground to impute suspicion, this principle cannot apply.

Applying this principle to the present case, the plaintiff having failed to make out a case for postponing the defendant's mortgage, the only decree I can make is the usual decree for redemption; but the plaintiff must pay the costs up to and including the decree. The charge in the bill that the plaintiff is entitled to redeem the defendant, seems to me to take this case out of the range of Lord Eldon's observations in *Martinez v. Cooper*.

Decree accordingly.

LORDS JUSTICES. } THE SUTTON HARBOUR IMPROVEMENT COMPANY v. HITCHINS.
 1851.
 Dec. 9, 10.

Lands Clauses Consolidation Act, 1845, sect. 68.—Property injuriously affected—Compensation—Injunction.

A harbour improvement company, in the prosecution of their works, under the authority of a special act of parliament, obstructed access to a wharf from the place of business of M. H. by which he was put to expense in loading and unloading ships. M. H.,

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claiming compensation, gave a notice and proceeded to appoint an arbitrator, under the 68th section of the 8 Vict. c. 18. (the Lands Clauses Consolidation Act, 1845). Upon a bill filed by the company, an injunction was granted to restrain the further proceedings of M. H. until he established his right at law, but on appeal the same was dissolved.

This was a motion to dissolve an injunction granted by the late Master of the Rolls (Lord Langdale) restraining the defendant from taking any proceedings under a notice he had given, to obtain compensation by an arbitration under the 68th section of the Lands Clauses Consolidation Act, 1845, for alleged injury sustained in consequence of the works performed by the company for the improvement of Sutton harbour, under the powers conferred on them by special acts of parliament of the 51 Geo. 3. c. cxcvi, the 2 & 3 Will. 4. c. ix, and the 10 & 11 Vict. c. ccxcvii, by the last of which, the Lands Clauses Consolidation Act and other general acts were incorporated therein. The facts of this case are fully set out in 20 *Law J. Rep.* (N.S.) Chanc. 489, but may be shortly stated thus:—The company, in the prosecution of their works, made a coffer-dam, which, for a time, enclosed part of the harbour, by reason of which the defendant, who rented stores adjoining Sutton Wharf, and who had a right, in respect of such stores, to ship and unship goods at the wharf, was prevented from so doing, and was compelled to send his workmen and labourers a greater distance for that purpose, and at an additional expense. When the works were sufficiently completed the coffer-dam was removed, and it was removed before the notice was given claiming compensation for the defendant's lands being "injuriously affected."

On the hearing, before Lord Langdale, the case of *The London and North-Western Railway Company v. Smith* (1) was cited and relied on on behalf of the plaintiffs. The defendant now appealed.

Mr. Bethell and *Mr. Terrell*, for the appeal, argued that the Master of the Rolls

(1) 1 Hall & Twells, 364; s. c. 1 Mac. & Gor. 216; 19 *Law J. Rep.* (N.S.) Chanc. 193.

had apparently acted on the authority of Lord Cottenham's decision in *The London and North-Western Railway Company v. Smith*; but since that case a decision of equal authority, namely, that of *The East and West India Docks and Birmingham Junction Railway Company v. Gattke* (2), had been pronounced by the present Lord Chancellor, who, in his judgment, observed that although he disclaimed any intention to overrule Lord Cottenham's decision in *Smith's* case, that being properly the province of an appellate court, yet he should not deem it right to extend the application of the principle of that decision. His Lordship then, in his judgment, said that the application of the principle of *Smith's* case to the one before the Court, "and to others of the same nature, would operate very hardly upon the claimant, and would, I think, defeat an intention clearly entertained by the legislature, that of giving a summary remedy for assessing and recovering compensation; and experiments like the present, if successful, would deprive the claimant of a small amount of his compensation money, and would defeat the intention of the act of parliament." In that case, which was a demand as to lands alleged to be injuriously affected by reason of the railway damaging *Gattke's* goods and diminishing his custom, the question was, whether such consequential damage was within the contemplation of the 68th section of the Lands Clauses Consolidation Act. The Vice Chancellor Sir James Wigram, on the company filing a bill to restrain *Gattke* from proceeding under a notice he had given for assessing compensation under that section of the act, granted an injunction; but on the same coming before the present Lord Chancellor he held that the words "injuriously affected" were not confined to the case of a person whose lands were directly interfered with by a company, but extended to a case of consequential damage, and that the sheriff's jury had jurisdiction to decide upon the title to compensation, as well as to the amount of damages to be awarded, and he dissolved the injunction accordingly. Whatever was the state of

the law in January 1851, when Lord Langdale decided this case, and it might be admitted that the decision in *Smith's* case, decided in 1849 by Lord Cottenham, was to be held binding, still, as now there had been the judgment of a succeeding Lord Chancellor in February 1851, differing from that state of the law, and declaring the law to be otherwise, though not overruling the decision, the defendant was entitled to have the injunction dissolved.

Mr. Roundell Palmer and *Mr. C. Hall*, for the company, contended that the appellant's case must fail, because the case of damage which he alleged, and which only amounted to 65*l.* by his own demand, was not within the meaning of the 68th section of the Lands Clauses Consolidation Act, and also because, as the case of *Smith*, before Lord Cottenham, was plainly and precisely in point, any reversal of the decision of Lord Langdale, in the case before the Court, would be in effect, and indeed in substance, an overruling of Lord Cottenham's judgment. It was to be observed that although Lord Truro had remarked on that case, and said in *Gattke's* case that he should not be disposed to extend the application of such a principle, he carefully and pointedly abstained from any course which might be considered as overruling it, and elaborately distinguished *Gattke's* case from that of *Smith*. The distinction was plain; *Smith's* was the case of arbitration, that of *Gattke* was a jury case. Although the judgment of the Master of the Rolls was pronounced in January, no action had been brought, nor did the defendant make any application for that purpose, as he might have done, and then the Court would have directed the judgment to be dealt with as it should see fit, as was done by Lord Cottenham, in the case before him.

[LORD JUSTICE LORD CRANWORTH.—There is this distinction between *Smith's* case and this. In that case *Smith* said that the works, when completed, would do permanent damage, while here the injury complained of is temporary, and has now ceased.]

Even supposing the company had done any damage, the remedy of *Mr. Hitchins* was under the special act, which provided for compensation for lands injuriously

affected by the works of the harbour improvement "in regard to lands actually taken" for such works; but as that gentleman had had no lands taken, he could not come under the clause, and the special act did not provide for such a case as this, because it must be assumed no such case could be a ground for compensation.

[LORD JUSTICE KNIGHT BRUCE.—Suppose the case of a much frequented part of a city, and that persons, having authority to do so, order the roadway to be taken up by which access to shops is prevented, and shopkeepers suffer in their custom, there the acts which authorize the thing done do not provide for compensation. Here the acts done are done by authority, and provision is made for compensation.]

There was a fallacy in such an argument, for the 68th section related to the case of lands not persons, injuriously affected. If the defendant was held to be entitled to proceed for compensation under the Lands Clauses Consolidation Act, every man conducting business on the side of a public road, the use of which was diminished by the construction of a neighbouring railway, would be entitled to compensation for the loss of custom in his trade and profit in his business.

[LORD JUSTICE KNIGHT BRUCE.—What is the precise head of equity on which the bill is founded?]

The equity on which the bill is founded was that by virtue of which the subjects of the realm were entitled to resort to a court of equity to have a question decided in the most convenient form, at the smallest amount of expenses, and without being compelled to resort to a multiplicity of suits, or involved in an entanglement of rights. If the present claim were successful, the harbour company, in the performance of their duties, and in constructing works for the general benefit of the community, would be open to a vast number of claims of the very smallest amount and for alleged injuries of the most insignificant character, which they now called upon the Court, in the exercise of its discretion, to prevent. Beyond this, if the company, on their part, named an arbitrator, they would have concluded themselves from afterwards questioning the title to compensation. The following cases were also cited—

The King v. the Directors of the Bristol Dock Company (3) and *The Queen v. the Eastern Counties Railway Company* (4).

Mr. Bethell was not called on to reply.

LORD JUSTICE KNIGHT BRUCE.—This Court being in the habit of interfering to prevent multiplicity of suits and needless entanglement of rights, it is not necessary for me to dispute or deny, and I do not dispute or deny, that cases may arise and have arisen in which this head of equity would support a bill founded upon an attempt and intention to prevent the resort to the powers of compulsory arbitration which are contained in an act of parliament of this description. A case may be so circumstanced as to bring it within the range of this head of equity, but in each particular case it is the duty of the Court, if it be satisfied, and more especially so on an interlocutory application, that more litigation and more entanglement will be created by interfering than by abstaining to interfere, to abstain from interference. Now, looking at all the facts of this case, considering all its circumstances, and seeing that I have come to the conclusion that more litigation, more expense, more delay, more entanglement, and more difficulty will be incurred by interfering than by declining to interfere, I am of opinion that there ought to be no interference, and that there ought to be no injunction. So far as I am concerned, I leave the parties to assert their legal rights, or their supposed legal rights.

LORD JUSTICE LORD CRANWORTH.—I am of the same opinion. This case does not appear to me to require the laying down of any such doctrine as has been argued. When the legislature has laid down a particular mode of proceeding it ought to be a strong case to induce us to direct another. It is to be observed that in the present instance the amount of compensation claimed is only 15*l.* above the minimum amount for which an arbitration could have been resorted to. I cannot yield to the idea of the naming an arbitrator being conclusive as suggested during the

(3) 12 East, 429.

(4) 2 Q.B. Rep. 347; s. c. 2 Rail. Cas. 736.

argument. In *Smith's case*—with the reasoning in which I confess I am unable to concur—the sum was large, it was 2,000*l.* and upwards, and it might be worth while to see whether there was or was not a claim for anything at all. I admit that although there is that distinction, it is not a distinction in principle. It does not appear that the company will be hurt by the proceedings under the act. They name an arbitrator under protest because the act compels them to do so. If there be any legal difficulty which shall arise in this case it will be very small when compared with the evil which will inevitably arise by the bringing an action at law, and which must occur from continuing the injunction. I think the injunction ought to be dissolved.

M.R. }
Dec. 12. } SIMS v. HELLING.

Mortgage—Equitable Deposit—Realizing—Administrator—Evidence.

*G. S. insisting that J. F., the owner of an agreement for a building lease, had deposited it to secure to him 900*l.*, claimed payment of the money from the administrator of J. F., who had expended money out of his own pocket in finishing the houses, and had obtained leases from the lessors, and questioned the deposit and the extent of the advance if any had been made:—Held, that the affidavits affording evidence of deposit, the Court was bound to act upon them; that when the deposit was made, it gave G. S. a title to a mortgage, and that he had a right to payment; and the Court made a decree for an account and sale of the houses comprised in the agreement.*

This claim was filed by George Sims to obtain payment of 900*l.*, with interest, which was advanced by the plaintiff to John Faithfull: or to have three leasehold houses in Goldington Crescent sold, and the produce applied in payment of the debt and costs, and to have the balance, or residue of such debt and costs, paid out of his general personal estate, or otherwise that it might be administered under the direction of this Court.

The claim stated that, in December 1849, the plaintiff, George Sims, agreed to advance 1,000*l.* to John Faithfull at 5*l.* per cent., upon some or one of four properties, being a freehold house at Worthing, four leasehold houses in Weedington Street, St. Pancras, two leasehold houses in Medburn Street, or three leasehold houses in Goldington Crescent, which were to be worth 2,000*l.* On the 13th of December 1849 the plaintiff advanced 400*l.* to J. Faithfull and took his memorandum. On the 14th of December 1849 he advanced a further sum of 200*l.* to J. Faithfull, who signed the following memorandum: "I hereby undertake to give a good and proper mortgage to the property in Medburn Street to George Sims, he having this day advanced me the sum of 200*l.*" On the 5th of January 1850 the plaintiff advanced a further sum of 200*l.*, and on the 11th of January 1850 the plaintiff lent him a further sum of 100*l.*, and J. Faithfull signed the following memorandum: "I acknowledge that George Sims has this day advanced me the further sum of 100*l.*, making together 900*l.* on account of the mortgage to be prepared by Mr. Read." In February 1850 George Sims agreed to give up his security on the houses in Medburn Street in exchange for a security on the three leasehold houses in Goldington Crescent, and John Faithfull then deposited and pledged with Mr. Read on behalf of the plaintiff, an agreement dated the 22nd of December 1849, under which he was building the houses in Goldington Crescent, and also the draft of a lease for the same with the approval of the head landlord marked upon it, and it was also marked with the approval of Albert Read on behalf of the plaintiff.

In pursuance of this agreement George Sims allowed J. Faithfull to sell the houses in Medburn Street, and apply the proceeds to his own use.

In November 1850 John Faithfull died, and on the 21st of December 1850 Joseph Helling, the defendant, became his administrator with the will annexed.

From the affidavits, it appeared that Albert Read had acted as the solicitor of both parties; that he had gone to Australia; that the plaintiff sold 1,035*l.* stock, out of which he made the advances; that on payment of the last sum of 100*l.* the memorandum

which J. Faithfull signed was read aloud by Mr. Read in the presence of J. Faithfull and his wife, and that she subsequently paid 4*l.* on account of interest, and that other sums of money were afterwards at different times paid by J. Faithfull on account of interest; that some disputes took place in consequence of the irregular payment of the interest; that on the 6th of July 1850 the plaintiff went with A. Read to the office of Mr. Vines, the solicitor of the Brewers' Company, who were the lessors, and that the clerk promised to send a copy of the leases to Mr. Read on the 11th of July 1850; and that Mrs. Faithfull, after the decease of her husband, said it was the fault of Mr. Read that the plaintiff had not the mortgage security.

The defendant, Joseph Helling, admitted that administration with the will annexed was granted to him as a creditor of J. Faithfull. That the principal part of the testator's property consisted of the carcasses of the houses in Goldington Crescent, and that he had finished the houses himself at a cost out of his own pocket of 630*l.*, and that he had obtained leases from the Brewers' Company, dated the 20th of March 1850. He denied that any notice of the plaintiff's claim had been given either to him or the Brewers' Company. That the building agreement was left in the hands of Albert Read as the solicitor of J. Faithfull, and passed with his papers to the solicitor who succeeded to his business. That there were no traces upon the books and papers of J. Faithfull of his having received any money from the plaintiff, and that he did not believe the testator was indebted to the plaintiff, when he died, in any money beyond 100*l.* And he believed that the plaintiff, if he had the money, made the advance to A. Read and not to the testator, and that he did not believe that the testator deposited the agreement with an intent to create a lien upon the premises in favour of the plaintiff.

Mr. Roupell and *Mr. Sandys*, for the plaintiff.—The plaintiff has advanced his money upon the security of one of four properties. The security had finally attached upon the houses in Goldington

Crescent which the deceased was building at the time: the agreement for the lease had been deposited with the gentleman who acted as the solicitor of both parties, but this was immaterial if the Court is satisfied that it was held by him for the plaintiff: that testimony, however, cannot be directly obtained as he has gone to Australia; but the plaintiff claims at the hands of the Court the benefit of the deposit, and his claim is supported by other collateral testimony upon which the Court can act.

Mr. R. Palmer and *Mr. Tripp*, contra.—This is not a case in which a claim ought to have been filed. The agreement upon which the claim was based was not the defendant's title; he has finished the houses at his own charge, and has obtained leases from the ground landlords. The agreement therefore was gone, and with it the plaintiff's security. But where is the evidence of the deposit? The agreement had been found in the custody of the solicitor of the deceased. Mr. Read had gone to Australia, and there is not even an allegation or any evidence that Mr. Read held the agreement for the plaintiff. The defendant also has expended money upon the houses, and the plaintiff sought no relief until they were complete. The claim, therefore, ought to stand over, with liberty for the plaintiff to file a bill, as no decree can be made upon such a claim without a more searching investigation, or without opening the doors of the court to fraud or worse.

No reply was heard.

The MASTER OF THE ROLLS.—The plaintiff has proved a debt of 900*l.* to be due from John Faithfull to him, and it was sworn that it was charged upon a particular property which had been sold, as the plaintiff agreed to give up that security in exchange for one upon the houses in Goldington Crescent. When, therefore, the deposit of the documents was made with Mr. Read for the plaintiff, a title to a mortgage was given. The evidence on behalf of the plaintiff was direct; there was nothing on the other side to contradict it. The Court was, therefore, bound to act upon it. The Brewers' Company, the

lessors, were said to have repudiated the agreement made with the deceased, and to have granted leases to Mr. Helling, who had become a purchaser of that interest, and came in under a new holding; his title, however, originated in his being the administrator of the deceased, and his having expended money and obtained leases did not make any difference, as the order of the Court would only affect the interest of the testator in the houses; I must, therefore, make the usual decree in the case of an equitable mortgage, for an account and sale of the leasehold property in Goldington Crescent.

LORDS JUSTICES. }
Nov. 24, 25. } PRICE v. GRIFFITH.

Specific Performance—Undivided Moiety—Lease.

A, in a letter addressed to B, said he would let the coal at L. B. to B. on the terms stated in the agreement in the hands of C. C. had two papers in his hands. One was called terms for letting "coals, &c." at L. B. and G. E; the other, instructions, &c. "to obtain coal in L. B." A. and another were, in fact, tenants in common in fee of the L. B. and G. E. property. B. assigned his interest to P, who filed a bill for specific performance of the agreement by A. and the other joint owner, but subsequently his bill was dismissed against the other owner. The prayer of the bill was, that both might specifically perform the agreement, or that A. might perform it if the claim should fail against both:—Held, that "coals, &c." was ambiguous, and that it was uncertain which of the documents in the hands of C. was meant.

Held, also, that there being no ground of impropriety or misrepresentation by A, the Court would not act against him as the owner of an undivided moiety by decreeing specific performance as to that share, with compensation for the other moiety which he was unable to demise.

This was a suit for specific performance. In 1842 Thomas Digby Aubrey Griffith and Miss Mary Jenkins his aunt, were

seised in undivided moieties in fee simple of farms, lands and hereditaments in the parish of Bettws, in Glamorganshire, called Llettai Brongie and Gellie Eblig. In the early part of 1843 the following document was drawn up, and is the document spoken of as Exhibit A. It was drawn up by Mr. Griffith, and placed by David Rees, a mining agent of Mr. Griffith and his aunt, in the hands of Mr. George Cuthbertson, a solicitor. The document was afterwards delivered back by Mr. Cuthbertson to Mr. Rees, and was in the following words:—"Terms proposed by Mr. David Rees for letting and taking of coals, &c. at Llettai Brongie and Gellie Eblig. Lessors to grant term of ninety-nine years. Term to commence from the 1st of May 1843. If worked as a country colliery without a road, rent to be 20*l.* per annum. If used for exportation or manufactories, or if sold to manufactories, rent to be 100*l.* per annum, with stated royalty. Royalty to be 6*d.* per ton on all minerals. If minerals from other lands than the said farms be carried over the said farms, rent to be 100*l.* per annum, whether the minerals on the said farms are worked or not. Lessors to grant all right of waters appurtenant to the said farms, and not being to the detriment of the said farms, to the lessees as far as the lessors' rights extend. Lessees to have the power of discontinuing said lease by twelve months' notice; such notice to commence and be given on the first day of May ensuing [then followed the reservation of rent quarterly, and the stipulations as to making the road]. That lessees shall supply lessors, and all tenants of lessors on the site of working, with coal for their purposes and the purposes of the land they shall hold of the said lessors, free of all expense, save and except the expense of working the said coal." The document then concluded with stipulations as to the price of the land taken for the road, and for timber destroyed in making it, and as to the erection of a weighing-machine, and liberty of inspection of lessees' books to ascertain the "quantity worked." In April 1843 Mr. Griffith addressed the following letter to Mr. Rees, which is the document marked C, and so referred to in the judgment.

"April 15, 1843.

"Dear Sir,—As to the coal at Llettai Brongie, I beg to say that I am still of the same mind as to the letting, and to you as the lessee, on the terms we advanced and which we both coincided in, which terms are stated in the agreement in Mr. Cuthbertson's hands, and the time to commence from May next.—I am, Sir, very truly yours,
T. D. A. Griffith."

"To Mr. David Rees, Bettws."

At the time of the writing of this letter, Mr. Cuthbertson had in his hands a paper in the following words, which is the exhibit referred to in the judgment as exhibit Z—"Instructions for proposed articles of agreement. Parties, Miss Jenkins and T. A. G. lessors. David Rees, of Bettws, lessee. Particulars—Lessors agree with lessee that for consideration 16*l.* per annum, payable weekly, lessee shall drive one level to obtain coal in Llettai Brongie for the space of twelve months. That for second year, the consideration be 20*l.* payable as before. That lessee will purchase all timber required for his purposes therein of lessors at market price. That if such coal is worked by more than one party deriving any interest therein as joint lessee or partner, that then the rent shall be 100*l.* per annum, payable as before, with a royalty of 6*d.* Or if lessee shall ship coal at any port or sell to any public company otherwise than as a country collier, that then for the first year the rent be 50*l.* payable as before, and the second 100*l.*, with the mentioned royalty." Then followed other stipulations as to determination of the term, and as to making a road, and as to the supply of coal to the lessors for the purposes "of the said farm." On the 18th of March 1846, Mr. Rees, by an indenture of that date, assigned to Sir Robert Price, Bart., his executors, administrators and assigns, all his right and interest under the alleged contract between him and Miss Jenkins and Mr. Griffith. This deed recited that the agreement was made between Mr. Griffith on his own behalf, and as agent for his aunt, with Mr. Rees. Sir Robert Price filed this bill in April 1846 against Mr. Griffith, Miss Jenkins and Mr. Rees, and it prayed specific performance of the agreement

against the two former, and if need be that Mr. Rees might be decreed to join them: or if the Court should be of opinion that she was not bound by the agreement, that Mr. Griffith might be decreed specifically to perform the same so far as respected his own undivided moiety of the said premises.

The answers denied the agreement, and set up the Statute of Frauds, and claimed the benefit of it. After the suit was at issue, and before witnesses were examined, the bill was allowed to be dismissed as against Miss Jenkins.

On behalf of the plaintiff, it was argued that the exhibits C and A formed an agreement, and that A was the paper referred to in C, and that the signature to paper C. was a sufficient signature by Mr. Griffith to the agreement. As to any doubt on the meaning of "coals, &c.," that could soon be set at rest by any person conversant with the customs of a coal district, and it would be found to mean coals, iron-stone and fire clay.

The cause was heard before Wigram, V.C., on the 25th, 26th and 28th of January 1850; and, on the 7th of February following, his Honour dismissed the bill, with costs, holding that there was no evidence to shew that exhibit A. was the document referred to in exhibit C, or what document was in fact referred to in exhibit C. On that occasion, the cases of *Wheatley v. Slade* (1), *Thomas v. Dering* (2), *Hyde v. Wrench* (3) and *Graham v. Oliver* (4) were cited. The plaintiff appealed from the whole decree.

Mr. Roll and *Mr. Hislop Clarke* appeared for the appellant.

Mr. Malins and *Mr. J. H. Palmer*, for the respondent, were not called on.

Upon the hearing of the appeal, the cases of *Mortlock v. Buller* (5) and *Nelthorpe v. Holgate* (6) were referred to.

LORD JUSTICE KNIGHT BRUCE.—The first question here is, whether the documents A.

(1) 4 Sim. 126.

(2) 1 Keen, 729; s. c. 6 Law J. Rep. (n.s.) Chanc. 267.

(3) 3 Beav. 334.

(4) Ibid. 124.

(5) 10 Ves. 292.

(6) 1 Coll. 203.

and C. taken together comprise a perfect agreement, capable of being carried into effect by a decree of this Court for specific performance. To the affirmative of that proposition there are several objections. In the first place, I am not satisfied, speaking for myself alone, that the subject-matter of the contract is sufficiently stated. I am not satisfied what it was which was intended to be included in the term, "coals, &c." There is no evidence to shew, and perhaps such evidence would be difficult to get, what this "&c." includes or what it does not include. In the next place, I am not satisfied that the other terms of the alleged agreement are completely intelligible, or such as could be compelled to be carried into execution. But assuming that papers A. and C. comprise all that is necessary for constituting a binding contract, the question remains, are they to be acceded to, inasmuch as they are not signed, but only proposed to David Rees as the conditions upon which the coal mines were to be let? The absence of a signed agreement was endeavoured to be overcome by the letter C, which letter, however, only refers to the coal at one of the two places mentioned in the exhibit A. The agreement referred to in this letter is alleged to be the document marked A, which, I may remark, is no agreement at all. However, it might perhaps be too strict criticism to decide on the absence of identity merely on such grounds. It is a more important observation that there were two papers, namely, the exhibits A and Z, in Mr. Cuthbertson's office, each of which might with equal propriety, if with propriety at all, answer the description in this letter. It is therefore unnecessary further to examine what is the meaning of the paper marked A, since we cannot assume that it was the document referred to as the agreement in Mr. Cuthbertson's hands, because of the uncertainty thus introduced.—[His Lordship then made reference to the Statute of Frauds, and proceeded.]—But this is not the whole case against the plaintiff. This colliery belongs to two persons in undivided moieties. The plaintiff filed his bill against both, alleging that the contract was binding against both, but by an alternative prayer

he prayed relief against one, if he should fail to establish his claim against the two. The bill was afterwards dismissed against Mary Jenkins, leaving only the owner of the other share. But the owner of the other share never meant to contract for one share alone: if he intended to contract at all, he intended for a lease of the whole colliery. I can conceive cases where a person who has contracted to convey more than it is in his power to convey, ought to be decreed to convey what he can, either with or without making compensation to the vendee for such part of the subject-matter of the contract as the vendor is unable to convey. A lease of an undivided moiety of a colliery is a very different thing from a lease of a whole colliery, and here there is no ground of impropriety or misrepresentation, as by holding himself out as capable of contracting for the whole, or in fact any other ground, for enabling the Court to act against the owner of one undivided share.

The only question which remains is, as to the costs of this appeal, and complaints have been made of the defence. There are numerous cases in which the plaintiff's case failing, it does not fail with all costs, but there the course of the plaintiff ought to be clear. Here, there is no case whatever against the defendant, and nothing for dividing or giving less than the whole costs. There was never any pretence for filing the bill at all.

LORD JUSTICE LORD CRANWORTH. — I am of the same opinion. The Vice Chancellor seems to have gone on the ground that there was no agreement capable of being enforced. The agreement relied on is in two respects deficient. I am not satisfied what that paper is which is referred to in the letter of the 15th of April 1843, as "the agreement in Mr. Cuthbertson's hands;" and if the document A. be that paper, I am of opinion that the terms of it are too ambiguous for this Court to carry into effect. The appeal must be dismissed, with costs.

M.R.
1851. } TRYE v. THE CORPORATION
June 5, 6, 24. } OF GLOUCESTER.

Charity—Bequest to build and endow, conditional on a Gift of Land—Mortmain—Stat. 9 Geo. 2. c. 36.

*J. O. by his will, directed his trustees, after the decease of his wife, to transfer funds of the value of 8,000*l.* sterling to the corporation of G, and a like sum of 8,000*l.* to the corporate bodies of C, T. and W, upon trust in each case thereout to raise 1,800*l.* and lay out the same in the foundation, building, and furnishing a hospital or almshouse for the city of G, and each of the other places, C, T. and W, in the event of any land being given or granted to the corporation for the purpose of his charity within the period of ten years next after his decease, under the provisions of 9 Geo. 2. c. 36. And he declared that no part of the trust monies should be applied in the purchase of land; and in the event of no land being granted within the ten years, then the principal trust monies incapable of being applied, were to fall into his residuary estate. Land as a site for the hospital was conveyed to the corporation of G, and to each of the corporate bodies of C, T. and W, shortly before the expiration of the ten years, but the deed conveying the land to the corporation of G, was not enrolled until five days after the ten years had expired:—Held, that the deeds conveying the land were good under the 9 Geo. 2. c. 36. That a bequest made on an inducement to third parties to convey land in mortmain, and not to take effect unless land should be conveyed accordingly, was void: and that a bequest which tended directly to bring fresh lands into mortmain was void: and that a bequest of money to be expended in the erection or repair of buildings was void, unless an intention was clearly expressed that the money was to be expended upon land already in mortmain.*

John Ollney, by his will, dated the 3rd of January 1836, gave unto Henry Trye, Thomas Hinney and William King, their executors and administrators, the sum of 36,000*l.* secured to him by a contract with William King, and also a sum of 5,000*l.* secured to him by the bond of the Rev. Henry Maxwell, upon trust to get in and

invest the same in government stocks or funds, and accumulate the dividends during the life of his wife Johanna, and after her decease, then to transfer so much of the said trust funds as should be equal in value to the sum of 8,000*l.* sterling into the names of the mayor and corporation of the city of Gloucester, who should stand possessed thereof upon the trusts and for the purposes thereafter declared of and concerning the same, (that is to say) upon trust that they, the said mayor and corporation, did and should thereout in the first place raise the sum of 1,300*l.*, and he directed that in the event of any land being given or granted to the said mayor and corporation of Gloucester for the purposes of his charity, within the period of ten years next after his decease, under the provisions of the 9 Geo. 2. c. 36, intituled "An Act to restrain the disposition of lands, whereby the same became inalienable," be laid out and expended in or towards the erecting and building, finishing and rendering habitable, a substantial hospital or almshouse for the city of Gloucester, according to the scheme or plan which he had drawn up and signed for the due regulation of those hospitals or almshouses which he intended should be founded and established in due time after his decease. And he directed that the residue of the said sum of 8,000*l.* should be held for the benefit of the city of Gloucester upon the trusts declared by him in his scheme or plan for the foundation and endowment of the respective almshouses.

The testator then directed the trustees for the time being of his will, as the trust monies and the accumulations should be sufficient, to transfer so much as should be equal to 8,000*l.* sterling into the names of the corporate body, or if none, into the names of the minister and churchwardens of each place thereafter mentioned, that is to say, Cheltenham, Tewkesbury and Winchcomb, who were to stand possessed thereof upon trusts similar to those before declared of the 8,000*l.* directed to be transferred to the mayor and corporation of Gloucester.

"Provided always, and he thereby declared that no part of the said trust monies, stocks, funds or securities should be in

any respect applied, or attempted to be applied, for the purpose of procuring or purchasing land upon which to build or erect any of the said hospitals or almshouses."

"Provided always, and he further declared that in the event of no land or site being respectively granted or conveyed for the purposes aforesaid within the period of ten years next after his decease, then and thenceforth so much of the said principal trust monies, funds and securities as should eventually become incapable of being applied for the purposes aforesaid, should sink into his residuary personal estate for the benefit of his residuary legatees."

The testator then gave several small charitable legacies, and directed that they should be paid out of his monies and other personal estate not arising from or secured upon land. And as to all the rest and residue of his said trust monies, stocks, funds and securities, subject to any further legacies he might give by any codicil to his will, he gave the same to his wife Johanna, Margaret Powell and William King for their own benefit as tenants in common; and he appointed his trustees executors of his will.

A testamentary paper, duly executed and attested, was annexed to the will, containing a scheme for the management of the almshouses intended to be founded. The testator died on the 16th of January 1836, having made and published a codicil to his will, dated the 9th of January 1836, which did not affect the question in the cause, and both the will and codicil were proved by all the executors on the 2nd of March 1836.

This suit was instituted by the trustees, on the 31st of May 1848, asking the Court to declare whether the bequests made by the testator of the four sums of 8,000*l.* each were valid; and if so, for proper directions as to the course they should pursue with respect to the monies.

The Master, by his report, dated the 23rd of April 1850, in pursuance of a reference made to him on the 15th of December 1849, found that by four several indentures, dated respectively the 12th of January 1846, the 13th of January 1846, the 12th of January 1846, and the 13th of

January 1846, four several pieces of land near Gloucester, Cheltenham, Tewkesbury, and Winchcomb, had been conveyed by several parties to the persons pointed out by the testator, in order that almshouses and hospitals might be built thereon, and that the whole of these indentures were enrolled, in compliance with the provisions of the Mortmain Act, prior to the 16th of January 1846, except the indenture by which the land, intended for the site of the hospital at Gloucester, was conveyed to the mayor and corporation of Gloucester; this indenture was not enrolled until the 21st of January 1846, which exceeded by five days the period of ten years from the day of the death of the testator. In each of these cases the grantors survived twelve months after each of the deeds severally executed by them, and that the several pieces of land had been given since the death of the testator, with the intention of giving effect to the purpose of the testator's charities.

The questions raised were, first, whether a gift of money to be applied for erecting, building, furnishing, and rendering habitable a hospital, in case land for that purpose should be given by a third party, was valid; and, secondly, whether, assuming such gift to be valid, the conditions specified by the testator in his will, requiring grants to be made for the purpose of his charities within ten years had been complied with.

Mr. Kenyon Parker and *Mr. Elderton*, for the plaintiffs, the trustees, and executors, stated the facts.

Mr. Lloyd and *Mr. Lewin*, for the corporation of Gloucester.—It may be considered as clearly established, that unless a testator distinctly points to some land in mortmain, the Court will consider that he means an interest in land to be purchased, and the gift will be invalid; that principle was laid down in the cases of *The Attorney General v. Tyndall* (1), *The Attorney General v. Davies* (2), *Mather v. Scott* (3), and *Dixon v. Butler* (4), but in this case the testator has declared that no portion of his

(1) 2 Eden, 207; s. c. Ambler 614.

(2) 9 Ves. 535.

(3) 2 Keen, 179; s. c. 6 Law J. Rep. (N.S.) Chanc. 300.

(4) 3 You. & C. 677.

property shall be laid out in the purchase of land, and has made his gift conditional upon land being legally in mortmain within the term of ten years after his decease. It was therefore open for a charity with lands already in mortmain to come forward within the time specified by the testator, and appropriate land for the purpose of erecting the almshouses, and it was also open for any person to give a piece of land for that purpose: in either case the object of the testator could be accomplished, as the land being in mortmain the money might be expended. The policy of the law allows bequests for the erection of hospitals and almshouses if lands are to be obtained for that purpose—*The Attorney General v. Bowles* (5). In *Giblett v. Hobson* (6) the bequest of a sum of money generally to build almshouses failed only because there was no land upon which they could be built, and the direction to build was considered as a direction to purchase. In this case the testator contemplated the formation of a fund auxiliary to others, and as an aid to other donations, and upon the presumption that other persons would assist in finding the house or land for the almshouses—*Henshaw v. Atkinson* (7), *The Attorney General v. Hinzman* (8). The gift of the testator was distinct and independent of the grant of the land, and neither depended upon the other, the condition in the will being no portion of the gift. A gift to repair almshouses already in mortmain is valid—*The Attorney General v. Parsons* (9), *Johnston v. Swann* (10), and *The Attorney General v. Nash* (11). In cases also where the Court can see the intention of the testator, and that it is wholly distinct from the Statute of Mortmain, it will not allow the bequest to fail on account of the frame of the gift—*Simon v. Barber* (12) and *Hayter v. Trego* (13). And here the land might be considered as conveyed to a corporation, under the 39

Eliz. c. 5. ss. 1, 3. and 4, which was made perpetual by the 21 Jac. 1. c. 1: those acts, for the purposes of a hospital, enabled persons seised in fee of lands to create a corporation and endow it with lands to the value of 200*l.* a year, and not less than 10*l.* In this case the deeds have been duly enrolled in Chancery in compliance with the provisions of the acts, and of the 9 Geo. 2. c. 36. There is, therefore, property upon which the gift of the testator will attach, so that with these powers in existence the whole intention and policy of the law shall be carried out. It will, no doubt, be argued that the corporation of Gloucester, or any other of the charities, has not any land as a site for the hospital, and that the deeds have not been duly enrolled: but enrolment was the act of the grantee—*Taylor v. Jones* (14), and might be done without the concurrence of the grantor. As, therefore, the donor has survived the execution of the deeds twelve months, their validity cannot be questioned. The enrolment was made within the six calendar months from the date—*Gilberton Uses*, 209, *Sug. ed.*, and upon the principle acted upon under the 27 Hen. 8. c. 16, no ejectment could be maintained between the date of the deed and the enrolment—*Dymmock's case* (15), and upon enrolment the deed became valid from its day of execution.

Mr. Walpole and *Mr. Jolliffe*, for the incumbents and ministers of the several churches of Cheltenham.

Mr. Haig, for the corporation of Tewkesbury.

Mr. R. Palmer and *Mr. Prior*, for the vicar and minister, and churchwardens of the parish of Winchcomb.

Mr. Roupell and *Mr. T. H. Hall*, for the residuary legatees.—If the formation of a charity was contemplated which could not be carried out, and a personal bequest was attached to it, that must fail with the principal object—*The Attorney General v. Whitchurch* (16). A bequest of money to build a parsonage-house at the bottom of the parson's garden has been held valid—*Brodie v. the Duke of Chandos* (17); but it is always necessary to consider

(5) 3 Atk. 806; s. c. 2 Ves. sen. 547.

(6) 3 Myl. & K. 525; s. c. 4 Law J. Rep. (N.S.) Chanc. 41.

(7) 3 Madd. 306.

(8) 2 Jac. & W. 270, 276.

(9) 8 Ves. 186.

(10) 3 Madd. 467.

(11) 3 Bro. C.C. 588.

(12) 5 Russ. 112.

(13) *Ibid.* 113.

(14) 1 Salk. 389.

(15) Cro. Jac. 408; s. c. Hob. 136.

(16) 3 Ves. 141.

(17) 1 Bro. C.C. 444, n.

whether there was an indirect intention that land should be purchased out of the money—*The Attorney General v. Davies*, *The Attorney General v. Nash*, *The Attorney General v. Hyde* (18). In *Henshaw v. Atkinson* the bequest was supported on account of the negative words, that the money was not to be laid out in land; but here the bequest was made a direct inducement to draw lands into mortmain. It was a condition precedent to the gift, and related to no particular parcel of land; it was a purchase in fact, the value for which was the intended outlay. In *The Attorney General v. Downing* (19), the devise was before the 9 Geo. 2. c. 36, and there it was considered necessary to obtain a licence from the Crown to take in mortmain, and the decree was conditional. The gift of the land in this case was not complete at the time indicated by the testator; the deeds were not duly enrolled, and until enrolment the estate was not legally vested in the grantees, and had they never been enrolled the bargainor would have continued seised—2 *Com. Dig.* tit. 'Bargain and Sale,' (B, 6). Until, therefore, the enrolment did take place, the estate was in abeyance—2 *Inst.* 674. It appears that all the grantors of these lands have lived a year after the execution of the several deeds; but have the conveyances satisfied the intention of the testator? The Court will not look into futurity to determine whether the gifts were severally good. The testator has named ten years, and the Court will not extend that time a day, and certainly not add to it the year which the grantors must live to render the gifts valid—*Matthews v. Venables* (20). Such gifts must be construed strictly and the condition be complied with—*Tulk v. Houlditch* (21), and here perfect and not inchoate gifts were contemplated. The reference was not to the gift being made, but to its being perfected. Assuming, therefore, that any of the gifts failed, who was entitled to that gift? The testator, as between the legatees, directed no abatement. The first named were to be satisfied

in full; the failure, therefore, of any one of the legacies would carry that legacy direct into the residuary estate. On the whole, it appears that the gift to the charities has failed, and the residuary legatees are entitled to the legacies.

Mr. Lloyd, in reply.

June 24.—THE MASTER OF THE ROLLS.
—The first question raised in this case is, whether the deeds which have been executed conveying the land for the purpose of these several charities can be considered as coming within the directions contained in this will, as it was impossible, on the day the ten years expired, to say that the conveyances had been perfected; and with respect to Gloucester in particular, from the circumstance of the non-enrolment, it was as it is alleged incomplete. With respect to all those points, I do not think any doubt exists, and that whatever might be the state of the property during the intermediate period that elapsed between the execution of the grant and the ultimate enrolment within six months and the survivorship of the grantors for twelve months, all the authorities, as well as reason and principle, concur in saying, that whether the deeds are made good or bad by the compliance or non-compliance with the necessary conditions imposed by the statute, the validity or invalidity must, for all purposes, date from the day of the execution of the deeds. I am therefore of opinion, that as the deeds were duly enrolled within the six months, and as the grantors all survived for twelve months after the date of the respective conveyances, the deeds were good and effectual deeds from the day of their due execution, and that in particular the deed conveying the land to the corporation of Gloucester was, on the 12th of January 1846, and has since continued to be, a good and effectual conveyance for all purposes. I consider this to be so well settled that I have been unwilling to go through the authorities cited at the bar, more particularly as I shall have to refer to several with reference to the subsequent part of the case. The circumstance that the grantors might defeat the conveyances (upon which I give no opinion) by conveying the land to a purchaser for valuable consideration does

(18) *Ambl.* 751.

(19) *Ibid.* 550; *Dick.* 414; s. c. *nom. Att. Gen.* s. *Bowyer*, 3 *Ves.* 714; 5 *Ves.* 300; 8 *Ves.* 256.

(20) 2 *Bing.* 136; s. c. 2 *Law J. Rep. C.P.* 124.

(21) 1 *Ves. & B.* 248; s. c. 1 *Rep. Leg.* 666.

not, in my opinion, affect the question. If the conveyance had taken place before the will of the testator, and he had directed the money to be laid out on the lands so conveyed, I should not have hesitated to consider the bequest good,—and yet the same question might have arisen if the grantor of the land had been then alive.

The remaining question is, whether the bequest is good, having regard to the Statute of Mortmain, and to the circumstance that the bequest is made on condition that lands should be granted for the purpose of enabling the bequest to be carried into effect. This depends entirely upon the principle to be extracted from the numerous decisions which have been pronounced on the construction of this statute, 9 Geo. 2. c. 36. To make the conclusion I have arrived at intelligible, I shall refer to many of these cases and state the points as they have arisen, and I shall also state how far I consider the law to be settled. These authorities I consider establish conclusively two propositions: first, that a bequest to lay out money in the erection of buildings, without more, pre-supposes that a portion of the bequest must be applied in the purchase of land for this purpose; and that this, therefore, comes within the prohibition contained in the Statute of Mortmain, and that the bequest is void: secondly, that a bequest to lay out money in the erection or repair of buildings upon land already in mortmain is not within the prohibition, but is a valid and effectual bequest.

The question I have to consider is, whether the bequest is good when it is so framed as to induce some other person to give land in mortmain, and where the testator provides that the bequest is not to take effect unless the inducement so held out shall prove effectual. The authorities which bear directly or indirectly on this subject are very numerous; and I think it necessary shortly to notice those that bear directly upon the subject. The first case is *Sorresby v. Hollins* (22). In that case a direction to secure an annuity to the poor of Leeke, “either by purchase of lands of inheritance, or otherwise as the executors should be advised,” was held by

Lord Hardwicke to be a good bequest, by reason of the words “or otherwise”; and he stated, that “upon this act of parliament there is no authority to construe a bequest to be void if by law it can possibly be made good”; and I cite this case rather for this observation as to the construction of the bequest with reference to the statute, than for the point expressly decided. In *Cantwell v. Baker* (23) the bequest of residue to trustees “in order to and towards erecting a school,” was held by Lord Hardwicke to be a good bequest. In *Vaughan v. Farrer* (24) Lord Hardwicke also held, that a bequest of personal estate for erecting a hospital was not void within the statute. In *The Attorney General v. Bowles* a testator gave 500*l.* “upon trust to lay out part thereof in erecting a small school-house, and a little house adjoining for the master to live in, the whole purchase and building not to exceed 200*l.*, the remaining 300*l.* to be laid out in the purchase of land, or in some real security, for the maintenance of master.” Lord Hardwicke held, according to the report in *Vesey, sen.*, that the 300*l.* was void; “but as to the 200*l.*, if they could get a piece of ground by the gift or generosity of any person—not by purchase—they might be at liberty to apply to the Court to lay out that 200*l.* in erecting a school-house thereon.” As to this it may be observed, that Lord Hardwicke has expressed in his judgment nearly what the testator has here expressed in his will. It is clear, therefore, consistently with that case, and with the cases I have already cited, if it is law, that this would be a good bequest. According, however, to the report in *Aikyns*, Lord Hardwicke held that the money could only be laid out in case there existed some piece of land in mortmain already in the parish, on which the school might be erected. In *Glubb v. the Attorney General* (25) a bequest to build a parsonage-house on existing glebe was held by Sir Thomas Clarke to be a good bequest.

The Attorney General v. Tyndall, of which I have three reports—one in *Ambl.* 614, a second in 2 *Eden*, 207, and also some private manuscript notes, which came to me from the possession of my father,

(23) Cited 2 *Ves. sen.* 185.

(24) *Ibid.* 182.

(25) *Ambl.* 373.

(but by whom those notes were made I am unable to state)—has been considered a sort of leading authority upon the subject, and appears to have been the subject of repeated comment in the subsequent cases. It certainly altered the precise law, as it is to be gathered from the decisions which I have already referred to, and it contains some propositions which have not received confirmation. The testatrix in that case expressly directed land to be purchased, and almshouses to be erected on the land so purchased: so that there was little doubt but that, according to all the authorities, the gift, so far as regarded the purchase of land, was bad; and the other gift depending on that would fail also, and would have been so decided by Lord Hardwicke, and Lord Henley accordingly so decided, and in doing so, though it was not necessary for his decision, he laid the rule down broadly thus—that a bequest to lay out money in erecting buildings, even if the land is already in mortmain, would be bad, “because building on an existing site is laying out the money in realty, and therefore contrary to the spirit of the statute: it improves the site, is demandable in a *præcipe*, and is a purchase of so much realty.” This is certainly not law, according to the modern decisions; and the importance of this decision is rather from the manner in which it has been treated by subsequent Judges, for the observations of Lord Henley were not necessary to the decision; and he seems also to have felt some little warmth in deciding the case with reference to his observations in the House of Lords. It is true, in the case in *Eden* it is stated that that does not appear in the manuscript note, and is supposed not to have been stated; but in the manuscript note which I have of the judgment, which is evidently a third report, the same observations are contained. It is possible, therefore, he might have thought that it was desirable to omit that subsequently. In the subsequent case also of *The Attorney General v. Downing*, Lord Northington seems desirous to support the case of *The Attorney General v. Bowles*, for he states that that case and the case of *The Attorney General v. Tyndall* are not inconsistent with each other; and in the decision I think they are not so.

In the case of *Pelham v. Anderson* (26), a bequest to “build and endow an hospital,” was held to be void; and in *Brodie v. the Duke of Chandos* a bequest to build a new parsonage-house on land already in mortmain was held to be good. In *The Attorney General v. Hyde* the testatrix gave 1,500*l.* to be laid out under the direction of the minister and churchwardens of Royston, for erecting a free school, and that when built 2,000*l.* should be applied for the support of it. It appeared that there was a piece of land in Royston already in mortmain, on a part of which there was a school-house standing, and which might be applicable for this purpose. Lord Apsley in his judgment reviewed the former decisions, and laid down this as the broad distinction:—that a gift to build on land already in mortmain was good, but a gift to build generally imported buying as well as building, and was therefore bad; and he held, that *The Attorney General v. Bowles* had been overruled by *The Attorney General v. Tyndall*. I consider the law as to this point to be in a great measure settled by this case. This distinction which he pointed out has prevailed since in all the subsequent cases. In *The Attorney General v. Nash* a bequest to build a school was held to be void, and a demurrer to the information was allowed accordingly; and so Lord Eldon states in 8 *Ves.* 191, solely upon the ground of the presumption already stated, that you ought to infer, where the testator is silent, that he meant land to be purchased. In *The Attorney General v. Whitchurch*, Lord Loughborough held that *The Attorney General v. Bowles* had been shaken by subsequent authorities, and he concurred in dissenting from it. *Chapman v. Brown* (27) and *The Attorney General v. Parsons* repeated and confirmed that a bequest of money to be laid out in making or repairing a building was good, so far as applicable to land already in mortmain, but bad to the extent that it went beyond that. But the latter contains a remarkable expression in Lord Eldon’s judgment, which, to some extent, is favourable to the case of the charities in this case.

(26) 2 Eden, 296.

(27) 6 Ves. 404.

He says, "I agree with the late cases, which go a great way to establish that the Court cannot put such a construction upon the word 'erect' as was put upon that word in former cases, and that *prima facie* the testator must be taken to mean by that word, that land shall be bought. I think the good sense is with the later cases, requiring that the testator himself should have manifested his purpose to be sufficiently answered if they could hire or beg land, according to the expressions in the different cases." I will consider the effect of this expression when I comment upon the case of *Henshaw v. Atkinson*; but, taking these words by themselves, it would appear as if Lord Eldon thought, that if the testator pointed out they might hire or beg the land, that would make a good bequest. *The Attorney General v. Davies* is a very important case. There a testator gave a "sum of 5,000*l.*, more or less, as it may be wanted, to build twelve almshouses, purchase the ground, six for poor men, and six for poor women, economy and convenience to be observed in the structure." Then he also gave as follows:—"After the foregoing bequests are discharged, and anything further that may occur of that sort, I give all the remainder of my property for the use of the Orphan School in the City Road, under the direction of the committee of that school for the time being, provided they will furnish a piece of ground near the school, to build the aforesaid houses on, and the committee to take the management of them and all my affairs, which is not great; and if it is not agreeable or convenient for them to do so, I request the following to accept of the trouble of fulfilling my desire." Then he makes some further statement. Sir William Grant held this to be void, on the ground that the residue was given to the charity on condition that they furnished the ground. He states, "It is unnecessary to consider how far that opinion, contrary to Lord Hardwicke's, may be well founded; for the provision of this will is not merely that if land shall be given these almshouses shall be built, but he proposes to the committee a gift, and offers them the residue as a consideration for their furnishing land for his almshouses, and

taking the management of them and his affairs." It would take me too long to read the reasons for his coming to that conclusion. Lord Eldon, in affirming this judgment, makes this observation, (*9 Ves.* p. 544), which is of great importance, "Whatever were the decisions formerly, when charity in this court received more than fair consideration, it is now clearly established, and I am glad it has come back to some common sense, that unless the testator distinctly points to some land already in mortmain, the Court will understand him to mean that an interest in land is to be purchased, and the gift is not good." In *Johnston v. Swann* it was held, that a sum of money that was left to be invested, and the dividends applied in providing a school-house, was good, inasmuch as this bequest pointed to hiring the school-house, and not to putting any land in mortmain. And in the case of *Henshaw v. Atkinson*, which was decided five months before by the same Judge, a case which at first sight appears to have a very material and controlling effect upon this case, the testator states his wish that a blue-coat school shall be erected at Oldham, and a blind asylum at Manchester, and he gives 20,000*l.* in trust to trustees for the use of each of the charities, and directs that the monies shall not be applied in the purchase of lands, it being his expectation that other persons will, at their expense, purchase lands and buildings for those purposes; and then he gave all the remainder of his personal estate in trust for these charities. He afterwards, by his codicil, points out that he does not expect that any land whatever shall be given. The reasons given, in the printed report, by the Vice Chancellor for his decisions are not, to my mind, very full or satisfactory, but he seems to have decided it solely upon the ground that the second codicil shewed, that although originally the testator might have contemplated that land would be required for the purpose of the charities, yet afterwards, when he made his second codicil, he was of a different opinion; he, therefore, directed only the interest to be paid to the trustees for the maintenance and the support of the charities. This was commented upon by Sir Thomas Plumer, in the case

of *The Attorney General v. Hinzman*, which is only material so far as it relates to this point. In *The Attorney General v. Hinzman* there was a bequest, which would have been good as it stood originally, but being inseparably connected with one that was bad, the whole failed. Sir Thomas Plumer said, in giving his judgment, that "if the case could be brought up to that of *Henshaw v. Atkinson*, where there were negative words shewing the intention to be, what is contended for here, that the money should not be applied to purchase or keep in repair any real estate,—if it appeared, as it did then, that the bequest was intended to form an auxiliary fund, to go in aid of other donations, on the supposition that some other person would give a house, we should then be relieved from the difficulty." These observations shew that Sir Thomas Plumer did not consider that the decision in the case of *Henshaw v. Atkinson* established anything more than this proposition, namely, that a bequest in favour of a charity expressly directing that no portion of the bequest should be applied to land, but providing that if, at any future time, some person should give land to the charity, this bequest might be made available in erecting or repairing buildings on that land, was a good bequest, and one of which this Court would execute the trusts. Assuming that to be decided, it is very much in accordance with the supposed case suggested by Lord Eldon, in his judgment in *The Attorney General v. Parsons*, to which I have already referred. It would also be very near the present case, and yet it would be scarcely consistent with the rule laid down by Lord Eldon in *The Attorney General v. Davies*, which I have already read. If that rule is to be carried to its fullest extent, still it would not be conclusive of the present case, as some material distinctions exist between that case and the present. The bequest in *Henshaw v. Atkinson* was to take effect at all events, even though no land should be obtained; and no portion was to be applied in obtaining land, nor any direct encouragement held out for that purpose. But in the case before me, though it is directed that no portion of the bequest is to be

expended in the purchase of land, yet the bequest is to fail altogether unless land can be obtained from other persons to be put in mortmain, and it is expressly conditional on that event. This has never been decided to be good, and is, as I have already stated, opposed to the dicta which I have read of Lord Eldon.

In *Pritchard v. Arbouin* (28) Lord Lyndhurst stated the rule to be as laid down by Lord Eldon, namely, that "unless the testator distinctly pointed to some land which was already in mortmain," a bequest to build could not be sustained. *Giblett v. Hobson* is an important and material case, but principally for the observations contained in the judgment. The bequest was in these words:—"I give and bequeath to the Butchers' Charitable Institution the sum of 5,000*l.*, towards building almshouses to the said institution." This was held to be void, in conformity with the older cases, because it assumed that land must be purchased in order to enable the legacy to take effect. Though the decision in that case does not positively bear upon the present, some of the observations of Lord Brougham are very important and material as to the general policy of the act. He observes, that "placing land in mortmain is the object against which the act is pointed: but then money is equally forbidden to be devised for the purpose of buying land, because that would indirectly put the land purchased in mortmain. So charitable bequests, to be invested in real securities, are equally forbidden, in consequence of their tendency to bring land by foreclosure into the perpetual ownership of a corporate mortgagee." It appears, therefore, to have been Lord Brougham's opinion, that any bequest which directly tended to put land in mortmain would be a contravention of the statute.

Mather v. Scott is a most important case: the bequest there was, "As to all the residue of my property, I give the same to the chaplains of His Majesty's Dockyard at Devonport, and of the Royal Hospital of Stonehouse, in conjunction with my executors, with a request that

(28) 3 Russ. 456; s. c. 5 Law J. Rep. (N.S.) Chanc. 176.

they will be pleased to entreat the lord of the manor, either at Devonport or East Stonehouse, to grant a spot of ground suitable for the erection of as many decent dwellings or rooms." And then it provides how they are to be built. The testator evidently did not here contemplate the purchase of land. He does not expressly prohibit it, but he expects that the land can be obtained, to use the expression of Lord Eldon in *The Attorney General v. Parsons*, by begging from the lord of the manor. Lord Langdale went carefully through the authorities. He did not, as it appears to me, consider the casual expressions of Lord Eldon in *The Attorney General v. Parsons*, nor the case of *Henshaw v. Atkinson*, as conclusive on the case; but, on the contrary, having reviewed all the cases, he laid down the rule thus: that the bequest was void unless it pointed expressly to land already in mortmain. He then adds this passage, which, if it be the law, is decisive, in my opinion, of the present case. It is at the end of his judgment:—"It is said, that the direction of the trustees, to be pleased to entreat the lord to grant a piece of ground, does not bring this case within the principle; but I am of opinion that, if the testator intended to exclude a purchase, he has failed to express his intention, and that it is contrary to the policy of the Mortmain Act to permit testamentary gifts of money to be laid out on land as an inducement to draw land into mortmain. I am of opinion, upon the first point, that the language of the bequest is not sufficiently express; and, upon the second, that the charitable gift must fail."

There is but one further authority to which I intend to advert, but before I do so I pause to consider the effect of the cases to which I have already referred. The current of the later decisions at least has been express, bearing stronger and stronger, and concluding with the last, that whatever acts as a direct inducement to put land in mortmain is a void bequest; and, with the exception of the case of *Henshaw v. Atkinson*, on which I express no opinion as to whether that case would now receive the same decision as it did then, but which, as it appears to me, is

easily distinguishable, so as to be consistent with all the other decisions, though not possibly with all the dicta to be found in those cases, the rule to be deduced from these decisions, laying aside some casual expressions, appears to be as stated by Lord Eldon in the case of *The Attorney General v. Davies*, to which I have already referred, that unless the testator distinctly points to some land already in mortmain, the Court will understand him to mean that an interest in land is to be purchased, and that the gift is not good; and this rule is confirmed by Lord Lyndhurst and Lord Langdale. I am therefore of opinion that I could not declare this legacy to be good, without being prepared to state my opinion that the cases of *Mather v. Scott* and *The Attorney General v. Davies*, decided by Lord Langdale, Sir William Grant and Lord Eldon, were not law—at least to this extent, that the case of *Mather v. Scott* was not law; and with respect to the second case, that the dicta in it would not be considered law, unless very much restricted in respect of what is there laid down.

The difficulty in this case, however, is not, in my opinion, concluded, for there still remains one case on which I must make two or three observations. This is the case of *Dixon v. Butler*. This case, as it stands reported, is one of a very singular description. As it appears to me, no arguable question in reality existed. In that case, the bequest was expressly made good by the statute 43 Geo. 3. c. 108, which had been passed by the legislature precisely to meet bequests of that nature; because, in the opinion of the legislature and of conveyancers, such bequests would be invalid unless sanctioned by statute; and yet the counsel seem to have argued the case, and the Court seems to have reserved its judgment, in entire ignorance of the existence of that statute. The learned Judge accordingly, in giving judgment, having apparently observed the statute subsequently to the argument, states, at the close of his observations, that the statute 43 Geo. 3. c. 108. determines the question in the case. His previous observations, therefore, are rather to be considered as *obiter dicta*, than as actually deciding the point. They are, however, from the ability of that learned Judge, entitled to the greatest

weight. He states the principle of all the cases to be this : " But I apprehend, where a testator gives money to be laid out on land already purchased by others for such building, or on land to be given by a third person for that purpose, and the trustees have only authority to lay out the money in building on such land so procured, and cannot employ it in procuring such land, the bequest, if such an object appear clearly from the language used in the testator's will, is good. For then the word 'build' is not to be taken in its extended sense, as including the purchase of the land, but is by the language of the testator applied specially to the mere cost of erecting, as contradistinguished from procuring the land on which such erection is to take place." With the greatest respect and deference to the opinion of that learned Judge, I cannot say that I have come to the same conclusion as to the result of the previous cases; and I cannot reconcile the observations I have just read with what was decided by Lord Langdale in *Mather v. Scott*; with what was laid down by Lord Brougham in *Giblett v. Hobson*—neither of which cases appears to have been cited before the learned Baron; nor can I reconcile it with the principle laid down by Lord Eldon in *The Attorney General v. Davies*, nor by Lord Lyndhurst in *Pritchard v. Arbouin*.

I am therefore unable to reconcile this with the former authorities—I mean the later authorities—because the earlier decisions of Lord Hardwicke undoubtedly would support that view of the case.

If I agreed with it on principle, and dissented from the other authorities, I should even then feel great difficulty in resisting what appears to me to be so strong a body of decision by such learned Judges; but as I concur with the principle enunciated by those decisions, and as I believe that the only clear and intelligible mode of construing the Statute of Mortmain, so as to give it a consistent rule and a test easily applied by which to ascertain the validity of bequests of this nature, is by adopting the rule laid down in those authorities, I am compelled to follow them in that which I consider they have decided. In order to facilitate an appeal in this case, and in order that

the grounds of my decision may be as clear and distinct as I can make them, I state my opinion to be, that, according to the decided cases and the true construction of the 9 Geo. 2. c. 36, a bequest is void which tends directly to bring fresh land into mortmain; and also, that a bequest of money, to be expended in the erection or repair of buildings, is void also, unless the testator in his will expressly states his intention that the money so bequeathed is to be expended upon some land already in mortmain. This bequest, in my opinion, offends against both these principles. It is therefore, in my opinion, void; and I am prepared to make a declaration to that effect, and to give the consequential directions.

I cannot, however, conclude this case without observing that it is of great importance that the principle on which gifts to charities can be supported should be settled; and that, as this is a case, in which the property is of large amount, it would, in my opinion, be a very proper case to carry to a higher tribunal; and with this view, and to assist the parties against whom I decide, I have endeavoured to make the grounds of my decision as plain as possible. This is a matter, however, to be left to their discretion. I can only make the decree as I have already stated, and give the costs of all parties out of the estate.

L.C. }
1851. }
Feb. 10; } WARDE v. WARDE.
Aug. 5. }

*Baron and Feme—Solicitor and Client—
Production of Documents.*

The plaintiff being the wife of the principal defendant, filed a bill against her husband, alleging that by their marriage settlement a particular estate was charged with a jointure on her behalf; that she afterwards signed a deed exonerating that estate from the jointure, upon the understanding that it was to be charged on another estate, and that during the preparation of that deed the solicitor of the husband acted also on her behalf, and that she had no other legal advice. The

decree prayed was that the second estate might be charged with the jointure. The husband, by his answer, stated that the transaction relative to the release of the jointure was conducted by the solicitor solely on his behalf, and the solicitor stated that the plaintiff had no separate solicitor or counsel, and acted only under the opinion of the husband's legal advisers:—*Held*, (reversing the decision of the Court below) that the solicitor was to be deemed the solicitor of the wife as well as of the husband; and that the wife had a right to the inspection of all documents which came into the solicitor's possession in relation to and during that employment.

Semble—Where husband and wife have distinct interests, and the wife is induced, in dealing with those interests, to act under the advice of a solicitor employed and paid by the husband, the solicitor will be deemed to act as the solicitor both of the husband and wife.

This was the renewal of a motion, which had been refused by the Vice Chancellor Lord Cranworth, for the production of certain documents referred to in the answer of the defendants Charles Thomas Warde and Henry Bury his solicitor (1).

The case may be stated shortly as follows.

By deeds of October 1834, being the settlements executed previously to the marriage of the defendant C. T. Warde with the plaintiff, certain estates in Warwickshire were charged with a jointure of 1,000*l.* a-year in favour of the plaintiff, in case she should survive her husband; and a power was reserved to C. T. Warde to substitute other estates in lieu of the Warwickshire estates as a security for the jointure. On the 29th of November 1844, C. T. Warde contracted for the purchase of an estate in Bedfordshire, called the Luton Hoo estate, for the sum of 150,000*l.*; and by the terms of the contract, 5,000*l.* was to be paid down at the time of signing, and a further sum of 50,000*l.* on the 25th of March 1845; and in default of such payment of the last-mentioned sum, the sale was to be void, and the 5,000*l.* forfeited to the vendor. C. T. Warde being desirous of selling the Warwickshire estates

for the purpose of raising funds to pay for the Luton Hoo estate, the plaintiff released the Warwickshire estates from the jointure of 1,000*l.* a year, on C. T. Warde covenanting to secure the same upon such real estates as he should thereafter acquire. C. T. Warde afterwards sold the Warwickshire estates, and out of the proceeds of such sale, paid the 50,000*l.*, part of the purchase-money of the Luton Hoo estate, and was let into possession; but he declined to charge it with the jointure of 1,000*l.* The bill was filed by Mrs. Warde against her husband, the surviving trustee of the settlement, Henry Bury (who was the solicitor of C. T. Warde in the transaction) and others, and it charged that at the time of the execution of the deed by which the Warwickshire estates were released from the jointure, it was understood by all parties that the Luton Hoo estate was to be charged with the same, and that on the faith of that being done, the plaintiff had executed and acknowledged the deed: and that the cases laid before counsel and the instructions for the preparation of the deeds, and the correspondence would, if produced, evidence the fact; and that the plaintiff entered into the arrangements and executed the release under the advice of the solicitor and counsel of C. T. Warde, and without having any other legal advice. The bill then charged that the defendants or some or one of them had in their possession or power, or in the possession or power of their solicitors or agents, divers deeds and cases for the opinion of counsel, and instructions to counsel for the preparation and settlement of deeds, letters and other papers relating to the matters aforesaid, or some or one of them, by which the truth thereof would appear; and that they ought to produce the same. The bill prayed a specific performance of the contract to charge the Luton Hoo estate with the jointure of 1,000*l.*

The defendant, C. T. Warde, by his answer, admitted that the release of the Warwickshire estates from the jointure was made for facilitating the sale of the same, and for enabling him to complete the purchase of the Luton Hoo estate, but that there was no contract or understanding that the Luton Hoo estate should be charged with the jointure; and he ad-

(1) 20 Law J. Rep. (N.S.) Chanc. 36.

mitted that previously to the execution of the release of the 20th of September 1845, divers cases for the opinion of counsel, and instructions for the preparation of the necessary deeds, were laid before counsel, and that considerable correspondence relating thereto did pass between the defendant and his legal advisers; but he insisted that he was not bound to produce the same, having reference to the matters in issue in the cause; and he admitted that the plaintiff executed the said release under the advice of the solicitors and counsel of the defendant without having any other legal adviser. The second schedule to the answer contained a list of cases for the opinion of counsel, and the opinions thereon, and letters passing between the defendant and his solicitors relating to the matters at issue in this suit; and the second part of the same schedule consisted of cases, opinions and letters respectively, stated, given and written, after the dispute between the plaintiff and the defendant had arisen; and the defendant submitted that he ought not to be compelled to produce any of the particulars contained in the said second schedule.

The defendant, H. Bury, by his answer admitted that the plaintiff had no separate solicitor or counsel; but he insisted that the documents in question came into his hands as solicitor of Mr. Warde alone, and that he could not without a violation of professional confidence disclose the contents of the same.

Mr. Stuart and *Mr. Dickinson*, in support of the motion, contended that, previously to the execution of the release, no dispute had arisen between the plaintiff and her husband, but there was a community of interest; and that the opinions were taken, and the instructions were given on behalf of both parties; and that the plaintiff, having acted throughout under the advice of her husband's solicitor, without having any separate legal advice, must be taken to have a joint interest with her husband in the documents in question; and they referred to

Clagett v. Phillips, 2 You. & C. C. C. 82.

Hughes v. Biddulph, 4 Russ. 190.

Flight v. Robinson, 8 Beav. 22; s. c. 13 Law J. Rep. (n.s.) Chanc. 425.

Blenkinsopp v. Blenkinsopp, 2 Phil. 607; s. c. 17 Law J. Rep. (n.s.) Chanc. 343.

Mr. Rolt and *Mr. Erskine*, contra.—These documents are protected, for they arose from the subject-matter of dispute out of which litigation subsequently ensued, though not at the time contemplated—*Lord Walsingham v. Goodricke* (2). The case of *Flight v. Robinson* is inconsistent with the case of *Herring v. Cloberry* (3). It does not necessarily follow that because the plaintiff employed no other solicitor, the defendant's solicitor was her solicitor; and the defendant Bury, by his answer, says that he got possession of the documents as the confidential adviser of the husband alone, and the plaintiff must take that statement as she finds it.

Perry v. Smith, 9 Mee. & W. 681; s. c. 11 Law J. Rep. (n.s.) Exch. 281.

Doe d. Peter v. Watkins, 3 Bing. N.C. 421; s. c. 6 Law J. Rep. (n.s.) C.P. 107.

Greenough v. Gaskell, 1 Myl. & K. 98.

Mr. Messiter appeared for the defendant, H. Bury.

Mr. Stuart replied.

August 5, 1851.—The LORD CHANCELLOR.—This is an appeal against an order made by the Vice Chancellor Lord Cranworth, dismissing an application made on behalf of the plaintiff for an order directing the defendants Warde and Bury, to produce for the inspection of the plaintiff, certain written documents referred to in the pleadings. The facts of the case, so far as they are relevant to this appeal, may be shortly stated. The plaintiff Marianne Warde is the wife of the defendant Mr. Warde. The marriage took place in 1834. A settlement was made previous to the marriage, dated the 18th of October 1834, by which certain estates in Warwickshire called the Clopton Hall estates, were charged, amongst other sums, with a jointure of 1,000*l.* a-year in favour of Mrs. Warde, in the event of her surviving her intended husband. The trustees of that settlement were the defen-

(2) 3 Hare, 122.

(3) 1 Ph. 91; s. c. 11 Law J. Rep. (n.s.) Chanc. 149.

dants Lawes and Cottle, and two other persons since dead. Mr. Cottle retired from the trust, and the defendant Bury was substituted in his place. The settlement contained the usual powers, allowing, under certain restrictions, a substitution of the security for a jointure. In the year 1845, the defendant contracted to purchase a considerable estate in Bedfordshire, called the Luton Hoo estate, and he became desirous to sell the Clopton Hall estate, in order to apply the proceeds in payment for the Bedfordshire estate; and to effect that purpose, it was necessary that the Clopton Hall estate should be discharged of the jointure, so that the purchaser should not be responsible for the validity of the substituted charge, and the necessary deeds were executed to release the Clopton Hall estate. It was alleged, on the part of the plaintiff, that she was induced, at the request of her husband, the defendant, and upon the advice of the defendant Bury, who she insists acted as the solicitor for her and her husband, to consent to the release of that estate, upon the understanding, that the newly purchased estate, or some other estate, should be properly charged with the payment of the jointure.

Amongst the deeds executed in relation to the transaction was a deed of covenant by which Mr. Warde contracted to grant and secure out of, or otherwise well and sufficiently charge, a competent and sufficient part of such estate as he should thereafter acquire, one annuity or yearly rent-charge for 1,000*l.* for the benefit of his wife, the plaintiff, in case she should survive him, with like powers as in the former settlement. The purchase of the Luton Hoo estate has not yet been completed, but a considerable part of the purchase-money has been paid, and the defendant is in possession of the estate, and has since entered into a contract for the sale of the estate. Differences arose between Mr. and Mrs. Warde which led to a separation, and Mr. Warde has refused to charge either the Luton Hoo estate or any other estate with the jointure. The present bill is filed by Mrs. Warde, praying that her husband may be decreed to make such charge. The defendant insists that he never did agree or contract to charge a jointure upon any estate of his, but admits

he intended to do so, and that the plaintiff, Mrs. Warde, joined in the release of the Clopton Hall estate, with the expectation merely that the defendant would secure the jointure by such a charge. Upon the coming in of the answers of Mr. Warde and Mr. Bury, containing admissions of the possession by Bury of certain documents, to which I shall presently advert, application was made to the Court for an order for the defendants to bring in those documents. That application was resisted on the ground that the documents referred to consisted of cases and opinions of counsel, drafts of deeds and letters, which referred to the matters in issue in the cause, and that some of them were given and written after the dispute had arisen, and in anticipation of and in reference to the present suit. The application for production was refused, and the present application is against that order. With respect to the second class of documents, no question can arise; they fall within a recognized and ordinary principle of protection, that the plaintiff is not entitled to such inspection.

So far as concerns the former class of documents, assuming that they would have been within the ordinary rule exempting them from inspection, as decided by the Vice Chancellor, if the plaintiff and defendant had been strangers to each other, I think the circumstances of the present case deprive them of such protection. The law excludes all presumption of fraud; and there is no evidence in this case to shew that this transaction was entered into or conducted on the part of Mr. Warde with any intention to deprive his wife of all security by inducing her to release the charge of the Clopton Hall estate, upon the pretence that he was only desirous of carrying into effect the provision in the settlement relating to the substitution of the security. I think the facts demonstrate that he entered into the transaction with perfect *bona fides*, and I think the *bona fides* involved in it a high moral obligation on Mr. Warde's part, to see that his wife was well advised and protected in such a transaction. This case may be important in its consequences to married women who are living with their husbands upon terms of affection and confidence, and most likely to act upon the representation and

advice of their husband's solicitor in dealing with their own property and legal rights, and who must often be precluded from resorting to other advice without a breach of domestic harmony and peace. Wherever the husband and wife have distinct interests, and the wife is induced in dealing with that interest to act under the advice of an attorney employed and paid by the husband, I shall feel bound to hold that the attorney must be deemed to act as the attorney of both husband and wife, and that each of them would have a right to call for the production and full inspection of all documents that should come into the possession of the attorney during such employment relating to transactions and to the advice so given by him to the wife. But for the reasons that will appear, my decision in the present case will not rest upon any such general principle.

The transactions out of which this litigation arises, consist of two parts, but the accomplishment of each of these parts was, equally with others, within the object and intention of the parties. The one object was to release the Clopton Hall estate, and the other was to provide for the substitution of another security. Mr. Bury was the attorney employed by the husband to effect both purposes, and to have the duty of advising the wife, and protecting her interests, which were confided to him; and I think Mr. Bury was bound to act as the professional attorney of Mrs. Warde, as distinctly and independently as if he had not been concerned for the husband. I cannot entertain the idea that after Mrs. Warde had been induced to deal with her pecuniary interests, on the reliance of the advice of the attorney employed by her husband for the purpose of giving that advice, she is to be told that the attorney is not to be considered as having advised or acted on her behalf to the extent of giving her a right to inquire into and inspect the documents which were the foundation of the advice so given to her, and upon which she was so induced to act. I cannot consider the husband and wife as strangers to each other in this transaction, but as united in seeking to obtain one common object and in effecting one common purpose. The wife had no wish to change the security; but she evidently, upon the

request of her husband, did unite with him in endeavouring to release one estate from her jointure, and to obtain an effectual substituted charge upon some other estate. I believe Mr. Warde acted at that time with the same identical purpose, and Mr. Bury was to my mind even employed to the extent to act for and on behalf of both in effecting such common purpose, and in doing so to protect the interest of both; and I therefore think the case is brought to that point that the learned Judge below thought would render that portion of the documents subject to inspection, which refer to the matters in issue, but which existed before any dispute arose. I come, therefore, to the distinct conclusion that Mr. Bury was the attorney of both husband and wife, and that each party had an equal right with the other to inspect the documents that came into the possession of Mr. Bury in relation to his employment. I will refer to the passages in the answer that lead me to the conclusion I have stated. The answer, after setting forth the general circumstances of the case, admits that under the circumstances stated in the bill, it was recommended by the legal advisers of the defendant, and was assented to by the plaintiff and her trustee, that the plaintiff should release the jointure; and the defendant believed that the plaintiff, as well as the defendant, executed the release in the expectation of the Luton Hoo estate, or a sufficient or competent part thereof, being voluntarily charged with the jointure. It will be observed that the answer contains no denial whatever that Mr. Bury did act as the attorney as well on the behalf and was employed to protect the interest of Mrs. Warde, as to protect the interest of Mr. Warde; and the fact of Mrs. Warde having no other legal adviser to protect her very important interests, which she was, at the request and with the recommendation of the husband, dealing with, can, I think, be accounted for on no other ground; but I am of opinion that the statement of the defendant amounts to an admission of the fact, and establishes for all the purposes of the present question that Mr. Bury must be considered as having conducted the transaction as the attorney and on the behalf of Mrs. Warde, as well as on the part of the defendant, and that

the plaintiff is entitled to the inspection of the documents which came into the possession of Mr. Bury, and which are connected with the advice he gave to Mrs. Warde. The only sentence which can be found which even by implication denies that Bury acted as such attorney, is contained in the affidavit filed by Mr. Warde, in order to explain an admission in his answer as to the documents in Mr. Bury's possession. In that affidavit Mr. Warde states that the several documents, which he enumerates, were laid before and obtained from counsel on his behalf, and by his direction, and not on the behalf of and by the direction of any other person. This statement, standing alone, would seem to be a denial that Mr. Bury acted on the behalf of Mrs. Warde; but whatever construction Mr. Warde may put upon the fact, I think that the other distinct statement by him that Mr. Bury, under the circumstances to which I have adverted, acted as the professional adviser of Mrs. Warde, connecting, as it does, that advice with the documents referred to, establishes her right to the inspection.

For these reasons, I am of opinion that the documents referred to in the first part of the second schedule, and which existed before the dispute commenced, ought to be produced.

PARKER, V.C. }
Nov. 11. } GROVE v. YOUNG.

Costs—Suits for establishing the Will of a Testator—Heir-at-Law.

A testator devised his real estates to A, and died, leaving B. his heir-at-law. B. brought an action of ejectment against A, in respect of a part of the testator's real estate, on the grounds of the incompetency of the testator, and fraud on the part of A. The action was tried, and failed, and a motion for a new trial was refused. A bill was then filed by A. against B. for the purpose of establishing the will. B. in his answer, set up the incompetency of the testator, and fraud on the part of the devisee, and entered into a good deal of evidence in support of his case. At the hearing, issues were directed to try the validity of the will. The issues were tried. B. at

the trial merely cross-examined A.'s witnesses, and did not enter into any independent evidence. A verdict was given in support of the will. On the coming on again of the cause on the question of the costs of the suit and issues,—Held, that B. was not entitled to any of the costs of the suit or issues, but was bound to pay so much of the costs of the suit and issues as were occasioned by his raising the above-mentioned questions of incompetency and fraud.

A testator, by his will, dated in 1844, after leaving some small legacies to his relations, devised and bequeathed the greater part of his property to the plaintiffs, upon certain trusts for the benefit of the solicitor who prepared the will, and his children. The will was made in the testator's last illness, and he died a short time after it was executed.

The trustees entered into a contract with Mr. Bastard for a sale of a part of the testator's real estate. After the contract was entered into, Mr. Young, the heir-at-law of the testator, brought an action of ejectment against the trustees in respect of this property, on the ground that the will of the testator had been obtained fraudulently and by undue influence. The action was tried, in July 1846, and a verdict was given for the trustees, and a motion for a new trial of the action, made in June 1847, was refused.

Mr. Bastard, declining to complete the contract, on the ground that the will was open to suspicion, a bill was filed against him for a specific performance of the contract. The Master, on the usual reference, found that a good title could be made to the property. Exceptions taken to the report by Mr. Bastard were overruled by Knight Bruce, V.C., and a decree was pronounced for specific performance. On appeal made by Mr. Bastard from that decision, Lord Cottenham thought that a bill ought to be filed by the vendors against the heir-at-law for the purpose of establishing the will. A part of his Lordship's judgment was as follows:—"In that way, the question will be speedily and conclusively determined. If, as soon as the bill is filed, the heir puts in an answer, abandoning his claim, the cloud will be removed at once, and the question

set at rest for ever. If, on the other hand, he insists on an issue, it is much more in accordance with the practice of this Court that that question should be tried between the heir and the devisee than between the heir and the purchaser, after he has paid his purchase-money" (1).

In pursuance of this decree, a bill was filed by the trustees against Mr. Young, the heir-at-law, in June 1848. Mr. Young, by his answer, insisted that the testator had been incompetent to make a will, and that the will had been obtained by fraud and undue influence, and entered into a great deal of evidence in support of his case. The cause came on to be heard, before Knight Bruce, V.C., and issues were directed to try the validity of the will. These issues came on to be tried at the Summer Assizes in 1851. At the trial, witnesses were examined by the trustees in support of the will, and cross-examined by Mr. Young. Mr. Young, however, did not examine any witnesses of his own. A verdict was given in favour of the will.

The cause now came on for further directions. The only question was as to the costs of the suit for establishing the will and the issues.

The evidence entered into by Mr. Young in the cause, was mentioned by the counsel for both parties in the discussion, but none of it was read. The counsel for the plaintiffs described it as containing very gross and scandalous charges against the solicitor, in whose favour the will was made. The counsel for the defendant described it as containing circumstances from which, at least, very grave suspicions of unfair dealing would arise.

Mr. Malins and Mr. Rasch, for the plaintiffs, read the following passage from *Berney v. Eyre* (2), "If a devisee brings a bill, and the heir-at-law does nothing more than cross-examine the witnesses who are produced to confirm the will, he is entitled to his costs. If he examines witnesses to encounter the will, then he shall not have his costs. If he sets up insanity or any other disability against the person who made the will, and fails, he

shall not have his costs. But it must be a very strong case which will induce the Court to give the costs against him, as spoliation or secreting the will." They also referred to *White v. Wilson* (3), *Smith v. Dearmer* (4) and *Tucker v. Sanger* (5). There are, then, these rules to be adapted to three classes of cases. First, if a bill for establishing a will is filed against the heir-at-law, and the heir merely puts the devisee to the proof of his title, and cross-examines the devisee's witnesses, he is entitled to his costs. Secondly, if such a bill is filed, and the heir, by his answer and by evidence, sets up a case of incompetency of the testator, or fraud on the part of the devisee, and fails in it, he shall not be entitled to costs, but shall not pay them. Thirdly, if such a bill is filed, and the heir sets up such a case, and also, in the conduct of his case conducts himself vexatiously, litigiously, and oppressively, he will be made to pay costs. Taking all the circumstances of this case into consideration,—the action that was tried before, in which everything that could be urged against the will had been pressed, and failed—the plaintiffs being compelled by the Court to file a bill to establish the will—the evidence adduced by the defendant, containing as it does gross charges against the devisee, which, at the trial of the action, he did not attempt to substantiate by independent evidence—all these bring the case into the third class, and the heir ought to be held to pay costs. At any rate, he ought not to be allowed any costs.

Mr. Bacon and Mr. Beales read the following passage from *Webb v. Claverton* (6), "Where an heir is made a defendant, even though he should insist upon the will's being fraudulent, and an issue at law is directed to try the fraud, yet this Court will not give costs against him, though he fails, but very often allows the heir his costs," and referred to *Wright v. Wright* (7). They then contended that the position that the heir was to pay costs was not established by the cases that had been cited by the plaintiffs. In

(1) This case, under the title of *Grove v. Bastard*, is reported, 2 Phill. 619; and 17 Law J. Rep. (N.S.) Chanc. 351.

(2) 3 Atk. 387.

(3) 13 Vea. 87.

(4) 3 You. & J. 278.

(5) 13 Price, 607; 6 c. M'Cle. & Y. 426.

(6) 2 Atk. 428.

(7) 5 Sim. 449.

the evidence adduced by the heir in the cause, there were circumstances from which unfair dealing might be inferred, and the testator's heir-at-law or his family, smarting under the disappointment of seeing his property go from them to strangers, and having reason to believe that there had been fraud and improper conduct, were entitled to a good deal of indulgence.

PARKER, V.C.—There is no doubt as to the general rules respecting the costs of establishing a will against an heir-at-law. The devisee coming to this Court to have a will established against the heir, comes for his own benefit, and the heir is entitled to put the devisee to the proof of his title, and, in an ordinary case, to have his costs of such a proceeding. The Court will not treat the heir-at-law as bound to litigate questions of that kind with his hands tied, and will consider him at liberty to bring any matter before the Court to determine the validity of the will. But, as in any other case, the heir-at-law, if he is guilty of litigious and vexatious conduct, must suffer the consequences of it. It would be dangerous to lay down that the heir-at-law, whatever his conduct may be, will be entitled to costs. These are the general principles; but the application of them to particular cases must be in the discretion of the Court.

The peculiar feature of the present case is this:—before the present bill was filed, the heir-at-law had brought an action against the devisee, disputing the validity of the will, and had then an opportunity of bringing forward everything against the will. In this action he failed. The effect of this was, not to preclude him from again disputing the will, but only to determine whether he was entitled to the property in dispute in that action. The devisee has afterwards occasion to establish the will. He had no right to ask the heir-at-law to release his claims, and he is obliged to come to this Court to file a bill to establish it. In this suit, the heir-at-law had certainly a perfect right to put the devisee to the proof of his title, but the circumstance that he had had the advantage of a judicial investigation before that time, must materially weigh with the Court in considering the question of costs, and

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induce the Court to look with much less indulgence on the line of defence adopted by him than in ordinary cases. The bill being filed, I find that the heir-at-law sets up the incompetency of the testator, and fraud, and improper practices on the part of the devisee. On these points he goes into evidence. Then the cause comes before the Court, and, on the hearing, issues are directed to decide the validity of the will. The parties go to trial upon those issues. The devisee examines witnesses in support of the will. The heir cross-examines witnesses, but does not examine any witnesses for himself. The result is a verdict for the devisee. Under the circumstances of the case, I shall refuse the heir his costs of the suit, including the costs of the issues, and shall make him pay the costs of so much of the suit and action as have been occasioned by the questions of fraud and improper practice which have been raised by his answer, and which he endeavoured to support by evidence at the hearing of the cause. The decree will be this—No costs as regards the general result of the suit and the issues. The defendant to pay the costs of so much of the suit and issues as were caused by raising the question by the answer, and going into evidence. The costs of this hearing to be treated as costs in the cause.

TURNER, V.C. { CALDWELL AND OTHERS v.
Dec. 8, 9, 20. { VAN VLISSENGEN.
SAME v. VERBECK.
SAME v. ROLFE.

*Injunction — Patent — Infringement —
Foreigners—Jurisdiction.*

Upon the plaintiffs entering into the usual undertaking to bring actions against the defendants, an injunction was granted to restrain foreign owners of foreign vessels whilst in this country from infringing a patent within the limits of the grant, unless and until they obtained proper licences from the owners of the patent, where the invalidity of the patent had been bonâ fide twice unsuccessfully contested at law in an action brought by the patentee, and once in an action, against him and the assignees of the patent, under a writ

of sci. fa. to repeal the grant of the letters patent.

These were three several motions on the part of the plaintiffs in the above causes for injunctions to restrain the defendants from using or exercising within the limits of that part of the United Kingdom called England, the dominion of Wales and the town of Berwick-upon-Tweed, including the seas, rivers and havens thereof, the invention of James Lowe, or any mode or process for the propulsion of vessels merely colourably differing therefrom; and from using or employing, or permitting to be used and employed within the limits aforesaid any vessel fitted or provided with a propeller constructed and applied without the licence of the plaintiffs, according to the form and mode respectively described in the specification of James Lowe's patent, or merely colourably differing therefrom; and particularly from permitting certain vessels mentioned in the several notices of motion, or any other vessel or vessels within the limits aforesaid under the command or controul of the defendants, and fitted or provided with a propeller or propellers constructed and applied without the licence of the plaintiffs, according to the form and mode aforesaid, or merely colourably differing therefrom, to proceed on any voyage or voyages.

The plaintiffs, Charles Andrew Caldwell, Joshua Procktor Brown Westhead, Webster Flockton, Magnus Count de Rosen and Frederick Collyer Christy, were the assignees, under certain indentures of the 14th of October 1846 and the 8th of February 1850, of Lowe's patent mentioned in the above notices of motion, and granted to him by letters patent of the 24th of March 1838, for the term of fourteen years, and of any extension to be granted of the patent. The nature of the patent is described in the judgment below; and it was stated that an extension of it had been duly granted.

It appeared from an affidavit of one of the plaintiffs that in November 1843 J. Lowe, the patentee, brought an action against John Penn, of the firm of Penn & Sons, engineers, for infringement of the patent, and obtained a verdict, with 40*s.* damages. This action was again tried, with

a like result, before Lord Chief Justice Denman and a special jury. A rule for a new trial was obtained, but judgment was subsequently entered up for the plaintiff by consent without another trial. A writ of *sci. fa.* was afterwards issued against the owners of the patent and the patentee, on the prosecution of Thomas Henry Maudslay, to repeal the letters patent. The action on the *sci. fa.* came on for trial in February 1850, in the Court of Exchequer, before the Lord Chief Baron, and a verdict of not guilty upon all the issues was by consent taken for the defendants, and an agreement to the following effect entered into, viz., the engineers (subsequently named) to pay all money received or to be received for propellers made or contracted for up to this time; the account to be furnished and settled by the 1st of May; to have licence to make propellers at 1*l.* per horse during Lowe's patent, and 10*s.* per horse during Smith's extension; parties left to their respective rights after that; other engineers to come in on the same terms on or before the 1st of May; *Flockton v. Miller* to be discontinued, each party paying his own costs; *Lowe v. Penn*, judgment for the plaintiff, each party paying his own costs. The engineers, parties to this arrangement are, Maudslay (Maudslay & Co.), Penn (Messrs. Penn & Son), Rennie (Messrs. Rennie & Co.), Seaward (Messrs. Seaward & Co.), and Miller & Ravenhill; Messrs. Caldwell, Newberry & Flockton to be parties on behalf of the representatives of the under-mentioned patents, viz., Smith's, Woodcroft's, Lowe's, Ericsson's and Blaxland's; any misunderstanding to be referred to the Attorney General, Sir John Jervis, (counsel for the defendants) and Sir F. Thesiger (counsel for the plaintiffs).

The affidavit stated that all those engineers (except two firms of them, who had only paid a portion on account) duly paid the sums and royalties agreed upon, and which amounted to 3,898*l.*; that eleven suits for injunctions to restrain infringement of the patent had been stayed at the request of the respective defendants, on payment by them of the royalties required and costs of suit; that the profits of the patent were very lucrative; and it enumerated other engineers and eleven steam navigation

companies who had submitted to pay royalties to the plaintiffs. The patent was also stated to be extensively used in the royal navy.

The several vessels particularly referred to in the notices of motion in the above-mentioned causes were three foreign vessels, viz., the *Burgemeester Hindekoper* and the *Gouverneur van Ewyck*, both belonging to a foreign company called the Amsterdam Steam Screw Schooner Company, and trading between Amsterdam and London, and the *Syemoord* belonging to a foreign company called the Netherlands Steam-Packet Company, and trading between Rotterdam and London. The defendant in the first cause, Paul Van Vliessengen, was the managing director of the first-mentioned company; the defendants in the second cause were Verbeck & Stuit, the former the alleged owner, and the latter the master or captain of the *Gouverneur Van Ewyck*; and Rolfe, the defendant in the third cause, had been the master or captain of the *Syemoord*, but had ceased to be so when his answer was filed.

Substituted service of the notices of motion were made by leave of the Court upon the London agents of the Amsterdam company, and the solicitors in London of the Netherlands company.

Mr. Rolfe and *Mr. Amphlett* appeared for the plaintiffs;

The Solicitor General and *Mr. Baggallay*, for the defendant in the first cause;

Mr. Eddis, for the defendants in the second cause; and

Mr. Bacon and *Mr. Miller*, for the defendant in the third cause.

The grounds of defence and the principal argument of the defendants' counsel are sufficiently noticed in the judgment.

The following cases were cited in support of the motions :—

Boulton v. Bull, 3 Ves. 140; s. c. 2 H. Black. 463.

Harmer v. Plane, 14 Ves. 130; s. c. (nom. *Harmer v. Playne*) 11 East, 101.

Stevens v. Keating, 2 Phill. 333.

Losh v. Hague, Webster's Pat. Cas. 200.

The following cases and authorities were referred to by the defendants' counsel :—

Hills v. the University of Oxford, 1 Vern. 275.

The Universities of Oxford and Cambridge v. Richardson, 6 Ves. 689.

Hill v. Thompson, 3 Mer. 622.

The King v. Wheeler, 2 B. & Ald. 345.

Saunders v. Aston, 3 B. & Ad. 881; s. c. 1 Law J. Rep. (N.S.) K.B. 265; 1 Hindm. Pat. 163.

Minter v. Williams, 4 Ad. & E. 251; s. c. 5 Law J. Rep. (N.S.) K.B. 60; 5 Nev. & M. 647.

Collard v. Allison, 4 Myl. & Cr. 487.

Brown v. Annandale, Webster's Patent Cases, 433.

Roebuck v. Stirling, Ibid. 573.

Wilson v. Tindal, Ibid. 730.

7 Bythewood & Jarman's Conveyancing, 'Patent and Copyright,' 511. (3rd edit.)

Hindmarch on Patents, pp. 28 and 385.

Treaty with Holland (27th of October 1837.)

5 Hertslet's Commercial Treaties, 338 (1820-44.)

Dec. 20.—TURNER, V.C.—after stating the effect, as above, of the notices of motion, said, — The plaintiffs in these causes are the assignees of a patent granted to James Lowe in the year 1838, for a mode of propelling vessels by means of one or more curved blades set or affixed on a revolving shaft below the water line of the vessel and running from stem to stern of the vessel. The defendants in the first two causes are owners of vessels trading between Holland and this country, and the defendant in the third cause was the captain of a vessel engaged in the same trade, but it appears by his answer that he is not now captain of the vessel.

Upon the argument of these motions, and particularly of the motion in the first above-mentioned cause, it was insisted on the part of the defendants that the injunction ought not to be granted; first, because the patent was invalid for want of novelty, and for several insufficiencies and other imperfections in the specifications; secondly, because there had been no such enjoyment under the patent as would war-

rant the interference of this Court before the validity of the patent was established at law; and thirdly, because the plaintiffs and those under whom they claim have, as it is said, acquiesced in the use of the invention by the defendants; but, on examining the affidavits on these points I think that the defendants have not established such a case of acquiescence as will preclude the interference of this Court. They have, I think, made out such a case as renders it incumbent on the Court to put the plaintiffs upon an undertaking to bring an action (the interference of the Court in cases of this nature being founded upon the legal right); but I do not think the case they have made out is such as would justify the Court in withholding its interference until the legal right has been tried.

The question whether the Court will interfere to protect a patentee before he has established his right at law, or will suspend its interference until the right at law has been established, appears to me to depend upon very simple principles. It is part of the duty of this Court to protect property pending litigation; but when it is called upon to exercise that duty the Court requires some proof of title in the party who calls for its interference. In the case of a new patent this proof is wanting. The public whose interests are affected by the patent have had no opportunity of contesting the validity of the patentee's title, and the Court therefore refuses to interfere until his right has been established at law; but in a case where there has been long enjoyment under the patent (the enjoyment of course including user) the public have had the opportunity of contesting the patent, and the fact of their not having done so successfully affords at least *prima facie* evidence that the title of the patentee is good, and the Court, therefore, interferes before the right is established at law. In the present case, I think that the plaintiffs have proved such a case of enjoyment under the patent and of their title having been maintained at law against the several attempts which have been made to impeach it that the Court is bound at once to interfere for their protection unless there are other sufficient grounds for withholding its interference.

It was insisted, on the part of the defendants, that there was in each of these cases a sufficient ground for the interference of the Court being withheld. In the first place the ground is thus stated in the affidavit of Izebbe Swart, of Amsterdam:— He says, in his affidavit, that he is the master of the ship called the *Burgemeester Hindekoper*, in the pleadings of this cause named, and that he has been master of the said ship since the 23rd of March 1850; that he was born in the kingdom of Holland; that the vessel belongs to a company formed in Holland in the year 1848, and called the Amsterdam Screw Schooner Company; that the company consists of a great number of shareholders or partners, all, he believes, natives and subjects of Holland, and residing in Holland, and that no Englishman has, as he believes, any share or interest whatever in the company or in the ship, property or effects thereof; that the said company was established for the purpose of trading with steam ships between Amsterdam and other countries; that for the purposes of the company and the trade for which the same was established, a vessel named the *Burgemeester Hindekoper* was, in the year 1849, built and fitted up with the same propelling power with that which is now and always has been used for the propulsion of the said vessel, by the defendant (Van Vlissingen) and workmen in his employ at Amsterdam, for and on behalf and by order of the company; that the vessel was *bond fide* built and fitted up with her steam engines and propelling power in the kingdom of Holland, by and for natives and subjects of that kingdom, and that no Englishman was in any way employed in building and fitting up the vessel; that it was so built and fitted up according to the most approved course of ship building then in use in Holland; that all the machinery and propelling power with which it was fitted up, or which have since been used for the purposes of the vessel, were manufactured and made up by the defendant at Amsterdam; that some time before the vessel was built and fitted, the same propelling power with that used for the vessel had been openly used and exercised in Holland; that the deponent is and always has been altogether ignorant and unacquainted with

James Lowe and with his alleged invention for certain modes of propelling vessels, and also with the patent alleged to have been obtained by him in respect of such alleged invention; that he verily believes that the ship was built and fitted up in ignorance of any such patent, and according to the most approved principles of ship-building and maritime machinery then in use in Holland; that no patent has been granted, or, as he is informed and believes, applied for in Holland, for or in respect of such alleged invention; that it is competent for English subjects who may have discovered any new or valuable invention to apply for and obtain a patent for the sole use of the same in Holland, and such patents are frequently applied for and obtained; that the said ship sails, and is entitled to sail, under and to carry the national flag of Holland, and is entitled to trade with and to enter the ports of all countries at peace with Holland, and to depart therefrom at pleasure; that the crew of the vessel are all natives of Holland; that before the vessel was built and fitted up with the propelling power, and before such propelling power was used on board the vessel, another steam ship had been built and fitted up by the defendant, for and by order of the company, and was built and fitted up in the same manner and with precisely the same propelling power as the *Burgemeester Hindekoper*; that he was mate of the vessel, and it had (before the *Burgemeester Hindekoper* was fitted up with such propelling power as aforesaid) traded between Amsterdam and London, and had made many voyages between those respective ports with such propelling power as aforesaid; that until the month of September last he never heard that the plaintiffs or James Lowe, or any other person, did or could raise any objection to the use of such propelling power as that now in use in the *Burgemeester Hindekoper*, or make any claim in respect thereof; and that he believes that previously to the said month of September last no objection or claim was made by the plaintiffs or James Lowe or any other person in respect of the said vessels or either of them, although he believes that the plaintiffs and James Lowe must have well known that the said vessels had, for upwards of two years and a half,

been from time to time trading to and from London; that various other steam ships have been built and fitted up in Holland, by and on behalf of natives and subjects of that kingdom, upon the same principle and with the same propelling power as the said *Burgemeester Hindekoper*, and that very large sums of money have been expended in building and fitting up such vessels, and that the same have respectively been built and fitted up in ignorance of the alleged patent; that a very large proportion of the trade of Holland consists in the export of articles for consumption from Holland to England, and the importation of goods and merchandise from England to Holland; that such trade is now, and has been for some time past, mainly conducted by and by means of steam ships, built and fitted up in the same manner and with the same propelling power as the *Burgemeester Hindekoper*; that such trade is, in his judgment and belief, of great advantage to both the said countries, and would be greatly prejudiced if such steam ships were prevented trading between them; that large sums of money have been expended by the company in the building and fitting up of the *Burgemeester Hindekoper*, and that very serious loss would be sustained by the company if the sailing of the *Burgemeester Hindekoper* were to be restrained by the injunction of this Court.

I think it right to observe that I never read an affidavit in this court more concise and more properly stating the case on the part of a defendant, and I very much wish that all the affidavits filed in this court were as much directed to the real point at issue as this has been.

In the next case, (*Caldwell v. Verbeck*,) I find no ground assigned beyond what is stated in the affidavit of the defendant Stuit, which merely states that he is master of the vessel, and does not enter upon the merits of the case.

In the third case, (*Caldwell v. Rolfe*,) the answer of the defendant Rolfe states his case as follows:—That the vessel in the said bill mentioned, called the *Syemoord*, has been employed by the Netherlands Steam-Packet Company for several months past, in steaming between Rotterdam and London; that this vessel was fitted

up or provided with a screw propeller; that the propeller was and is composed of two blades only, each being a portion of a curve, and that the same is set or affixed on a revolving shaft below the water-line, and running from stem to stern of the vessel; that he believes that the propeller used in the vessel was made in Holland, and designed and invented by the maker thereof, without having seen any propeller alleged to have been invented by J. Lowe, or any drawing or specification thereof; and he denies that he is the captain of the vessel *Syemoord*, or that he has any management or controul of the vessel, or that the management is under his command; that he does not threaten or intend to take the vessel on her voyage between Rotterdam and London; that he resides at Rotterdam, in Holland, where he has always resided, and that he has not used any domicile in any part of the kingdom of Great Britain; that the Netherlands Steam-Packet Company is a registered company according to the laws of Holland, and that all the persons interested in the company and having any right to interfere in the management of the vessels belonging to it are resident in Holland; that he is advised that the plaintiffs can, according to the law of Holland, obtain relief in the courts of that country against the company for any infringement of the patent which they may be able to establish; and, therefore, submits and insists that the plaintiffs are bound to pursue their remedy in those courts against the company, and that this suit has been improperly instituted against him.

It is to be observed, that in none of these cases is it attempted to be denied on the part of the defendants, that the screw-propellers used in their respective vessels fall within the invention claimed by the patent; and after anxiously considering the case, I am of the opinion, that I cannot withhold these injunctions upon the grounds which are above stated. I take this rule to be universal, that foreigners are in all cases subject to the laws of the country in which they may happen to be, and if in any case when they are out of their own country, their interests are regulated and governed by their own laws, I take it to be not by force of those laws,

but by the law of the country, in which they may be, adopting those laws as part of its own law for the purpose of determining such rights.

Mr. Justice Story, in his *Treatise on the Conflict of Laws*, addressing himself to this subject, says, "In regard to foreigners resident in a country, although some jurists deny the right of a nation generally to legislate over them, it would seem clear, upon general principles of international law, that such a right does exist; and the extent to which it should be exercised, is a matter purely of municipal arrangement and policy. *Huberus* lays down the doctrine in his second axiom. All persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof. *Boullenois* says, that the sovereign has a right to make laws to bind foreigners, in relation to their property within his domains, in relation to contracts and acts done therein, and in relation to judicial proceedings if they implead before his tribunals. And, further, that he may of strict right make laws for all foreigners who merely pass through his domains, although commonly this authority is exercised only as to matters of police. *Vattel* asserts the same general doctrine, and says, that foreigners are subject to the laws of a state while they reside in it" (1). In this country, indeed, the position of foreigners is not left to rest upon this general law, but it is provided for by statute; for by the statute of 32 Hen. 8. c. 16. s. 9, it is enacted, "that every alien and stranger born out of the king's obeisance not being denizen, which now or hereafter shall come in or to this realm or elsewhere within the King's dominions, shall, after the 1st of September next coming, be bounden by and unto the laws and statutes of this realm, and to all and singular the contents of the same." Natural justice, indeed, seems to require that this should be the case. When countries extend to foreigners the protection of their laws, they may well require obedience to those laws as the price of that protection. These defendants, therefore, whilst in this country, must, I think, be subject to its laws.

(1) *Conflict of Laws*, c. 14. s. 541.

It is to be considered, then, what are the laws of this country with reference to the rights of patentees? According to our laws and constitution the Crown, I apprehend, has at all times exercised a controul over the trade of the country. Anterior to the statute of 21 Jac. 1. c. 3. the Crown assumed to exercise that controul to a very prejudicial extent by the creation of monopolies, and in the great case of monopolies—*Darcy v. Allein* (2), such an exercise of its powers was held to be illegal; but it was at the same time held, that the Crown had power to grant as a recompence for any new invention the exclusive right to trade in it for a reasonable period. What was to be considered as a reasonable period does not appear to have been settled. By the statute of James it was fixed at fourteen years, and thus,—as explained by Lord Coke in his commentaries on the statute (2),—the statute did not create, but controuled the powers of the Crown in the granting of patents. Patentees, therefore, have always derived, and still derive, their rights not from the statute, but from the grant of the Crown.

We must consider, then, what is the effect of the grant. It purports to give to the grantee, his executors, administrators, and assigns, special licence, full power, sole privilege, and authority, that he, his executors, administrators and assigns, and every of them, by himself and themselves, or by his and their deputy and deputies, servants or agents, or such others as he, his executors, administrators or assigns, shall at any time agree with, and no others, from time to time and at all times hereafter during the term of years herein expressed, shall and lawfully may make, use, exercise, and vend his said invention within that part of the United Kingdom of Great Britain and Ireland called England, the dominion of Wales, and the town of Berwick-upon-Tweed. Undoubtedly, this grant gives to the grantee a right of action against persons who infringe upon the sole and exclusive right purported to be granted by it. Foreigners coming into this country are, as I apprehend, subject to actions for injuries done by them whilst

here to the subjects of the Crown. Why, then, are they not to be subject to actions for the injury done by their infringing on the sole and exclusive right which I have shewn to be granted in conformity with the laws and constitution of this country? And if they are subject to such actions, why is not the power of this Court, which is founded upon the insufficiency of the legal remedy, to be applied against them as well as against the subjects of the Crown? It is said that the prohibitory words of the patent are addressed only to the subjects of the Crown; but these prohibitory words are in aid of the grant, and not in derogation of it, and they were probably introduced at a time when the prohibition of the Crown could be enforced penally against the parties who ventured to disobey it. The language of this part of the patent, therefore, does not appear to me to alter the case.

In the course of the argument upon these motions, I put the question whether, in the case of a railway engine patented in England and not in Scotland, the engine, if made in Scotland, could be permitted to run into England; and I might have added, whether, if the invention we are now considering was patented in England and Scotland, and not in Ireland, steamboats propelled by means of it could be permitted to run from Dublin to Holyhead, Bristol, and Glasgow. The answer which I received to this question was that, in the case of patents, there was a difference between Scotland and foreign countries; that a prior user in Scotland would, although a prior user in a foreign country would not, invalidate an English patent; but this answer does not appear to me to meet the question. What previous user will invalidate a patent, and what user if any can be permitted in contravention of the patent right, are different questions, depending wholly on different considerations; the one upon the extent of previous knowledge, the other upon the effect of the grant.

It was further argued, upon the part of the defendants, that the user by them of this invention was not such user or exercise of the invention as would amount to an infringement of the patent; and some observations which fell from Lord Eldon, in *The Universities of Oxford and Cambridge v. Richardson*, (*supra*,) were cited on this

(2) 11 Rep. 85; also reported in Noy, 173.

(3) 3 Co. Inst. 181.

point, as was also the case of *Minter v. Williams*, (*supra*), in which it was intimated that there might be an innocent user of a patented invention. But I do not think those authorities at all assist the case of the defendants. On the contrary, the case of *The Universities of Oxford and Cambridge v. Richardson* appears to me to be very much in favour of the plaintiffs; for there Lord Eldon draws a marked distinction between user for the purposes of trade, and other user. It is true that he there speaks of cases of necessity; but surely it cannot be said that the user of this invention by the defendants is a matter of necessity. Their user of it is merely for the purposes of trade, and is not otherwise necessary than as the means of securing them increased profit by their trade. If, indeed, any of their vessels were stranded, and it became necessary to use the propeller, this might be a case of necessity, falling within the range of Lord Eldon's observations. So, again, in the case of *Minter v. Williams*, I find no trace of a user for the purposes of trade being considered as innocent.

In the argument, on the part of the defendants, much was said upon the hardship of this Court interfering against them, and upon the inconvenience which would result from it, and some reference was made to the policy of this country; but it must be remembered that British ships certainly cannot use this invention without the licence of the patentees, and the burthens incident to such licence; and foreigners, I think, cannot justly complain that their ships are not permitted to enjoy, without licence and without payment, advantages which the ships of this country cannot enjoy otherwise than under licence and upon payment. It must be remembered, too, that foreigners may take out patents in this country and thus secure to themselves the exclusive use of their inventions within Her Majesty's dominions, and that if they neglect to do so, they to this extent withhold their inventions from the subjects of this country. It is to be observed, also, that the enforcement of the exclusive right under a patent does not take away from foreigners any privilege which they ever enjoyed in this country; for if the invention was used by them in

this country before the granting of the patent, the patent, I apprehend, would be invalid. One principal ground of inconvenience suggested was, that if foreign ships were restrained from using this invention in these dominions, English ships might equally be restrained from using it in foreign dominions. But I think this argument resolves itself into a question of national policy, and it is for the legislature and not for the Courts to deal with that question. My duty is to administer the law, and not to make it.

Upon the grounds which I have mentioned, I think that the facts stated in the affidavits and answer do not furnish sufficient grounds for refusing these injunctions. I think, however, that the defendant Rolfe having ceased to be captain of the vessel mentioned in the third suit, and being no longer in a position to infringe the patent, and there being no evidence of any intention on his part to resume the infringement, the injunction as to him ought not to be granted. I do not think that the Court would be justified in acting upon the suspicion that it is intended to re-appoint him; at all events, not without such a case being made upon the record: and I think that the injunction in the other suits must be qualified. I cannot go further than to restrain the defendants unless and until they shall have obtained the licence of the plaintiffs so to do, from using and exercising, or causing or permitting to be used or exercised within the limits of that part of the United Kingdom called England, the dominion of Wales and the town of Berwick-upon-Tweed, the invention of James Lowe in the bills mentioned, or any mode or process for the propulsion of vessels merely colourably differing therefrom, and in particular to restrain the defendants unless and until so licensed as aforesaid, from propelling the vessels in the bills mentioned, or causing or permitting the same to be propelled within the limits aforesaid with or by means of the propeller now attached thereto, and from propelling the same vessels or any other vessels or vessel, or causing or procuring or permitting the same to be propelled within the limits aforesaid, with or by means of any propellers or propeller constructed and applied according to the form

and mode respectively described in the specification of the said James Lowe's patent, or merely colourably differing therefrom.

The orders were accordingly so made, on the usual undertaking of the plaintiffs to bring actions. Liberty for either party to apply. No order as to costs.

LORDS JUSTICES.

1851.

Nov. 5, 6, 25.

PELLEY v. WATHEN.

Solicitor and Client—Lien on Deeds.

A. contracted to buy the equity of redemption of the L. estate, and immediately contracted to sell part. He then mortgaged the other part and his other estates to B. for securing 10,000l. He then mortgaged the part of L. he had before mortgaged, to C. for securing 3,000l. and the same part to D. for securing 1,000l. The legal estate in L. was then conveyed by the vendor to a trustee for A, and a term of years was assigned to another trustee to attend the inheritance, the original mortgages affecting the same being paid off. Before the mortgage for 10,000l. was created, A. was indebted to solicitors in a bill of costs, and became indebted to them for the conveyance of the legal estate. On the occasion of that conveyance, the title deeds of the L. estates were handed over by the vendor to the solicitors, as solicitors for A. Subsequently one of the firm of solicitors, having no notice of the mortgage for 10,000l., took an assignment of the 3,000l. and 1,000l. mortgages, and made a further advance on the same security:—Held, that the deeds, if in the hands of A, be would subject to the right of B, and they were so subject in the hands of the solicitor.

Held, also, that the deeds being delivered by the vendor to the solicitors and not to A. and by him to the solicitors, made no difference.

Held, also, that there was no distinction between the costs due before the mortgage to B. and the costs of getting in the legal estate, the solicitors in that matter being employed by A, and he alone being responsible for them.

A client cannot give a lien to his solicitor

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of a higher nature than the interest which he himself has in deeds.

This was an appeal from an order of the late Vice Chancellor Sir James Wigram, made on the hearing of the cause, on exceptions to the Master's report, and on further directions.

The facts of the case are fully stated in the report (1), and a mere recapitulation of them only will now be necessary. They are as follows:—Previous to the month of September 1839, Mr. William Lewis had contracted to purchase the equity of redemption of certain property in Gloucestershire, designated as the Lyppiatt estate, and which was subject to two mortgages for 18,000l. and 6,000l. In order to enable him to raise money for completing the purchase, he agreed to sell part of the property to two gentlemen, who agreed to become purchasers; and by an indenture dated the 14th of September 1839, he conveyed to Mr. Robert Parker Pelley, the plaintiff in the suit, all his real estates, including so much of the Lyppiatt estate as had not been so agreed to be sold; to hold the same to the plaintiff by way of mortgage, for securing a running account, not exceeding 10,000l. By another indenture, dated the 14th of December 1840, Mr. Lewis mortgaged that part of the Lyppiatt property comprised in the plaintiff's mortgage, to Mr. Horatio James, to secure 3,000l.; and afterwards, by another mortgage, dated the 3rd of September 1841, he mortgaged the same property to Mr. Charles Barton, to secure 1,000l. The purchase of the property by Mr. Lewis had not, up to this time, been completed; but in the month of January 1842, the transactions were brought to a close in the following manner:—The parts of the property which had been agreed to be sold had been conveyed to the purchasers; and by means of their purchase-money, or otherwise, the two old mortgages of 18,000l. and 6,000l. were paid off, and the legal fee in the parts not sold to the two sub-purchasers was conveyed to Mr. Thomas Bassett in trust for Mr. Lewis; and an outstanding term of 1,000 years was at the same time assigned to Mr. John

(1) 18 Law J. Rep. (N.S.) Chanc. 281.

Gurney, in trust, to attend the inheritance. At this time Mr. Thomas Bassett and Mr. John Gurney carried on business as attorneys and solicitors, in partnership with the defendant, Mr. George Wathen, under the firm of Wathen, Bassett & Gurney; and that firm acted as the solicitors for Mr. Lewis in the matter of the purchase, Mr. George Wathen, in fact, having so acted for many years previously. Upon the completion of this purchase the title deeds were handed over to Messrs. Wathen, Bassett & Gurney, as solicitors of Mr. Lewis. After the execution of these deeds in January 1842 the only outstanding interest, exclusive of the plaintiff's mortgage, were the two mortgages vested in Mr. James and Mr. Barton, and Mr. George Wathen agreed with Mr. Lewis to pay off those charges and to take assignments of them to himself. This was accordingly done by two indentures, both dated and executed on the 14th of February 1842, so that Mr. George Wathen became a mortgagee for the two sums of 3,000*l.* and 1,000*l.* In the following month of August he advanced a further sum of 673*l.* on security of the same premises, and thus became an incumbrancer for a principal sum of 4,673*l.*

This bill was filed by Mr. Pelly against Mr. George Wathen, Mr. Lewis and others for redemption and foreclosure. A decree was made, directing inquiries as to mortgages on Mr. Lewis's estates and their priorities, and what lien existed on any deeds, and other matters. The Master reported the existence of the mortgages above enumerated, and that those in the hands of Mr. George Wathen had priority over that of Mr. Pelly. He also reported that the solicitors had a lien on the deeds mentioned in the schedules to his report in priority over Mr. Pelly's mortgage. Mr. Pelly filed exceptions on these points.

The cause came on, before Wigram, V.C., in the month of March 1849, when he overruled the exceptions as to priority, declaring that Mr. George Wathen's security had priority over that of Mr. Pelly, by reason of the conduct pursued by the latter; but he allowed those relating to the lien. From this decree, so far as it related to the question of lien, the repre-

sentatives of the defendant, Mr. George Wathen, appealed.

Mr. Rolfe and *Mr. Basalgette*, for the appellants, argued that the case of a solicitor's lien was different from the lien of any other party; that a solicitor might claim a lien on the deeds in his possession for all that was due to him; and here, moreover, the debt due to the firm of solicitors was mainly contracted before the date of the mortgage security to the plaintiff. Here originally there was no legal estate in any of the parties now disputing; the solicitor got in that legal estate, and thereupon the deeds came into his possession and invested him with the lien of a solicitor for all his costs, whether for business before done or then transacted; and as the getting in of that legal estate was as beneficial to the mortgagee, the plaintiff, as to the mortgagor, the solicitor was entitled to his costs of that transaction as against both, even supposing he was not held to be so entitled as against the mortgagee in respect of the former costs. The former costs, however, were incurred before the plaintiff's mortgage, and ought to be included in the lien, and more especially as his conduct in not disclosing his mortgage and his activity in procuring the loan of the 3,000*l.* and the 1,000*l.* had operated to make his own charge an inferior one in point of priority to that of the defendant the solicitor, in his character of mortgagee.

[**LORD JUSTICE KNIGHT BRUCE.**—The solicitor has only a dormant lien, not a lien by contract.]

That a depositor might obtain a priority over a former mortgagee was clear from the case of *Wiseman v. Westland* (2), where on a mortgage the deeds were not delivered, and afterwards they were deposited for a loan; and there no notice was given to the depositor of the mortgage, and he was held to be entitled to priority.

[**LORD JUSTICE KNIGHT BRUCE.**—There the mortgage was for a term, and not in fee.]

The case was then argued on the question of the lien remaining to successive firms of solicitors, as it had been in the

Court below; but as the judgment does not touch that point the argument is omitted. On the general question of lien the case of *Bernard v. Drought* (3) was cited, in addition to many of those cited in the court below. It was also argued that the deeds were delivered to the solicitors, not by Mr. Lewis the mortgagor, but by the vendor himself.

The Solicitor General and *Mr. Bevir*, for the respondent, contended that the deeds, having come into the possession of the solicitor as solicitor for the mortgagor, were in his possession subject to all the rights to which they would have been subject in the hands of the mortgagor himself, and that it mattered not that they were delivered by the vendor and not by the mortgagor. They relied, on the appeal, on the same cases as were cited on the original hearing, more particularly on the decisions of Sir Edward Sugden. The cases were as follows:—

Smith v. Chichester, 2 Dr. & War. 393.

Blunden v. Desart, Ibid. 405.

Molesworth v. Robbins, 2 Jo. & Lat. 358.

Jacobs v. Latour, 5 Bing. 130; s. c. 6 Law J. Rep. C.P. 243.

Young v. English, 7 Beav. 10; s. c. 13 Law J. Rep. (N.S.) Chanc. 76.

Mr. Chandless, for the representatives of Mr. Lewis, the mortgagor.

Mr. Bazalgette, in reply.

Nov. 25.—LORD JUSTICE LORD CRANWORTH delivered the judgment of the Court.—After observing that the facts of the case were very complicated, but might be stated in a comparatively narrow compass, so far as it was necessary for the due understanding of the question before the Court, he proceeded to detail them as before set forth, and then continued as follows.—It must be taken as a fact not in dispute that the plaintiff, Mr. Pelly, so conducted himself towards Mr. James, Mr. Barton and Mr. Wathen, the parties entitled to the securities of December 1840, of September 1841 and of February 1842 for 3,000*l.*, 1,000*l.* and 673*l.*, thus amounting to 4,673*l.*; that his mortgage, though prior

in point of date, would be postponed to theirs. He had actively assisted Mr. Lewis in obtaining the loans from Mr. James and Mr. Barton, and neither to them nor afterwards to Mr. Wathen did he communicate the fact of the existence of his mortgage of September 1839, of which Mr. George Wathen had no notice till a few days before the institution of this suit, on the 19th of March 1843. Upon the completion of the purchase by Lewis in January 1842 the title deeds were all handed over to Messrs. Wathen, Bassett & Gurney, as solicitors of Mr. Lewis; and they claim a lien on those deeds against the plaintiff, Mr. Pelly, for the amount of their bill of costs against Mr. Lewis, and whether this claim is valid is the point we have to decide. Sir James Wigram decreed against the lien, and against his decision the solicitors have appealed. The argument for the appellants divided itself into three heads:—First, it was contended that independently of any special circumstances the lien of the solicitors must prevail. Secondly, if this were not so, still that there were circumstances which would give such a lien independently of any general right; and, thirdly, it was argued, that even if there is no lien for the general costs due to the solicitors, still there is such a lien for the costs of and incident to the procuring the conveyance.

On the first point, we think it clear that no such lien as that contended for exists. The general lien of a solicitor is merely a right to keep back from his client the deeds and papers which he holds as solicitor until his bill of costs is satisfied. It is a right derived entirely through the client; and therefore, on the most obvious principles of justice, cannot go beyond the right of the client himself. If the client's right to the deeds which came to the hands of the solicitor is absolute, so will be the right of the solicitor. If the deeds in the hands of the client are subject to any rights outstanding in third parties, such rights will follow them into the hands of the solicitor. These consequences flow so immediately from the nature of the relation subsisting between the client and his solicitor, that even independently of authority we should have felt bound by the principles on which they

depend. But we have the most ample authority in support of the view we take on this part of the case, in the three cases before Sir Edward Sugden, so much dwelt on in the argument. We allude to the cases of *Smith v. Chichester*, *Blunden v. Desart* and *Molesworth v. Robbins*. In the last of these cases it was expressly decided that the claim of a party having an equitable right against the client must prevail into whosoever hands the deeds have come after such equitable right has arisen. Indeed, the principle is obviously the same, whether the right affecting the client's interest is legal or equitable. "No man," as was stated by Sir Edward Sugden in his judgment, "can give a lien to a solicitor of a higher nature than the interest he himself has in the deeds."

Applying, then, these principles to the facts of the present case, it appears to us clear, that, laying aside all consideration of particular conduct, the solicitor did not on the completion of the contract acquire any lien on the deeds against the plaintiff. If, on the completion of the contract and execution of the conveyance in January 1842, the title deeds had been all handed over to Mr. Lewis himself, and not to his solicitors, he would then have had them subject to an equitable claim on the part of the plaintiff as mortgagee, by virtue of his mortgage of September 1839. And if Mr. Lewis had then put them into the hands of his solicitors, they could only have held them subject to the same rights as attached to them in the hands of Mr. Lewis himself. It can make no difference that instead of coming first into the hands of Mr. Lewis and from him to the solicitors, they were at once handed over by the vendors to the solicitors; for the solicitors, on their obtaining them, obtained them not by any title paramount to that of their client, but as his agent, and of course with all the liability which would have attached on them if they had passed first into the hands of the client and from him to the solicitors. This disposes of the first head of the argument.

But then, it was said, secondly, that whatever may be the general doctrine, here the conduct of the plaintiff was such as to preclude him from insisting on his title against the lien of the solicitors of

Mr. Lewis; but we can discover nothing whatever in the plaintiff's conduct to warrant such a proposition. When the plaintiff advanced his money and obtained his mortgage-deed in September 1839, he, of course, employed his own solicitor to act for him. All that can be alleged against him by the solicitors of Mr. Lewis, the mortgagor, is that he did not inform them of his security. But he was under no obligation to give them any such information, nor was it in the ordinary course of business that he should do so. There is no suggestion that he meant or wished to mislead them. There was nothing to suggest to his mind that it could be of importance to the solicitors that he should give them notice of his security. Cases may undoubtedly occur in which parties by standing by and remaining silent may give to others rights against them in the same way as if they had been active in making representation, but that can only be where it has been the duty of the party not to be silent, or where the party remaining silent might reasonably infer that such silence would be taken by others as sanctioning a particular course of conduct. No such circumstances exist here. The conduct of the plaintiff, for aught at least that appears, was just what might be expected from a man intending to deal with perfect fairness. He became mortgagee, employing his own solicitor, and took it for granted that the mortgagor and his solicitor would settle their own rights among themselves. There does not, therefore, appear to us to be anything in the conduct of the plaintiff depriving him of his ordinary rights.

The only remaining question is on the point, whether the solicitors may not have a lien against the plaintiff, though not for their whole demand on Mr. Lewis, yet for so much as relates to the obtaining the conveyance of the Lyppiatt estate from the vendors? As to this the argument was, that these costs were incurred for the common benefit of the plaintiff and Mr. Lewis, and so that the lien of the solicitors ought to prevail against both the one and the other. On this minor point, Lord Justice Knight Bruce entertains some doubt, and I can, therefore, express my own opinion only.

In my opinion these costs do not differ from the rest. I think the solicitors have no lien against the plaintiff for the costs of obtaining the conveyance any more than for any other part of their bill. The lien of the solicitor is a right to retain deeds as a mode of enforcing payment of a debt due by the party whose deeds are retained. It is essentially a right arising between the party employed and his employer. The right when once constituted may, under circumstances, prevail in favour of the solicitor, not only against his employer but also parties deriving title under his employer. But it always originates from the relation of client and attorney,—that is, the employer and the employed. Taking that to be a correct view of the law, the question here is, who employed Messrs. Wathen, Bassett & Gurney to obtain and perfect the conveyance? No doubt when they had completed the conveyance their services enured to the benefit not only of Mr. Lewis the purchaser, but also of the plaintiff who claimed under him. But I do not think that this is material. If the case could be brought to the point, that the solicitors were acting not only for Mr. Lewis but also for the plaintiff, then neither Mr. Lewis nor the plaintiff could take the deeds of conveyance out of their hands without paying them the full amount of their costs incurred in preparing and perfecting them. But this certainly was not so. The solicitors were the solicitors of Mr. Lewis and of him only. He alone employed them. He alone was liable to pay them for their services, and against him alone, therefore, was this lien available when the deeds came into their hands. Their right is, as I think, precisely what it would have been if on the final settlement of the purchase, and execution of the deeds, the vendors had delivered the deeds to Mr. Lewis, and he had handed them over to the solicitors. In such a case the right of the solicitors would be only, as I think, to hold the deeds subject to all the rights legal and equitable affecting them in the hands of Mr. Lewis; and therefore their right was, as I conceive, subject to a prior right in the plaintiff in respect of his mortgage of September 1839. I do not, therefore, think there is any dis-

inction between these deeds and the other deeds in the hands of the solicitors.

The result, therefore, is, that the decision of Sir James Wigram will be affirmed in every respect, and this appeal must therefore be dismissed; and Lord Justice Knight Bruce concurs with me, that the costs of the appeal must in this case follow the event, and so be paid by the appellants, because the appeal reproducing litigation on points manifestly in the opinion of both members of this Court properly decided by the Vice Chancellor, has taken a range widely beyond the narrow and restricted part of the case on which alone my learned Brother entertains any doubt. It is unnecessary to say anything on the question raised at the bar, whether if the lien had been established it would have extended to the debts due to all the successive firms, or only to that due to the last firm? Whether, in short, according to the doctrine laid down in *In re Forshaw* (4), the lien of a solicitor is affected by his taking a partner? That question does not arise in this case. On that point we express no opinion.

PARKER, V.C. } *In re HADLEY'S TRUSTS.*
Nov. 21. }

New Trustees—Death of Trustee in the Lifetime of the Testator—Appointment of Trustees by a Trustee declining to act.

A testator, by his will, appointed A. and B. to be his trustees; he then directed that "if the trustees hereby appointed or to be appointed as hereinafter is mentioned, should die," &c. it should be lawful for other trustees to be appointed as therein mentioned. A. died in the lifetime of the testator:—Held, that, under the power, a new trustee could be appointed in the place of A.

A testator, by his will, appointed A. and B. to be his trustees, and directed that if his trustees thereby appointed should die, or desire to be discharged from, or refuse or decline to act, it should be lawful for the surviving or continuing trustee or trustees, or if there should be none such, then for the

(4) 16 Sim. 121; s. c. 17 Law J. Rep. (N.s.) Chanc. 61.

a description of the persons appointed trustees of the will. I can see no difference between her describing them as "trustees hereby appointed," and the naming them, and, if she had named them, there could not have been any doubt. I apprehend that it is clear that if a testator gives an interest to A, B, C, and D, to continue up to a certain time, and then provides that if A, B, C, and D. shall die, this interest shall go over, this provision will apply to the event of A, B, C, and D. dying in the lifetime of the testator, as well as after his death. I think that the cases referred to establish the principle that a contingency is not less a contingency because it operates in the testator's lifetime. I may also observe that this construction is a convenient one. It would be extremely inconvenient if it were to be held that, where a testator has directed the appointment of new trustees in case of the death of his trustees, this provision should be defeated by the death of a trustee in the testator's lifetime.

As to the question whether the power could be exercised by the trustee who declined to act, except for the purpose of appointing new trustees, it is to be observed that the testatrix has herself distinctly said "that it should be lawful for the surviving or continuing trustee, or, if there was no surviving or continuing trustee, then for the trustee so desirous of being discharged, or refusing, or declining to act, to appoint." Hence a person refusing to act is not prevented from exercising the power of appointing a new trustee. The case of *Sharp v. Sharp* (8) was much narrower than this. There the appointment of new trustees was given to the "survivors or survivor acting in the trusts." The trustees disclaimed, and it was held that the persons disclaiming were not to be considered as "the survivors or survivor of persons acting in the trusts." Here there is a power enabling the person refusing to act to appoint trustees. Being of opinion that the power was properly exercised, I think that this petition must be dismissed.

Lordes Justices. }

1851.

Dec. 12, 22. }

ROBINSON v. ROBINSON.

*Trustees—Investment—Real Securities
Tenant for Life—Cestui que Trust—Rate
of Interest—Payment of Money out of Court
without Petition.*

Trustees under a will had an option to invest the testator's estate either in 3l. per cents. or on real security, but neglected to do so, leaving the fund in some other state of investment:—Held, overruling a decree at the Rolls, that the cestui que trust had not the option of charging them with the money and interest, or to claim the amount of 3l. per cents. because the cestui que trust never had the right to compel the purchase of 3l. per cents. and that the trustees were chargeable only with the money and interest.

The trustees having this option to invest either in 3l. per cents. or on real security,—Held, overruling the same decree, that the tenant for life was entitled to interest for one year after the death of the testator at 4l. per cent. on the money the property would have produced if sold at the end of that year, until the produce was invested in the 3l. per cents., not exceeding the amount of interest actually received.

Turnpike road bonds, secured by a mortgage or charge on tolls and toll-houses, are real estate, and held so to be, overruling the same decree; and although the tenant for life was declared entitled to the interest on them, the Court, considering the social changes resulting from the formation of railways, directed a reference to the Master, to inquire whether it was expedient to leave assets so invested.

A party having paid in money, in obedience to a decree of the Court below, and the decree being varied in such a way that he is entitled to have that money paid out, the same can be directed in the order on the appeal to be so paid out without any petition being presented for that purpose.

Semble—that where trustees are bound to invest in 3l. per cents. and 3l. per cents. have fallen instead of risen in value, they are chargeable with the money and interest, instead of 3l. per cents., at the option of the cestui que trust.

The Court also, after reviewing the former decisions, laid down the following propo-

sitions :—*First, where trustees improperly retain balances or cause or permit trust money to be lost, they are chargeable for the same with interest at 4l. per cent. Secondly, where trustees have money in their hands, which they are bound permanently to invest for the benefit of their cestui que trust, the rule of the Court is generally that they shall invest in 3l. per cents.; therefore, if they neglect to do so, and there is no express direction not to do so, or there is an express trust that they shall do so, in the latter case, and semble as to the two former cases, it is in the option of the cestui que trust to charge them either with the principal sum retained and interest, or with the amount of 3l. per cents. which would have been purchased if the investment had been made. Thirdly, where trustees lend, or use trust money in trade, they are chargeable not only with the money and interest, but with the profits made in the trade, the interest generally being 5l. per cent.*

This was an appeal from part of a decree of the late Master of the Rolls, Lord Langdale. The facts are fully set forth in the report of the case, 18 *Law J. Rep.* (N.S.) Chanc. 73, but may be sufficiently stated for the understanding of the judgment on the appeal, as follows:—Matthew Robinson, by his will, gave his residuary personal estate to trustees, upon trust, with all convenient speed to collect, get in, and dispose thereof, or to continue the same in or upon any of the parliamentary stocks or funds of Great Britain, or on real securities in England, at interest, or to alter and vary the same for others of a like nature, when and so often as it should be expedient, and to pay the interest and dividends unto his son Augustin Robinson, for his life, and after his decease to pay and transfer the said residuary estate, and the stocks, funds, and securities, in which the same should be invested among the children of his son in equal shares as therein mentioned. The trustees were appointed executors, who, after the testator's death, proved the will. A large part of the estate consisted of London Dock stock, Bank stock, and money due to the testator from the trustees of the Surrey and Sussex roads, and on bonds from the Commissioners of Sewers of Surrey and Kent, and these were allowed by the trustees to remain unconverted for

several years after the testator's death, and a loss accrued to the estate from the sale of the Bank stock and the Sewers bonds, but a gain was made from the London Dock stock. Some turnpike bonds, part of the estate, were never converted at all. The dates were as follow :—the testator died in July 1837, and his will was proved in August following; in December in the same year two of the Surrey and Sussex road bonds were paid off; in July 1845, the Bank stock and London Dock stock were sold, and in August following the tenant for life bought the debt due to the testator (5,000*l.*) from the Commissioners of Sewers for 5,000*l.*, and the money in each case was invested in 3*l.* per cent. consols; and in November 1846 another of the road bonds was paid off at par. The sewers bonds were secured by the rates and assessments which the Commissioners were authorized by certain acts of parliament to levy, and the road bonds were secured on the toll-houses and the tolls payable thereat. Lord Langdale was of opinion and held, that the turnpike bonds were not such real securities as were contemplated by the testator in his will, and were, at best, only mixed securities; and after stating that it could not reasonably be contended that the sewers bonds were real securities, held that they were not so; his Lordship also held that the loss which had arisen on the sale of the sewers bonds and Bank stock could not be set off against the gains that arose from the sale of the London Dock stock, and that Augustin Robinson, the tenant for life, was entitled to the whole of the dividends and annual income that actually accrued due from the residuary estate, including therein the dividends and income that accrued due on the Bank stock, the London Dock stock, and the money secured on the sewers bonds and road bonds, during and up to the end of the first year from the testator's death, and that he was entitled to the dividends and annual income of so much of the residuary estate as was in a proper state of investment at the end of such first year, and to so much only of the dividends and annual income that since the end of such first year had actually accrued due on the Bank stock and London Dock stock, and the money secured

on the Sewers bonds and road bonds as should not exceed the amount of the dividends which would have accrued on the 3*l*. per cent. consols, which should have been purchased at the end of such first year with the monies arising from the sale or conversion or receipt of the same respectively, if the same had been sold or converted or received and invested in the purchase of 3*l*. per cent. consols. And it was also ordered that the trustees and executors should make good to the estate of the testator such an amount of Bank annuities as could have been purchased with the proceeds of such sale or conversion or receipt, in case the same had been sold or converted into money, or raised at the end of such one year. And it was declared that the gain which had accrued in respect of the London Dock stock had accrued for the benefit of the estate. From so much of this decree as related to the road bonds, and the amount of interest to be paid to him, the tenant for life appealed. There was also a petition of appeal by the executors and trustees, as to the refunding by them.

The plaintiffs in the suit were infant children of Augustin Robinson, the tenant for life; the defendants were Augustin Robinson the tenant for life, the two surviving executors and trustees, and the personal representatives of the deceased executor and trustee, and the object of the suit was the administration of the testator's estate and a declaration of the rights of all parties in the clear residue. It was in evidence that in order to indemnify the executors and to secure the full benefit of the rights of his children, Mr. Augustin Robinson, the tenant for life, had bought three sums of 3*l*. per cents. in the names of the executors, to meet the excess of his receipts beyond what he would have been entitled to from the dividends of 3*l*. per cents. if the same had been purchased at the end of a year from the testator's death. These sums were 289*l*., 225*l*. and 1,213*l*. consols.

Mr. Walpole and *Mr. Kent*, for the appellant, the tenant for life, stated that the question of the Sewers bonds was not raised, but as to the road bonds it was clear they were real securities; and the only

point for consideration on them was whether they were so within the meaning and intention of the testator's will. The case of *Doe d. Banks v. Booth* (1) shewed that the money being secured on the toll-houses, ejectment could be brought; therefore, in the abstract, these road bonds were real securities, and as the form of the bonds was in pursuance of the local act (and the acts continuing that statute), by which the road trustees were authorized to mortgage, among other things, the "toll-houses;" and as the testator himself had so invested his money, and had directed his trustees either to call in or to continue his property on their present investment in the funds, or on real securities, or to alter and vary, and so on, it was plain the road bonds were real securities within the contemplation of the testator himself. Had money been at the time of the testator's death invested in railway shares, and had such a discretion been given to trustees as was here conferred, no doubt could have been entertained but they were real securities, and real securities within the meaning of the testator's will. As to the rate of interest to be given to the tenant for life, the judgment of the Master of the Rolls was fallacious, for it seemed to go upon the ground that there was an improper investment, and that there ought to have been a sale and an investment in 3*l*. per cent. consols, that being most advantageous to the *cestuis que trust*. In the first place, there was a fallacy as to investment; for the complaint here was, that there had been no investment; and, secondly, that the option should be treated as belonging to the *cestuis que trust*. In truth, the option was given to the trustees, and they not having exercised it, they were answerable, but not for an investment or assumed investment in stock; if it were otherwise, in case the will had contained a power of investing in railway shares, and the trustees had neglected so to invest, as well might the *cestuis que trust* select shares in any particular railway which were most expensive to be purchased. The cases of *Marsh v. Hunter* (2), *Hockley v. Ban-*

(1) 2 Bos. & P. 219, 223.

(2) 6 Madd. 295.

tock (3), *Watts v. Girdlestone* (4), *Ames v. Parkinson* (5), *Ouseley v. Anstruther* (6), *Shepherd v. Moulds* (7), and *Rees v. Williams* (8), were also cited and commented on, on behalf of the tenant for life, as to the foregoing points. That the interest should be 4l. per cent., the cases of *Caldecott v. Caldecott* (9) and *Sutherland v. Cooke* (10) were referred to.

Mr. Roundell Palmer and *Mr. Elmsley*, for the surviving trustees and executors and representatives of the deceased trustee and executor, argued that the case of *Dimes v. Scott* (11), relied on in the argument in the court below, was no longer an authority. It was a confusion in principle to consider the present case as governed by those where the trustees had used the trust fund, and to say that, because an investment had not been made, 3l. per cents. were to be bought. The case of *Buxton v. Buxton* (12) was also cited.

Mr. G. Druce, for other defendants.

Mr. Rolt and *Mr. Dickinson*, for the plaintiffs, contended that the principal security of the road bonds was on the tolls, and they could not be real securities within the testator's meaning; and, moreover, the tolls were only to be collected during the continuance of each act of parliament, as it was successively passed authorizing the collection of such tolls. The charge on the toll-houses could not be relied on, for they were of very trifling comparative value. The case of *Doe v. Booth*, cited by the appellants, was an authority in favour of the plaintiffs, as was that of *Mills v. Mills* (13). The question before the Court, as to real securities, was very different from that which arose under the Mortmain

Act. In this case the Court would use its discretion; in those cases the only question was, whether the money given was charged on real estate. Here the Court would see, first, whether the security was a real security; and, secondly, whether it was of such a character as was contemplated by the testator. Road bonds were not of such a nature. The cases of *Dimes v. Scott* and *Ex parte Lewis* (14), and some of the later cases before Lord Langdale, and which had before been cited, shewed, whatever was the weight now given to the first-mentioned case in other respects, that the tenant for life was entitled to no more than 3l. per cent. On both grounds, therefore, the appeal should be dismissed, and with costs.

Dec. 22.—LORD JUSTICE LORD CRANWORTH, after stating the will, the suit and its object, the reference to the Master on the original hearing, the Master's report, and the decree of Lord Langdale on further directions, particularly as to those parts which relate to the tenant for life, and his title to interest as before set forth, and as to the executors and the tenant for life being bound to refund so much of the interest, after the first year of the testator's decease, on the Bank stock, the London Dock stock, the road bonds, and the Sewers bonds, as had been paid to the tenant for life, over and above the dividends on consols, if such consols had been purchased at that time, proceeded with the judgment of the Court as follows:—Against this part of the decree Augustin Robinson, the tenant for life, and the executors, have severally appealed, on the ground that the decree is erroneous in charging the executors with the amount of 3l. per cents. which might have been realized at the end of the year, and also in declaring that the tenant for life was entitled to no more than the amount of the dividends that would have arisen from such 3l. per cents. in case they had been purchased. The executors contend that they are chargeable only with the money which the securities in question, if sold at the end of a year from the testator's decease, would then have produced, and with interest thereon at 4l. per

(3) 1 Russ. 141.

(4) 6 Beav. 188; a. c. 12 Law J. Rep. (n.s.) Chanc. 363.

(5) 7 Beav. 379.

(6) 10 Ibid. 453.

(7) 4 Hare, 500; a. c. 14 Law J. Rep. (n.s.) Chanc. 366.

(8) 1 De Gex & Sm. 319.

(9) 1 You. & C. C. 312, 321; a. c. 11 Law J. Rep. (n.s.) Chanc. 158.

(10) 1 Coll. 498; a. c. 14 Law J. Rep. (n.s.) Chanc. 71.

(11) 4 Russ. 195.

(12) 1 Myl. & Cr. 80.

(13) 7 Sim. 501; a. c. 4 Law J. Rep. (n.s.) Chanc. 266.

(14) 1 Glyn & J. 69.

cent. ; and that, as in fact the securities produced more than could have been obtained in 1838, the plaintiffs have no demand against them. The tenant for life contends that he is entitled to have credit from July 1838 to July 1845, not for the amount of the dividends which would have been produced if the 3*l.* per cents. had been purchased, but interest at 4*l.* per cent. on the sums which the securities, if sold in July 1838, would then have produced, not exceeding of course the amount of dividends or interest actually realized.

The case was very fully argued before us a few days since, and as there has been a difference of opinion in different branches of the Court on the subject of the duties and liabilities of executors, and the rights of a tenant for life in cases like the present, we desired a short time to look into those authorities before we came to a decision. In the present case, it will be observed, the executors had the option of investing the trust money at their discretion in real or government securities ; and in such a case Sir John Leach held, in the case of *Marsh v. Hunter*, that the trustees by whose default the money was lost were chargeable, not with the amount of stock which might have been purchased, but only with the principal money lost ; and, of course, although the report is not so expressed, with interest thereon. That decision occurred in 1822. Four years later, namely, in 1826, occurred the case of *Hockley v. Bantock*, before Lord Gifford. There the executors had a similar discretion of investing either in real or government securities ; and upon a bill seeking to charge them with balances improperly retained in their hands, Lord Gifford directed an inquiry as to the price of 3*l.* per cents. at the several times when the balances ought to have been invested. Such an inquiry would have been improper if the executors could not have been charged with the value of the stock ; and that case, therefore, is an authority that, in the opinion of Lord Gifford, they might be so charged. Notwithstanding this last case, however, Sir John Leach adhered to his own view of the law, and acted upon it in an unreported case of *Gale v. Pitt*, at the Rolls, on the 10th of May 1830, which we referred

to in the Registrar's book. Lord Gifford's authority has been followed by Lord Langdale in several reported cases, to which we were referred in the course of the argument, namely, *Watts v. Girdlestone*, *Ames v. Parkinson* and *Ouseley v. Anstruther*. On the other hand, Sir James Wigram, in *Shepherd v. Mouls*, and my learned Brother, in *Rees v. Williams*, have refused to follow the authority of *Hockley v. Bantock*, and have acted on the earlier case of *Marsh v. Hunter*. In this irreconcilable conflict of authority, it is absolutely necessary for us to look to the principle on which the doctrine rests.

There can be no doubt but that where trustees improperly retain balances in their hands, or by want of due care cause or permit trust monies to be lost, they are chargeable with the sums so retained or lost, and with interest thereon at 4*l.* per cent. ; and it may also be true that where the trustees have in their hands money which they are bound to secure permanently for the benefit of their *cestuis que trust*, there, in the absence of express authority or direction to the contrary, they are generally bound to invest the money in the 3*l.* per cents. This obligation, not the result of any positive law, has been imposed on trustees generally by the Court as a convenient rule, affording security to the *cestui que trust*, and presenting no possible difficulty to the trustees. Supposing, then, the trustees have improperly retained in their hands balances which they ought to have invested in the 3*l.* per cents., either by reason of this general rule of the Court or because such a duty was expressly imposed upon them by the terms of their trust, or have by neglect allowed such balances to be lost, what, in such a case, is the right of the *cestui que trust* ? In all such cases, or, at all events, in all cases where there has been an express trust to invest in the 3*l.* per cents., the *cestui que trust* has the option of charging the trustee, either with the principal sum retained and interest, or with the amount of the 3*l.* per cents. that would have arisen if the investment had been properly made. The doctrine of the Court, where it implies this rule is, that the trustee shall not profit by his own wrong. If he had done what he

was bound to do, a certain amount of 3*l.* per cents. would have been forthcoming for the *cestui que trust*; and, therefore, if called on to have such 3*l.* per cents. forthcoming, he is bound to do so; just as in an ordinary case every wrongdoer is bound to put the party injured, as far as the nature of the case allows, in the same situation in which he would have stood if the wrong had not been done. All this is very intelligible. Again, suppose the trustee has not improperly retained balances, but has lent or used them in trade; there the *cestui que trust*, if it is for his interest to do so, has a right to charge the trustee, not only with the sum retained and interest, but also with the profits made in the trade. The ground on which that right rests is this: the employment in trade is unwarrantable, but if it turns out to be profitable the *cestui que trust*, in such a case, has a right to follow the money that is used in trade and the profit, because in such a case the trade profits have, in fact, been produced by the employment of the money of the *cestui que trust*; and it would be manifestly unjust to permit the trustee to rely on his own misconduct in having exposed the fund to the risks of trade as a reason for retaining the extra profits beyond interest for his own benefit. Even where no such extra profits have been made, the *cestui que trust* is, in general, at liberty to charge the trustee who has allowed the trust money to be employed in trade with interest at 5*l.* per cent., that being the ordinary rate of interest paid on capital in trade. This right depends on principles the same, or nearly the same, as those which enable the *cestui que trust* to adopt the investment and take the profit actually made. But the ground on which, in all these cases, the right of election in the *cestui que trust* rests, wholly fails in the case where a trustee, having an option to invest either in the 3*l.* per cents. or in real securities, neglects his duty and carelessly leaves the trust fund in some other state of investment. In such a case, the *cestui que trust* cannot say to the trustee, "If you had done your duty, I should have had a certain amount of 3*l.* per cents.;" or, "the trust fund would now consist of a certain

amount of 3*l.* per cents." It is obvious that the trustee might have duly discharged his duty, and yet no such result would have ensued. Where a man is bound by covenant to do one of two things and does neither, there an action lies by the covenantee; the measure of damage is the loss arising by reason of the covenantor having failed to do that which is most, not that which is least, beneficial to the covenantee; and the same principles may perhaps be applied, by analogy, to the case of a trustee failing to invest in either of two modes, equally lawful by the terms of the trust. It was contended at the bar that in such a case the trustee has, by his neglect, lost his right of electing between the two modes of investment,—that he was always bound by the trust to exercise his discretion in the mode most beneficial for the objects of the trust,—and that having omitted to do so at the time when the option was open to him, he can no longer do it when he is called on to account for his neglect, and when he can no longer exercise an unbiassed and impartial option. The fallacy of this argument consists in assuming that, in the case supposed the trustee is called on to exercise any option at all. He is not called on to exercise any option retrospectively, but is made responsible for not having exercised it at the proper time; for not having made one of two several kinds of investment: and a reason for his being in such case chargeable only with the money which should have been invested, and not with the 3*l.* per cents. which might have been produced, is, that there never was any right in the *cestui que trust* to compel the purchase of the 3*l.* per cents. The trustee is answerable for not having done what he was bound to do; and the measure of his responsibility should be, what the *cestui que trust* must have been entitled to, in whatever mode that duty was performed.

The grounds on which Lord Langdale proceeded in the several cases before him appear to have been, that when the trustee has failed to discharge his duty in either of the ways which were open to him, the *cestuis que trust* may then exercise an option which certainly did not belong to them by the terms of the trust; that is to

say, that if the trustee has failed to exercise his option, then the right of election passes to the *cestui que trust*, though not given to him by the instrument creating the trust. But on what foundation does this supposed right of the *cestui que trust* to exercise such an option rest? No such right can be derived from the principle that the *cestui que trust* is entitled to compel the trustee to do what he was bound to do, for he was not bound to purchase the 3*l.* per cents.; nor from the principle that he may follow the trust funds into their actual state of investment, or charge a higher rate of interest in consequence of such investment; for the foundation of the complaint is, that the funds have not been invested at all. The only plausible foundation for the doctrine which occurs to us is this: the trustee was bound to exercise his option, not capriciously, but in the mode likely to be most beneficial to the *cestuis que trust*; and their interests appear, in the result, to be best served by requiring the investment of the 3*l.* per cents. But this reasoning seems founded on a fallacy; the selection of the 3*l.* per cents. is thus made to depend, not on any option in their favour which the trustee was originally bound to exercise, but upon the accident of their subsequent rise in value; a principle of decision from which, with all deference, we differ. If such a principle is to be applied, then, as it was well put at the bar, if in the present case there had been a discretion to invest in railway shares, the *cestui que trust* might perhaps now fix on shares in some particular railway which have risen very highly in value, and say the investment might have been and so ought to have been made on that particular security. Upon the whole, therefore, we cannot discover any such right of option as is contended for in the *cestui que trust*; not on the ground of his being entitled, by the terms of the trust, to compel the trustees to make an investment in the 3*l.* per cents., for no such obligation was imposed on them,—not on the ground of his being bound to adopt or insist on any actual investment, for no investment was made,—not on the ground of any obligation on the part of the trustees to select the 3*l.* per cents. as the most beneficial mode of investment, for the advantage of the 3*l.* per cents. arises from

the accidental subsequent rise in value, and not from any necessary superiority at the time when the investment ought to have been made.

The consequence is, that the decree should, we think, be varied by striking out so much of it as declares that the produce arising from the sale of the Bank stock, London Dock stock and Sewers bonds ought to have been invested in the 3*l.* per cents., and that the defendant, Augustin Robinson, was entitled to so much only of the income arising from those funds from the end of one year after the testator's decease, as should not exceed the amount of the dividends which would have accrued due on the 3*l.* per cents. if purchased. And it must be declared that he is entitled, from the end of the first year after the testator's decease up to the time of the sale and investment in the 3*l.* per cents. in July and August 1845, to interest at 4*l.* per cent. on the amount which the Master has found that those funds would have produced at the end of the year, not exceeding the amount of interest and dividends actually produced. This disposes of the question as to the Bank stock, London Dock stock and Sewers bonds. But before we quit this part of the subject we think it right, by way of caution, to remark that our decision does not at all go to exonerate trustees who, by the express terms of the trust, are bound to invest in the 3*l.* per cents., but who have retained the balance in their hands, from the obligation to account for those balances, with interest, instead of making good the amount of 3*l.* per cents., whenever the 3*l.* per cents. have fallen instead of risen in value. In such a case, the same principle applies which authorizes the *cestui que trust* to adopt any investment in trade or otherwise which has been actually made. He may insist on having the 3*l.* per cents., for, by the very terms of the trust, it was the duty of the trustee so to invest the trust money; or he may, on the other hand, if no such investment has been made, treat the money as being, according to the fact, in the hands of the trustee, to be accounted for by him. No such question arises in the present case, and we only advert to it now because an argument principally founded on such a

possible state of things was advanced by counsel.

It now remains to consider the question as to the turnpike road bonds. The Master found that the testator was at his death entitled to 6,000*l.* due from the trustees of the Surrey and Sussex roads, secured by a mortgage or charge on the tolls and toll-houses, which the said trustees were by act of parliament authorized to make. Of this sum 1,000*l.* was paid off by the road trustees to the executors on the 2nd of December 1837, which was duly applied as part of the testator's assets. The interest on the remaining 5,000*l.* was regularly paid to the tenant for life up to the 23rd of November 1846, when a further sum of 500*l.*, part of the 5,000*l.*, was paid off and was invested by the executors in the purchase of 3*l.* per cents., so that a sum of 4,500*l.* only now remains secured on those road securities. Lord Langdale's order puts these road bonds, as they have been not very accurately designated in the argument, on precisely the same footing as the Bank stock, London Dock stock, and Sewers bonds, and treats the 5,000*l.* road bonds which were in the hands of the executors at the end of the year from the testator's decease, as assets left by them improperly invested, and as to which, therefore, the executors ought to be charged with the amount of 3*l.* per cents. which, if they were sold, they would have produced. If these securities are not real securities within the meaning of that expression contained in the will,—by which it is to be recollected, the testator authorizes his executors to invest in real securities, or to leave any money in real securities ;—if these securities are not real securities within the meaning of that expression, then of course the same rule must be applied to them as to the other securities sold in July and August 1845. But we think that these road bonds, as they have been called, are real securities, in which, by the terms of the will, the executors were justified in leaving the testator's assets invested. There cannot be any doubt that they are real securities. Indeed they are so, perhaps, even more emphatically than an ordinary mortgage. The security is merely a security on the tolls and toll-houses, that is to say, on

certain corporeal and certain incorporeal hereditaments. They give no personal right against any one. The remedy of the mortgagee or bondholder is merely against the real property made the subject of the charge, and if the testator had given to any one by way of specific legacy all such real securities as he should die possessed of or entitled to, we consider it perfectly clear these turnpike road securities would have passed. The question then is, whether the executors were justified in leaving these securities as they found them? That is to say, treating them as being not improper investments to be continued under the authority given by the will? We think they were. There was nothing to fetter the discretion of the executors; they were at liberty to leave any part of the assets which they might find invested in real securities, in the same security in which they might find it. The 5,000*l.* in question was invested in that which we consider to be a real security, permanent in its nature and approved by the testator. To hold that it was a breach of duty in the executors to leave that sum as they found it, would, as we think, be to deprive them of the discretion given to them by the testator, without any sufficient warrant for our so doing. The circumstances, however, connected with the great social changes resulting from the formation of railways, may now have made these turnpike mortgages ineligible as a security in which longer to leave the assets invested; and we think it reasonable that the Master should inquire whether it may not be expedient that they should now be called in? But, in the mean time, we do not feel warranted in treating them as securities which the executors were bound to realize. The order, therefore, must, as to these mortgages, be varied by declaring, if necessary, that they were real securities in which the executors were justified in leaving the assets of the testator invested, and the interest on which, therefore, has been properly paid to the tenant for life. We desire not to be understood as giving any opinion on the point, not arising in the present case, whether the executors would have been justified in laying out any part of the general assets in turnpike securities similar to those now in question.

It appears that, in order to cover the deficiency in the 3*l.* per cents. purchased by the investment of 1845, with the money produced by the sale of the Bank stock and Sewers bonds, Augustin Robinson, the tenant for life, has purchased in the names of the executors two sums of 289*l.* 3*l.* per cents. and 225*l.* 3*l.* per cents., and he has in like manner purchased in their names 1,213*l.* 3*l.* per cents. to meet the excess of his receipts as income beyond what he would have been entitled to in the way of dividends on the 3*l.* per cents. if purchased at the end of the first year. An account must be taken of what Augustin Robinson ought to have received as interest at 4*l.* per cent. on the value of the Bank stock, the London Dock stock, and Sewers bonds, at the end of the year from the testator's decease, and he must pay into court the excess of his receipts of the dividends and interest on those funds beyond the amount of such 4*l.* per cent. Those three sums of 289*l.*, 225*l.* and 1,213*l.* 3*l.* per cents. will stand as a security for what shall be found due from him in respect of that excess, and on his paying into court what, if anything, shall be found due from him on taking the account, those sums of stock must be re-transferred to him. That disposes of the whole case.

At the close of the judgment, counsel for the appellant, Augustin Robinson, stated that that gentleman had paid into court, in obedience to the decree of the Master of the Rolls, a considerable sum of money, much more than, now the decree had been varied, would be payable by him. It was, therefore, desirable that the expense of a petition to get any balance due to him out of court should be saved, if that could be arranged in the decree on the appeal. All parties admitted that the balance would be in his favour.

LORD JUSTICE KNIGHT BRUCE, as all parties agreed, directed the Registrar to enter the decree now pronounced thus:—Vary the decree in the manner stated by Lord Cranworth, and then go on—"Counsel on all sides representing" so and so (the facts now stated), "the Court doth order" so and so (the payment of the

balance out to the tenant for life). That would save the expenses of a petition, and if the parties could come to an understanding, the amounts could be verified by affidavit.

L.C. }
1851. } *In re UPFULL'S TRUST.*
May 13. }

Trustees Relief Act—Pauper Lunatic—Order for Payment to Guardians of the Poor for past Maintenance.

A fund belonging to a pauper lunatic was paid by the trustees into court under the 10 & 11 Vict. c. 96. On the petition of the guardians of the poor, an order was made for the payment to them out of the fund of the expenses incurred by the parish in the support of the lunatic.

Andrew Upfull, by his will, dated the 29th of March 1831, gave to his wife, Mary Upfull, to her own use, and for the care and support of his son, Charles Upfull, all the Bank stock which he might be possessed of at the time of his decease, with power to his wife to sell out of the principal stock every year so much as would, with the dividends, amount to 45*l.*, and to raise an additional 10*l.* if required; and the testator also empowered his wife by will to bequeath to such trustees as she might choose what should remain of the stock at her death.

At the time of the testator's death, in 1833, he was possessed of 800*l.* 3*l.* per cent. annuities.

Mary Upfull died in April 1850, and, by her will, after directing payment of her debts, &c., gave all her personal estate to her executors in trust, to apply the same towards the maintenance of Charles Upfull in such manner as they should think fit; and she appointed the respondents, Thomas Dawes and H. G. Day, her executors, who duly proved her will. On the 7th of February 1851, the executors transferred into the name of the Accountant General of the Court of Chancery to an account entitled "In the matter of Upfull's Trust," the sum of 350*l.* 3*l.* per cent. Bank annuities, being the residue of the said sum

of 800*l.* stock, after sales made at different times by Mary Upfull.

Charles Upfull, at the time of the testator's death, was a person of unsound mind, and had ever since so continued; and in February 1844, he was placed by Mary Upfull in the workhouse of the Brentford Union, whence he was shortly afterwards removed to the Middlesex county lunatic asylum at Hanwell, where he now resided at the cost of the parish of Ialeworth; but no commission of lunacy had been taken out against him.

The present petition was presented by the guardians of the poor of the Brentford Union, stating that, at the time Charles Upfull was placed in the workhouse, it was not known to the parish authorities that either he or his mother was entitled to any property; that various sums had been paid by the guardians of the poor of the Brentford Union to the treasurer of the said county lunatic asylum for the maintenance of the said Charles Upfull, which sums amounted on the 31st of December last to the sum of 155*l.* 14*s.*; and that the parish authorities were liable to pay yearly to the said treasurer the sum of 22*l.* so long as the said Charles Upfull should continue an inmate of the said asylum. The petition prayed that it might be referred to the taxing Master to tax the costs of the petitioners and respondents relating to this application, and that so much of the said sum of 350*l.* stock might be sold as would be sufficient to raise the sum of 155*l.* 14*s.* and the said costs, and the proceeds applied accordingly; and that no part of the residue of the said stock, after such sale as aforesaid, might be sold or transferred without notice to the petitioners or the guardians for the time being of the Brentford Union.

Mr. S. Miller, for the petition.—The 27th section of the 7 & 8 Vict. c. 101. enacts, that expenses incurred for insane paupers may be levied on their estates, and authorizes any person having property of a lunatic to defray such charges; and by the 12 & 13 Vict. c. 103. s. 16, the guardians of the poor are authorized to take the property of a pauper for the expenses of his maintenance. In this case, there is a direct trust in favour of the lunatic, and the fund is in court; and the question is,

whether the Court will, in analogy to the statute, direct payment of these expenses out of the fund, and without a reference.

In re Burbidge, 3 Mac. & Gor. 1.

Brodie v. Barry, 2 Ves. & B. 36.

Ex parte Green, 1 Jac. & W. 253.

Ex parte Swift, 1 Russ. & M. 575.

Shelford on Lunatics, p. 220.

Mr. Nichols appeared for the trustees, and submitted that the next-of-kin ought to have been served.

The LORD CHANCELLOR.—The act of the 7 & 8 Vict. c. 101. authorizes the trustees of a lunatic, out of property in their possession, to defray certain expenses incurred by the parish in respect of such lunatic, and makes the receipt of the overseers a good discharge to the trustees for the money so paid; and the act of 12 & 13 Vict. c. 103. empowers the guardians of the poor to levy for maintenance on the property of paupers generally; but neither of those acts refers to the jurisdiction of the Court. The 10 & 11 Vict. c. 96, the act under which the fund has been paid in, empowers trustees, having money belonging to a trust, to pay the same into court in the matter of the particular trust, to attend the orders of the Court; and the second section empowers the Court to make orders on petition for the administration of the trust, such orders to have the same effect as if made in a suit. Assuming the money to be properly paid in, and the application to be properly supported, the question still remains, how far the act applies to the case of a lunatic *cestui que trust*? For the act supposes the party interested to be served, but here the lunatic is not represented. Now, before payment of the fund into court, the trustees might, under the authority of the 27th section of the 7 & 8 Vict. c. 101, have paid this money to the guardians of the poor, and their receipt would have been a sufficient discharge to the trustees. By the 10 & 11 Vict. c. 96, the Court is placed in the position of a trustee; and, therefore, I am of opinion that I may properly make the order.

L.C.	}	FOWLER v. REYNAL.
1851.		
Nov. 5.		
1852.		
Jan. 15, 16, 17.		

Trust, Breach of—Parties—Proof of Title in Plaintiffs.

By an ante-nuptial settlement the trustees were empowered, with consent of the parties, to sell out the trust fund, and invest the proceeds upon real securities. By a memorandum executed contemporaneously with and indorsed on the settlement, the parties requested the trustees to advance the trust monies to the owners of Vauxhall Gardens upon mortgage as first, second, or third mortgagees:—Held, that "the owners" meant owners at the date of the settlement and memorandum, and that an advance to the three owners originally without security, and the subsequent acceptance of a mortgage with a joint and several covenant from two of the three owners, one having then retired, was a breach of trust, and the trustees were ordered to bring the fund into court.

The bill alleged that some of the plaintiffs were children of another plaintiff, and that they and certain defendants were the only children of the marriage. The answer did not deny the allegation, but stated that the defendants did not know that these were all the children, and raised no objection for want of parties on this ground; no evidence was gone into to prove the relationship. The Court refused to entertain an objection taken for the first time on the rehearing that some of the plaintiffs had not proved their title.

By an indenture, dated the 15th of January 1825, made between Thomas Bish and Frances Elizabeth Bish, spinster, his daughter, of the first part, Robert Hodgson Fowler of the second part, and George Thomas Robert Reynal, George Webb, William Fowler, and Chappel Fowler of the third part, being a settlement made previously to the marriage of Mr. Fowler with Miss Bish, after reciting, that 8,450*l.* 3*l.* per cent. reduced annuities, had been transferred, by Thomas Bish, into the names of the said G. T. R. Reynal, G. Webb, W. Fowler and C. Fowler, it was declared that they, the said four trustees, should stand possessed thereof, after the

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then intended marriage, upon trust out of the dividends to pay the premium on a policy of assurance, and subject thereto, to pay the residue to the intended wife during her life, for her separate use, without power of anticipation; and after her decease, in case there should not be any child or issue of the marriage living at her decease, the said trustees were directed to stand possessed of the capital stock in trust for the said T. Bish; but in case she should have any issue of the marriage living at the time of her death, then upon trust to pay the dividends to the intended husband for life, or until his bankruptcy; and after the determination of the preceding interest, the said trustees were directed to stand possessed of the capital stock and dividends in trust for the children living at the decease of the intended wife, who should live to attain the age of twenty-one years, or who should die leaving issue. And there was a power for the trustees, with the consent and approbation of R. H. Fowler and F. E. Fowler, in writing, during their lives, to sell out the 8,450*l.* 3*l.* per cent. reduced Bank annuities, or any part thereof, and invest the proceeds upon any other public stock or funds, or upon real security or securities at interest; and also from time to time to vary the securities on which the trust monies should be invested.

Contemporaneously with or shortly after the execution of the settlement, and before the marriage, the intended husband and wife and Mr. Bish signed a memorandum indorsed on the settlement to the following effect:—

"We hereby request the trustees within named to advance, pursuant to the power within contained for that purpose, the sum of 8,450*l.*, 3*l.* per cent. reduced Bank annuities, or any part thereof, to the owners or lessees of Vauxhall Gardens, in the county of Surrey, upon mortgage, either as first, second, or third mortgagees, for such time and at such rate of interest as the said trustees may in their discretion think fit."

At the date of the settlement, Mr. Bish, with two partners named Frederick Gye and Richard Hughes, were proprietors of Vauxhall Gardens (which were of copyhold tenure) and were entitled to the fee

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according to the custom of the manor, as tenants in common.

The marriage having been solemnized, the trustees soon after sold out the stock, and on the 24th of February 1825 lent the proceeds, amounting to 8,000*l.* to Thomas Bish, Frederick Gye, and Richard Hughes, on the understanding that a mortgage of Vauxhall Gardens should be executed, but without taking any present security.

On the 30th of July 1825, Mr. Bish retired from the partnership concern, and all his interest in the copyhold premises was thereupon transferred to and became vested in Messrs. Gye & Hughes, who continued to carry on the concern.

The 8,000*l.* lent remained unsecured until the 29th of November 1826, when, by an indenture made between Messrs. Gye & Hughes of the one part and the four trustees of the other part, Messrs. Gye & Hughes covenanted to surrender the property (subject to two prior mortgage securities therein specified, and also subject to redemption on repayment of the 8,000*l.* and interest) to the four trustees.

The interest on the 8,000*l.* was regularly paid, and in the year 1837, Messrs. Gye & Hughes, upon the application of Reynal for repayment of the 8,000*l.*, repaid 1,000*l.* in part thereof.

In May 1840, Messrs. Gye & Hughes became bankrupts; and on the 9th of September 1841, in pursuance of an order made in the bankruptcy by the Court of Review, upon the petition of Mr. Reynal and of the three other trustees, and of certain other persons interested in the two other prior mortgages, the mortgaged premises were put up for sale by auction, but they were not then sold.

The premises were afterwards nominally sold to Mr. William Fowler, one of the trustees, at a nominal price of 22,339*l.* 7*s.* 7*d.*, and were conveyed to him by an indenture, dated the 16th of February 1843, in consideration of the payment of that sum to the several mortgagees; but no part of the sum was ever in fact paid by him.

No part of the balance of 7,000*l.* was ever afterwards realized.

On the 30th of June 1847, Mrs. Fowler with other plaintiffs described as her chil-

dren, by their next friend, filed a bill against Mr. Reynal, one of the trustees of the settlement of her husband, and other *cestuis que trust* under the settlement; but Mr. Webb, Mr. William Fowler, and Mr. Chappel Fowler, the three other trustees of the settlement, were not made parties.

The bill detailed the facts and circumstances above stated, and various transactions from which it appeared that the security had been deficient for many years. The bill charged that the plaintiff Mrs. Fowler and her husband had made certain specified requests to the trustees to realize the security, and to enforce the payment of the mortgage debt of Messrs. Gye and Hughes, long previous to their bankruptcy, but that the trustees had not done so. It also charged that all the transactions relating to the trust funds, and the security, and the mortgaged premises, were managed and conducted by and under the direction of Mr. Reynal alone; and that after the bankruptcy of Messrs. Gye and Hughes, Mr. Reynal entered into possession of the mortgaged premises, and took upon himself the sole management thereof; and that he had ever since continued in the possession thereof; and that he had constantly represented that the whole was unprofitable and unproductive.

The bill prayed a declaration that by varying the investment of 8,450*l.* 3*l.* per cent. reduced annuities, and by selling the same and lending the proceeds to Messrs. Bish, Gye & Hughes, the defendant Reynal was guilty of a breach of trust, and became personally liable to make good the amount of the Bank annuities; and that he might be charged with the same, or that he might be declared liable to make good the amount of the loss, which had or should have arisen to the trust estate by the depreciation in value of the mortgage security from the time when he ought to have realized, or to have concurred in realizing the same.

The defendants, by their answers, admitted the principal facts charged in the bill, and evidence was also gone into. But as regarded the infant plaintiffs being children of Mrs. Fowler, or what children she had, the only evidence against the defendant Reynal was a statement in his answers, that he could not state whether the co-

plaintiffs were all the children then living of Mrs. Fowler. Mr. Reynal also stated in his answers, that the plaintiff Mrs. Fowler, by receiving the increased rate of interest on the mortgage, as tenant for life, or otherwise, had acquiesced in the investment, and the acts of the trustees; and that the defendant Reynal was under no liability, at all events as regarded her. The bill was subsequently amended by making the three other trustees parties to the suit.

The cause coming on for hearing, before Knight Bruce, V.C., his Honour held that there had been no waiver of the breach of trust, if any had been committed; that, independently of the memorandum, the loan originally would have been clearly a breach of trust, but that the memorandum was to be taken as part of the settlement, being entered into by Mrs. Fowler when unmarried and of age; that "the owners or lessees of Vauxhall Gardens" must be construed to mean the persons who were such at the time of executing the memorandum; and that the trustees were bound to have taken from the three a joint and several liability for the money; and an order was made for the stock to be brought into court by the four trustees, and an inquiry was directed as to the state of the family of Mrs. Fowler.

From this order the defendant Reynal appealed.

Mr. Bacon, Mr. Malins, and Mr. Humphreys, for the plaintiffs, in support of the decree.—In the first place, there was a clear breach of trust in advancing the trust money without security; and in the next place in taking an insufficient security—*Stickney v. Sewell* (1). The memorandum authorized a loan to the then proprietors of Vauxhall Gardens, and the money was advanced to the three, and a year afterwards a security was taken from Gye & Hughes alone, with a covenant by the two only for the repayment of the advance; and thereby the simple contract debt of Bish was extinguished. A married woman can only be bound by acquiescence, when such acquiescence is in accordance with the deed creating her

rights—*Bateman v. Davis* (2), *Cocker v. Quayle* (3), *Nail v. Punter* (4), *Hopkins v. Myall* (5), *Kellaway v. Johnson* (6), *Brice v. Stokes* (7), *Ryder v. Bickerton* (8). An infant's title cannot be affected by acquiescence—*Buckeridge v. Glasse* (9).

Mr. Wigram and Mr. Drewry, for the defendant Reynal.—First, there is no evidence that the co-plaintiffs are the children of Mrs. Fowler and interested in the suit. All the plaintiffs must be interested in the subject-matter of the suit, and every plaintiff's title to sue must be proved—*The King of Spain v. Machado* (10), *Makepeace v. Haythorne* (11), *Cowley v. Cowley* (12), *Anderson v. Wallis* (13), *Hudson v. Maddison* (14), *Padwick v. Platt* (15); and the evidence in this case is insufficient to make a case for inquiries—*Marten v. Whicelo* (16), *Miller v. Priddon* (17), *Jope v. Morshead* (18), *Simmons v. Simmons* (19). The loan originally was authorized by the settlement and memorandum; and if that is so, the decree is wrong in directing the trust fund to be brought into court; but inquiries ought to have been directed as to whether the defendants might, by due diligence, have got in the money sooner, and what loss has ensued in consequence of their laches—*Mucklow v. Fuller* (20),

(2) 3 Madd. 98.

(3) 1 Russ. & M. 535.

(4) 4 Sim. 479.

(5) 2 Russ. & M. 86.

(6) 5 Beav. 319.

(7) 11 Ves. 319.

(8) 3 Swanst. 80, n.

(9) Cr. & Ph. 126; a. c. 10 Law J. Rep. (n.s.) Chanc. 134.

(10) 4 Russ. 225; a. c. 6 Law J. Rep. Chanc. 61.

(11) 4 Russ. 244; a. c. 5 Law J. Rep. Chanc. 147.

(12) 9 Sim. 299; a. c. 7 Law J. Rep. (n.s.) Chanc. 259.

(13) 1 Phil. 202; a. c. 10 Law J. Rep. (n.s.) Ex. Eq. 9; 4 You. & C. 336.

(14) 12 Sim. 416; a. c. 11 Law J. Rep. (n.s.) Chanc. 55.

(15) 11 Beav. 503.

(16) Cr. & Ph. 257; a. c. 10 Law J. Rep. (n.s.) Chanc. 384.

(17) 1 Mac. & G. 687; a. c. 18 Law J. Rep. (n.s.) Chanc. 226.

(18) 6 Beav. 213; a. c. 12 Law J. Rep. (n.s.) Chanc. 190.

(19) 6 Hare, 352.

(20) Jacob, 198.

(1) 1 Myl. & Cr. 8.

Stiles v. Guy (21). They cited also the cases of—

Denton v. Davy, 1 Moore, P.C. 15.

Say v. Creed, 3 Hare, 455.

Mitford v. Reynolds, 1 Phil. 185; s. c. 12 Law J. Rep. (N.S.) Chanc. 40.

Beauclerk v. Ashburnham, 8 Beav. 322; s. c. 14 Law J. Rep. (N.S.) Chanc. 241.

Mr. Osborne, Mr. Goldsmid and Mr. Freeling appeared for other parties.

Mr. Bacon replied.

The LORD CHANCELLOR.—The bill in this case is filed by the plaintiff, Frances Elizabeth Fowler, the wife of the Rev. Robert Hodgson Fowler, and by several other persons, alleged to be the children of Mr. and Mrs. Fowler, as parties interested under a marriage settlement, for the purpose of making the trustees accountable for the trust fund, upon the ground of certain acts, on the part of the trustees, which are alleged to have amounted to breaches of trust. The facts of the case, so far as they are material, are the following:—On the 15th of January 1825, a deed of settlement was executed, by which a sum of 8,450*l.* 3*l.* per cent. reduced annuities, was settled on the marriage of Mr. and Mrs. Fowler, upon trust, to apply the dividends to various purposes, and among them a certain portion to the separate use of Mrs. Fowler during her life, with a trust as to the principal for the benefit of the children of the marriage, in certain events, which have happened. The particular trusts are not, in other respects, material to the consideration of the present case. The parties to that settlement were, Thomas Bish, the father of Mrs. Fowler, who gave the 8,450*l.* stock, by way of marriage portion, Mrs. Fowler and her intended husband, and the defendants, George Thomas Robert Reynal, George Webb, William Fowler and Chappel Fowler, the trustees. The settlement contained a power to the trustees, and the survivors and survivor of them, with the consent of the plaintiff and her intended husband, or

the survivor of them, and after the decease of such survivor at their own discretion to sell the said trust fund, or any part thereof, and to invest or place out the monies to arise by such sale on any other public stock or funds or upon real security, and from time to time to call in the monies so placed out on security, or to sell the stock in which the same might be invested, or any part thereof, as they should think fit.

The four trustees named in the settlement accepted the trusts, but the defendant George Thomas Robert Reynal has throughout been the acting trustee. It was understood by the parties, previously to the execution of the settlement, that the funds about to be settled should be lent to the said Thomas Bish, the settlor, and Gye and Hughes, who were joint lessees of Vauxhall Gardens, and who were also joint equitable owners of the same property, under a purchase contract, dated the 6th of December 1824, and the loan was proposed to be secured by a mortgage upon the property, which was of copyhold tenure. With the view of carrying into effect the proposed arrangement, contemporaneously with the execution of the settlement, a memorandum was accordingly indorsed upon the deed of settlement, and signed by Mr. Bish, and Mr. and Mrs. Fowler, which was as follows: "We hereby request the trustees within named to advance, pursuant to the power within contained for that purpose, the sum of 8,450*l.* 3*l.* per cent. reduced Bank annuities, or any part thereof, to the owners or lessees of Vauxhall Gardens, in the county of Surrey, upon mortgage, either as first, second, or third mortgagees, for such time and at such rate of interest as the said trustees may, in their discretion, think fit. (Signed) T. Bish, R. H. Fowler, and F. E. Bish." The stock was transferred to the trustees, and the whole was shortly afterwards sold, and the produce of the sale amounting to about 8,000*l.*, was, on the 24th of February 1825, advanced to Bish, Gye and Hughes, but no written security was then taken for the repayment. On the 25th of March 1825, the purchase of Vauxhall Gardens was completed by a surrender to Bish, Gye and Hughes. On the 30th of July 1825, Thomas Bish retired from the partnership

(21) 1 Hall & Twells, 523; s. c. 1 Mac. & G. 426; 19 Law J. Rep. (N.S.) Chanc. 185.

with Gye and Hughes, and his interest in the property in Vauxhall Gardens was surrendered to, and became vested in Gye and Hughes.

By an indenture, dated the 29th of November 1826, Gye and Hughes covenanted with the trustees of the settlement to surrender Vauxhall Gardens, by way of mortgage, subject to two charges of 7,000*l.* each created in favour of the defendant Reynal and others as trustees under the will of Thomas Bish the elder. Whether this mortgage was an adequate security, at the date of this mortgage deed, it is not necessary to determine. The defendant Reynal admits that it is now wholly inadequate. Consequently a loss has clearly arisen, and which there is reason to fear may prove a total one, and the present suit is instituted to compel the trustees to reinstate the stock. There are several acts of the trustees which are imputed to them as breaches of their trust, which in equity subject them to the liability with which it is the object of this suit to fix them. The Vice Chancellor held that the trustees were bound to replace such stock, and ordered the amount of the produce to be paid into court. The present appeal is against that decision.

As before stated, the defendants are charged with various breaches of trust. The first, and most important, is alleged to arise out of the following circumstances:—that the authority given to them to advance the trust fund, which, as before stated, was signed contemporaneously with the execution of the settlement, was to advance it to the owners or lessees of Vauxhall Gardens upon a first, second or third mortgage—while the trustees, in fact, advanced the money without having any mortgage or written security, until November 1826, the loan having been made in March 1825—and that although the advance in March was made to Bish, Gye & Hughes, who were then the lessees and equitable owners of Vauxhall Gardens, yet the mortgage security, which was in the form of a covenant to surrender and a covenant for repayment of the mortgage-money, was taken from Gye and Hughes only, without Bish. Mr. Bish has been long since dead, and his estate administered. Gye & Hughes have become bankrupts, with a very insufficient estate, and it is doubtful whether Vauxhall

Gardens will produce more than sufficient to pay off the first and second mortgages, and it is alleged that the defendants' conduct, as above stated, amounted to a breach of trust. First, because the money was originally lent without taking any security whatever. Secondly, that although the trustees were authorized to lend the money, upon the security of Vauxhall Gardens, yet that was subject to an implied condition that the security was adequate, which it was not. Thirdly, that the trustees improperly, not only forebore taking any security whatever until many months after the loan, but that when they did take the security, it was taken from Gye & Hughes only, and Mr. Bish was discharged by the trustees choosing to take covenants from two only of the joint debtors. Fourthly, that the trustees improperly forebore to recall and enforce payment of the mortgage-money for an unreasonable time; and by these means it is alleged that a great part, if not the whole, of the trust fund will be lost.

In answer to the first alleged breach, it is said that no loss has arisen from the circumstance of the mortgage not being procured until November, several months after the loan. The effect of this objection and the sufficiency of the answer to it may be subject to the same observations as will arise in respect to the second alleged breach; and with regard to that breach, it is contended that the memorandum indorsed on the deed expressly authorized the loan to be made to the owners or lessees of Vauxhall Gardens; and the security taken in November was, in fact, taken from the then owners of the property. Their conduct, it is therefore said, was sanctioned by the terms of the memorandum, the authority or direction expressly pointing to Vauxhall Gardens. In estimating the effect of this charge and the answer to it, it will be necessary to consider what will be the proper construction of the memorandum. It is contended, on the part of the plaintiffs, that the authority was to advance the money to the owners of the property at the date of the memorandum, and not to persons who might become the owners at some indefinite future time; that the owners at that time were persons whose credit and solvency were

known; whereas, according to the defendants' construction, the trustees were authorized to make the advance to any persons who might fill the character of owners in future, without regard to their condition or responsibility; which, it is said, cannot be reasonably intended to have been the meaning of the parties.

It is argued that the memorandum operated as an imperative direction to the trustees, which they were bound to obey by advancing the money within a convenient time; and that they were not at liberty to postpone such advance at pleasure, one object of the advance being to obtain an increase of income, and if (the owners of the Gardens being ready to take the money on loan) the direction referred to a present advance, it necessarily pointed to the owners for the time being. The property, from its peculiar nature, must be considered as likely to fluctuate in value, according as the public taste and fashion might adopt the place as one of public resort and amusement. The loan was also authorized to be made on a first, second, or third mortgage. Both these circumstances strengthen the supposition that the known personal responsibility of the owners of the gardens might influence the discretion of those who directed the investment.

Upon these grounds, it is contended, that the conduct of the trustees was in no respect sanctioned by the terms of the settlement and memorandum, and that, by advancing in March, without any written security, and having advanced to the then three owners of the property, and afterwards by accepting a covenant from two only, they made an investment unauthorized by the trust reposed in them, and accepted a less and different security from that which upon the true construction of the memorandum they were directed to do.

As I understand the judgment of the Vice Chancellor, he was of opinion that the construction of the memorandum contended for on the part of the plaintiff was a correct construction, and that under such circumstances the trustees must be considered, in making the advance without security and in afterwards accepting the covenant of two only of the three joint debtors, as having misapplied the fund and subjected

themselves to replace it when called upon by the Court. I am of opinion that the judgment and order made by his Honour, was the proper judgment to be given in the case, and must be affirmed.

It is necessary that I should observe upon a point which has been raised in the argument before me, but which I understand was not made in the court below. The plaintiffs in this suit, besides Mrs. Fowler, are alleged to be her children; but it has been said, that although the bill contains such an allegation, there is no admission on the part of the defendants of the identity of those plaintiffs, nor any evidence in support of it in the cause; and it was said that a bill ought to be dismissed, in which it shall appear at the hearing that persons having no interest in the subject-matter of the suit are joined with others who are properly made plaintiffs. The plaintiffs contended that such an objection, if valid, was too late at the hearing of the cause, and after the plaintiffs' case had been heard; but that, at all events, the pleadings raising no issue in regard to the identity of the alleged children, but such identity being assumed throughout, up to the rehearing, the Court would allow the objection to be repelled by an affidavit.

Several cases were referred to as authorities in support of the argument; but, in all the cases referred to, the alleged interest of the plaintiffs, to whom the objection applied, was either disproved by evidence or denied. In the present case, the answer contains no denial, nor uses any expressions importing a doubt upon the fact, that the plaintiffs, other than Mrs. Fowler, were her children. The answer rather proceeds upon the assumption that they in truth possessed the character ascribed to them by the bill.

Supposing the objection to have been taken at the proper time, and in proper form, its validity is very doubtful; but as it is in fact taken, I think it cannot be sustained; and it is so obvious from the course of the pleadings, and from the fact that it is urged for the first time upon the rehearing, that it is an entire afterthought, occurring probably for the first time after hearing the plaintiffs' case, that if I thought the objection, when taken, was open to the

party, I should feel it my duty to receive an affidavit to repel it.

I have not come to the conclusion upon the merits which I have stated, without an anxious and laborious consideration of the case, and of the authorities which bear upon it, because I have felt that under the circumstances disclosed in the pleadings, the case bears very hardly upon the defendant Reynal, who has been influenced solely by kindly feelings and confidence to fail in the observance of his strict legal duty. But as he became a trustee for the benefit and security of the children of the marriage, and the loss of the trust fund to those children has been the consequence of his departure from his duty towards them, they are entitled to the remedy for that loss which the decree secures to them.

As regards Mrs. Fowler being a party to all the departure of duty committed by the defendant Reynal, he, being a professional man, must have been aware that her authority and sanction, being a married woman, would afford no excuse or justification of such conduct. This appeal must, therefore, be dismissed, with costs.

TURNER, V.C. }
Nov. 14. } GOODE v. WEST.

Claim, Allegations in—Trustees Indemnity Acts (10 & 11 Vict. c. 96. and 12 & 13 Vict. c. 74.)—Jurisdiction.

A claim not stating all the facts of the case within the plaintiff's knowledge is liable to be dismissed, with costs, and if the plaintiff withholds those facts and takes the chance of relief from what may turn up from the affidavits, the Court will not adjudicate upon the claim.

When trustees have paid any monies into court under the Trustees Indemnity Acts, the remedy of a plaintiff as to the sum paid in can be prosecuted only under those statutes, and not under the ordinary jurisdiction of the Court by bill or claim.

This was a claim for the administration under the direction of the Court of a cer-

tain trust fund, amounting to the sum of 1,777*l.* 13*s.* 4*d.*, and of certain arrears of interest thereon, and was filed against the trustees of the fund by a *cestui que trust* entitled to one fourth part of it. The claim stated the title of the plaintiff under a settlement of the 20th of December 1844, a deed of appointment of the 6th of June 1845, and certain dealings with the settled property, whereby he became entitled in January 1850 to one fourth part of the above sum (which had been invested by the trustees on mortgage), and of the arrears of interest thereon from October 1849.

It appeared from the affidavits that the amount due to the plaintiff had been agreed upon by himself and the trustees in November 1850, and that the latter had offered to pay the amount upon having a release from the plaintiff, and the delivery to them of the deed of appointment, or an attested copy and a covenant to produce the original, executed at the expense of the plaintiff. The latter declined to deliver up the deed of appointment, or to pay the expense of the attested copy and covenant, and the trustees then paid the amount of his share (444*l.* 8*s.* 4*d.* for principal, and 17*l.* 2*s.* 2*d.* for interest) into court under the provisions of the Trustees Indemnity Acts (10 & 11 Vict. c. 96. and 12 & 13 Vict. c. 74.) less the sum of 25*l.*, retained by them for their costs. The claim contained no statement of this dealing with the plaintiff's share.

*The Solicitor General and Mr. Younge, for the plaintiff, submitted that he was entitled to have the whole fund administered under the direction of the Court; that he disputed the right of the trustees to deduct so large a sum as 25*l.* for costs, on the grounds that one of them, who was a solicitor, could only charge for costs out of pocket in matters in which he had acted professionally; and that the plaintiff could not raise the question of such deduction if he proceeded under the Trustees Indemnity Acts, because they did not contain any provision in that behalf.*

They cited—

In re Bloye's Trust, 1 Mac. & Gor. 488; s.c. 2 Hall & Twells, 140; 19 Law J. Rep. (N.S.) Chanc. 89.

Mr. John Baily and Mr. Simpson, for the trustees, argued, first, that the plaintiff ought to proceed under the Trustees Indemnity Acts, and that by those acts the ordinary jurisdiction of the Court by bill or claim in respect of the sum paid in by the trustees was superseded; and secondly, that the claim was substantially for the amount deducted for costs by the trustees, in respect of which the claim contained no statement, and ought therefore to be dismissed, on the authority of his Honour's decisions in *Johns v. Mason* (1), *Penny v. Penny* (2) and *Eccles v. Cheyne* (3).

The Solicitor General replied.

TURNER, V.C.—A claim recently came under my consideration, in which I expressed an opinion upon a point which is also involved in the case now before me (4). It was a claim for the redemption of a mortgage, and upon the hearing it came out upon the affidavits that there had been a release of the equity of redemption. The plaintiff in that case had filed the claim without noticing the release of the equity of redemption, and I on that occasion expressed an opinion which I still adhere to, viz., that parties resorting to the summary jurisdiction of the Court upon claims are bound to state all the facts of the case which are within their knowledge, and that they are not justified in bringing a case before the Court, not as it really stands, but as it would have stood in the view the parties may entertain of the relief to which they are entitled. If they put before the Court a case not fully stating the facts, the Court ought not to entertain the claim but dismiss it, whatever course it may pursue to preserve the rights of the parties on a claim if properly brought.

The claim before me is filed stating a settlement under which a sum of 1,777*l.* 13*s.* 4*d.* was settled upon trust as to one-fourth for a certain person for life, and subject to the life interest for the appointee of the tenant for life, and as

to the remaining three fourth parts of the fund, subject to distinct and separate trusts. Before this claim was filed, it was known to the plaintiff that the three-fourths had been severed from the one-fourth, and that the one-fourth had been paid into court under the Trustees Indemnity Acts. The claim takes no notice whatever of this application of the fund, but seeks to have the whole sum of 1,777*l.* 13*s.* 4*d.* administered under the decree of the Court. Until set right by a higher authority, I must entertain a strong opinion that a claim of this kind should state to the Court the actual facts of the case; and that if the plaintiff withholds those facts and takes the chance of relief resulting from what may turn up from the affidavits, the claim ought not to be adjudicated upon. It is the duty of the plaintiff upon a claim to proceed *secundum allegata et probata*, and as the case suggested by the claim is not the case the Court is asked to adjudicate upon, I think, on that ground, the claim must be dismissed. The question is, whether it should be dismissed with or without costs; but however that may be, it will be dismissed without prejudice to any other proceeding the plaintiff may be advised to take.

With regard to what has been done by the trustees, no doubt the jurisdiction of the Court by bill is gone as to the fund paid by them into court under the above acts, which enact to the effect that trustees may pay into court any monies, and that such payment into court shall be a discharge of the trustees as to what they shall so pay in. If the acts had said *all* monies, and part only were paid in, it might be well contended that the original jurisdiction of the Court by bill remained. The distinction, however, is, that the acts say "any" monies, and that payment into court shall be a discharge as to those monies. I am of opinion that the remedy of the plaintiff as to the sum paid in can be prosecuted only under those statutes, and not under the ordinary jurisdiction of the Court by bill or claim. The effect of this is, that the case appearing upon the claim, if indeed it can be entertained at all, is reduced to a claim for 25*l.* retained in hand by the trustees for their costs.

(1) 9 Hare, 29; s. c. 20 Law J. Rep. (N.S.) Chanc. 305.

(2) 9 Hare, 39; s. c. 20 Law J. Rep. (N.S.) Chanc. 339.

(3) 20 Law J. Rep. (N.S.) Chanc. 631.

(4) His Honour was understood to refer to the claim of Borritt v. Moore (not reported), which was heard on the 5th of November 1851.

For the reason already given I do not think I can entertain the claim, and the only question is, whether it shall be dismissed with or without costs as to the trustees. Trustees are undoubtedly entitled in all cases to apply under those statutes for protection; and I am of opinion, looking through the correspondence in evidence, that they have in the present case unanswerable grounds for coming to the Court for that protection. However, although so entitled, they are not entitled to settle their own charges against the estate. What I have to consider is, whether, if the trustees had paid over the whole trust fund, less the amount retained for costs, without prejudice to the right of the *cestui que trust* to dispute the amount so retained, a bill could be filed by the *cestui que trust* to recover the amount which the trustees had retained. Now, if it should appear on the result of a bill of that kind that the trustees are truly entitled to a certain amount of the costs retained by them, and there being no fraudulent conduct on their part, that they had retained an amount beyond that which the law will strictly allow them for their costs, I do not think that the fact of having retained an amount beyond what they are entitled to would be a ground for depriving them of their costs of that suit. That being so in the case of a suit by bill, the same reasoning will apply to the case of a suit by claim. I cannot, therefore, refuse the trustees their costs, although I give them with reluctance, seeing that by a little forbearance on their part they might have prevented the claim from being filed. I, therefore, dismiss the claim with costs, but without prejudice to the right of the plaintiff to proceed as he may be advised in respect of the sum retained by the trustees.

Decree accordingly.

LORDS JUSTICES.

1851.

Nov. 8, 10, 25.

TOFT & STEPHENSON.

Lien for Unpaid Purchase-money—Statute of Limitations—Trustee and Cestui que Trust—Acknowledgment.

A testator devised his real estates to A. B.

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in fee, charged with the payment of his debts. A. B. in 1811 contracted with C. D. to sell part of the real estate, the purchase-money to be paid two months after. C. D. was immediately let into possession. The purchase-money was not paid. In January 1812, A. B. was declared a bankrupt. In October in the same year, C. D. contracted to sell part of the same real estate to E. F, who was let into possession, but his purchase-money was not paid. C. D. made his will in 1817, by which he devised his real and personal estate to trustees upon trust to pay his debts, and then upon trust for his children, and died in 1827. The trustees refused to act, and the widow of C. D. and her children filed a bill for the appointment of trustees, and in that suit J. S. and W. R. were appointed new trustees. In 1834 the attorney for J. S. and W. R. gave notice to the assignees of A. B. (J. T. and J. C.) that the purchase-money for the property comprised in the contract of 1811, and interest, or rent in respect of the land, were ready to be paid, for the express purpose of completing the agreement. In 1844, the money not having been paid, the assignees filed a bill against J. S. and W. R., the trustees of the will of C. D., and against the parties beneficially interested thereunder, and against E. F. the sub-purchaser and others, praying a declaration that the plaintiff had a lien on the estate for the unpaid purchase-money.—Held, that the notice from the attorney of J. S. and W. R. was an acknowledgment in writing within the meaning of the 40th section of the statute 3 & 4 Will. 4. c. 27: that a person by whom "the money is payable," means, in the case of a claim by equitable lien, the person entitled to the land on which the charge is sought to be fixed, and that this acknowledgment being by devisees in trust for payment of debts was good as against the cestui que trust under the same will.

There being no proof as against the cestui que trust that the attorney who wrote the notice was in fact the agent of the devisees in trust, the Court granted an inquiry.

This was an appeal, by the plaintiff, from a decision of the late Vice Chancellor Sir James Wigram which is reported in 7 Hare, 1. In the court below several questions were raised to which it is not

necessary now to advert; they are referred to in the judgment. On that occasion the notice or letter of acknowledgment, produced and admitted in evidence on the appeal, was not tendered. The admission of that document as against the trustees on whose account it was written was resisted on the ground that it did not form part of the evidence on which the Court below had founded its judgment; but that objection was at once overruled, both their Lordships concurring in that determination. The suit was instituted by Joseph Toft and John Chapman, the assignees of the estate and effects of Thomas Marris, a bankrupt, against Joseph Stephenson and William Read, the trustees of the will of John Stephenson, and against the parties beneficially interested under that will under the following circumstances:—Joseph Marris, who died in 1808, by his will, dated a short time before, devised his real estates to Thomas Marris in fee charged with the payment of his debts. By an agreement in writing, dated the 4th of March 1811, Thomas Marris agreed to sell to John Stephenson lands in Owston, in the county of Lincoln, containing 151 acres and something more, parcel of the lands devised by the will of Joseph Marris, in consideration of a sum of 6,300*l.* to be paid on the 13th of May then next; and immediately on the execution of the agreement John Stephenson was let into possession, though no part of the purchase-money was paid. In January 1812, a commission of bankruptcy issued against Thomas Marris and his then partner Richard Nicholson, under which they were duly found and declared bankrupts, and the plaintiffs, Joseph Toft and John Chapman, were, at the institution of the suit, their assignees. In October 1812, John Stephenson agreed to sell to Cornelius Sandars 63 acres or more, part of the Owston estate, so purchased from Thomas Marris, and thereupon Cornelius Sandars was let into possession, and he and those who derived title under him ever since remained in possession. John Stephenson, by his will dated in 1817, devised all the lands so contracted to be purchased, together with all his personal estate, to two trustees in fee, in trust for payment of his debts and subject thereto upon certain

trusts for the benefit of his children. John Stephenson died in July 1827, without having revoked or altered his will, and the two trustees named in the will having refused to accept the trusts thereof, the defendants, Joseph Stephenson and William Read, were duly appointed trustees in their place by virtue of a decree of this Court in a suit instituted for that purpose by the parties interested under the will. The bill was filed in 1844 by the assignees of Thomas Marris against Joseph Stephenson and William Read and the parties beneficially interested under the will of John Stephenson, and also against the representatives of Cornelius Sandars (the sub-purchaser) for the purpose of establishing a lien on the property comprised in the original contract of the 4th of March 1811, and for that purpose it prayed as follows:—“That it may be declared that the plaintiffs have a lien upon the said hereditaments and premises comprised in the said agreement of the 4th day of March 1811, for the said sum of 6,499*l.* 18*s.* (1), with interest thereon after the rate of 4*l.* per cent. per annum from the 13th day of May 1811, and the said defendants Elizabeth Stephenson, Joseph Stephenson and William Read, and Frances Sandars and William Brocklehurst Stonehouse and Elizabeth his wife (the representatives of Cornelius Sandars), or some or one of them, may be ordered to pay the same to the plaintiffs as this honourable Court shall think fit at an early day to be named for that purpose, and in case the said defendants shall not pay the same to the plaintiffs, then that the same may be raised by sale or mortgage of the said hereditaments and premises as to this honourable Court shall seem meet, and that in the mean time some proper person may be appointed as receiver,” and so on. The case was heard in the court below several days in the month of March 1848, and on the 20th of March the Vice Chancellor Wigram held, that the right of the vendor to recover the purchase-money as a lien or charge on the lands was barred by the 40th section of the Statute for the Limitation of Actions and Suits (3 & 4 Will. 4. c. 27): that the

(1) The purchase-money was by the contract agreed to be ascertained in certain events; and this was the amount claimed.

lien was not saved by the 25th section of the same: and that the lien was not kept on foot by a suit for the administration of the devisee's estate, nor by suit by the residuary devisees and legatees of the will of the purchaser for the administration of his estate. The bill was retained for twelve months, and leave was given to the surviving plaintiff to proceed in ejectment for the recovery of the property, as he might be advised (2).

Mr. Lee, Mr. Glasse and Mr. Fooks, for the appellant, the plaintiffs, argued that the statute did not apply, and if it did the time at which the suit would be barred had not arrived; that the defendants, the trustees claiming under the will of John Stephenson the purchaser, were constructively trustees of the purchase-money, and they were such trustees for the plaintiffs, the assignees of Thomas Marris the devisee in trust under the will of Joseph Marris the deviser. Lord Hardwicke, in *Green v. Smith* (3), laid down "that the vendor of the estate is, from the time of his contract, considered as a trustee for the purchaser, and the vendee, as to the money, a trustee for the vendor." Lord Loughborough, in *Blackburn v. Gregson* (4), citing the words of Lord Camden, used by him in *Chapman v. Tanner*, there referred to, said, the vendor "has a natural equity," and added, "it struck me always that there was such a lien, and that it was so

from the foundation of the court." And again, "if an estate is sold and no part of the money paid, the vendee is a trustee." The time had never arrived for payment, for the title had never been completed, and therefore the statute could not operate—*Burrell v. the Earl of Egremont* (5), *Grant v. Ellis* (6); and if so, relief might be had notwithstanding the statute. *Mestaer v. Gillespie* (7), which was first heard before Lord Eldon, and afterwards by him assisted by Sir William Grant, shewed that the mere formality required by an act of parliament would not stand in the way of this Court doing justice, and that the purchaser or those representing him could not by the neglect to do what should have been done long ago, vary the rights of other parties. Independently, however, of that point, the objection on which Sir James Wigram had mainly decided the case, namely, that the plaintiff's claim was barred by the 40th section of that statute, no longer existed, for the answers of the defendants Stephenson and Read having stated that a correspondence had passed between Mr. Cartwright, their solicitor, and Mr. Holgate, the solicitor of the plaintiff, an investigation took place and a search was made, the result of which was the production of the following letter, dated in 1834, and therefore within the time prescribed by the 40th section. That letter was as follows:—"To Messrs. Joseph Toft and John Chapman, assignees of the estate and effects of Thomas Marris, a bankrupt, and to Mr. Patteson Holgate, their attorney.—As attorney for and on behalf of William Read, of Epworth, in the county of Lincoln, draper, and Joseph Stephenson, of Everton, in the county of Nottingham, farmer, the persons appointed by the High Court of Chancery to carry into execution the trusts of the last will and testament of John Stephenson, late of Craiselound, in the parish of Haxey and said county of Lincoln, land surveyor, deceased, I do hereby give you notice that the amount of the purchase-money for all those several pieces or parcels of freehold

(2) The 40th section of the 3 & 4 Will. 4. c. 27. is as follows:—"And be it further enacted, that after the 31st of December 1833, no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given."

(3) 1 Atk. 572.

(4) 1 Bro. C.C. 420, 424.

(5) 7 Beav. 205; s. c. 13 Law J. Rep. (n.s.) Chanc. 309.

(6) 9 Mee. & W. 113; s. c. 11 Law J. Rep. (n.s.) Exch. 228.

(7) 11 Ves. 621.

and copyhold land situate in the parish of Owston, in the said county of Lincoln, mentioned in a certain agreement in writing, bearing date the 4th of March 1811, and made between the said Thomas Marris of the one part, and the said John Stephenson of the other part, and all interest due in respect of the said purchase-money, or rent in respect of the said land, are ready to be paid, and that the amount of such purchase-money and interest or rent is lying at bankers' interest; and as attorney as aforesaid, I further give you notice, that the said William Read and Joseph Stephenson are willing to invest at your expense the amount of the said purchase-money and interest or rent in any security or securities to be approved of by them and you for the express purpose of completing the purchase under the said agreement; and as attorney as aforesaid, I further give you notice, that unless the said purchase be immediately completed, or the said investment be made, the said William Read and Joseph Stephenson will only allow bankers' interest on the amount of the purchase-money from the date hereof to the time of completion of the said purchase. Witness my hand this 13th day of March 1834." That was an acknowledgment within the 40th section of the statute.

Doe d. Cadwalader v. Price, 16 Mee. & W. 603; s. c. 16 Law J. Rep. (N.S.) Exch. 159.

Cator v. Croydon Canal Company, 4 You. & C. 405, 420.

Mr. Teed and *Mr. Rogers*, for the trustees, Stephenson and Read, objected to the reception of this paper as not having been used in the court below; but their Lordships, as already stated, overruled it, and the same was proved *vidé voce*; they however decided that counsel should be heard at the proper time, as to the weight to be attributed to it.

Mr. Kenyon Parker, *Mr. Bacon*, *Mr. Willcock*, *Mr. Follett*, *Mr. Goodeve*, *Mr. Osborne*, *Mr. Faber*, *Mr. Smythe* and *Mr. Lean* also appeared for the defendants.

On behalf of the trustees, as well as of the *cestuis que trust*, it was argued that the

admitted document was not an acknowledgment within the meaning of the 40th section; for, in the first place, the legal personal representatives of Sandars as to part of the money, and the legal personal representatives of John Stephenson as to the remainder, were the only parties by whom the same was "payable;" and, secondly, Stephenson and Read, the trustees, were not such representatives; and, on behalf of the *cestuis que trust*, it was contended that, even if the general objection to the acknowledgment failed, still as to them, or at any rate as to such of them as had insisted on the bar of the statute, it could not be made available, for it was not referred to in the bill, and was not known to them at the hearing in the court below; and even if it had been, there was no proof as against them that Mr. Cartwright when he wrote the letter was the agent for the trustees; and, lastly, that if he were the agent for those trustees, still their acknowledgment could not bind the *cestuis que trust*. For the same parties, it was also argued, that the possession was clearly adverse, and that the 15th section of the act applied, the application of the 25th section relating to trustee and *cestuis que trust* being out of the question.—*Christophers v. Sparke* (8).

Mr. Lee, in reply, argued that the contract clearly constituted a legal debt, a simple contract debt, which effected a charge on the land, which charge was not defeated by the statute. It was, in effect, an equitable mortgage or equivalent to it. It was a debt provided for by the debtor by a charge made by him. In reply, the cases after mentioned were cited—

Howell v. Price, Prec. Ch. 423.

Bulwer v. Astley, 1 Phill. 429; s. c. 13 Law J. Rep. (N.S.) Chanc. 329.

Longuet v. Scawen, 1 Ves. sen. 402.

Nov. 25.—LORD JUSTICE LORD CRANWORTH now delivered the judgment of the Court; and after recapitulating the facts of the case, proceeded as follows:—There could be no doubt as to the right of the plaintiffs to the relief which they ask, if they had proceeded within a reasonable time after the date of the contract. The question in

the cause is, whether by, not proceeding more promptly they have forfeited that right. The defendants Stephenson and Read, the trustees, by their answer, say they submit to the Court whether the right of the plaintiffs to the relief sought by the bill is not barred by laches and by lapse of time, and whether the same is not barred by the Statute for the Limitation of Actions and Suits. Of the persons entitled beneficially under the will of John Stephenson, some do and some do not insist on the Statute of Limitations. The parties claiming under Mr. Sandars do not insist on the statute, but say that they are ready to pay to Stephenson's representatives the money due to them in respect of the subsale to Mr. Sandars, on having a good title made to them. Upon the hearing of the cause before the Vice Chancellor Wigram, he held that the answers sufficiently set up and insisted on the Statute of Limitations and that the 40th section of the statute, 3 & 4 Will. 4. c. 27. expressly applied to the case, and presented a complete bar to the relief sought by the bill, unless the plaintiff could by ejectment establish a legal title to possession of the lands in question. The 40th section is as follows:—[His Lordship here read the section as before set out, to the effect that money charged upon land and legacies were to be deemed satisfied at the end of twenty years, if there shall be no interest paid, or acknowledgment in writing in the mean time]. The Vice Chancellor, by his decree, ordered to the following effect:—"That the bill be retained for twelve months, with liberty for the surviving plaintiff, in the mean time to proceed at law touching the matter in question as he shall be advised." (That was with reference to the point, that if there was a legal title to the land then the judgment of the Court could not apply.) "But in case the plaintiff shall not proceed at law, and proceed to trial within the time aforesaid, the plaintiff's bills are from thenceforth to stand dismissed out of this court, with costs to be taxed by the Master," and so forth. In the argument of the case before the Vice Chancellor, it was contended that, even admitting the 40th section to apply to the present case, still there were a variety of circumstances that made the statute inapplicable. His Honour

decreed against those arguments, and we do not feel ourselves called upon to consider that part of the case, because assuming the view taken by His Honour to have been perfectly correct, as to which we express no opinion whatever, yet, upon the hearing before us there was evidence not before the court below, which puts the case arising on the statute wholly out of the question.

That evidence is as follows: the defendants Stephenson and Read, the trustees, by their answer, state that a correspondence passed between Mr. Cartwright, their solicitor, and Mr. Holgate, the solicitor of the plaintiffs, in reference to some of the matters in question. At the hearing before us, one of the letters constituting that correspondence was proved and read in evidence, being a letter from Mr. Cartwright as solicitor of Read and Stephenson, to Mr. Holgate as solicitor of the plaintiffs. The letter was dated the 13th of March 1834, and, I must state, was not in evidence before the Vice Chancellor Wigram, and was as follows.—[His Lordship here read the letter before set out.]—Now, this letter appears to us to come precisely within the very terms of the 40th section, and to be a document taking the case out of the operation of the statute. It is an acknowledgment in writing of the right to the money in question, signed by the agent of the persons by whom it was payable, and given to the agent of the person entitled thereto; and is within the express words of the clause. It was indeed attempted to be contended before us, though but faintly, that Read and Stephenson were not the persons by whom the money was payable, for that no one was liable to pay the money but the legal personal representatives of Mr. Sandars the purchaser. Read and Stephenson, it was said, though entitled to the land upon which the plaintiffs sought to enforce a lien, were not personally liable to pay anything; but this argument evidently proceeds on an erroneous interpretation of the statute. The person designated in the 40th section as "the person by whom the money is payable," must evidently mean in the case of a claim by equitable lien, the person entitled to the land on which the charge is sought to be fixed; the money is payable by him in the only sense in which it must of necessity be payable by some one, and

unless he pays it he will lose his land. It is obviously in that sense that the statute speaks of the money as payable.

It was further contended that this acknowledgment by Read and Stephenson ought not to affect the *cestuis que trust*; but this again is a mistake. The acknowledgment of the executor in an ordinary case will keep a debt alive against all parties beneficially interested, and the same principle prevails in the case of devises of real estate in trust for the payment of debts, as was decided by Sir Lancelot Shadwell, in the case of *Lord St. John v. Boughton* (9). We are aware that Read and Stephenson were not the trustees named in John Stephenson's will, but that appears to us to be immaterial. They were appointed trustees by a decree of this Court in the place of the original trustees, and have ever since been in possession in that character. This letter of Mr. Cartwright's displaces altogether the bar of the statute so far as respects Read and Stephenson, the trustees. But though conclusive as against them, yet the other defendants who have insisted on the statute are not in the present state of the record bound by it; for as against them there is no legitimate proof that Mr. Cartwright, when he wrote the letter, was the agent of the trustees, and those other defendants have a right to insist on this proof being properly made; and even as against Read and Stephenson themselves, the document, though as we stated at the hearing clearly receivable in evidence, is not specifically referred to in the bill. It is, therefore, not unreasonable that an opportunity should be given to them, as well as to the other defendants, of offering any further proof touching the genuineness and nature of the paper. The only course open to us for the present, is to direct an inquiry on this point: that is, an inquiry "whether any acknowledgment in writing of the right to the money payable by virtue of the contract of the 4th of March 1811, was ever and when given by Read and Stephenson, or their agent, to the plaintiffs, or their agent." There can be little doubt as to what will be the result of such an inquiry, and assuming it to be established that Mr.

Cartwright did write the letter of the 13th of March 1834, as agent and by the authority of Read and Stephenson, then the bar of the statute will be removed, and the plaintiff will be clearly entitled to relief. No further inquiry can in such a case be of any advantage; but with a view to the possibility of a report as to the document unfavourable to the plaintiff, we are willing, if any parties desire it, to direct a further inquiry in conformity with what was suggested at the bar as giving rise to a possible equity even against the statute, namely "by whom the estate comprised in the contract of 1811 and the rents and profits thereof have been held, received, and applied since the date thereof, and under what circumstances, and whether any and what payment or payments has or have been ever and when made, and by and to whom, for or in respect of the purchase-money in the said contract mentioned or the interest thereon, and whether the title of the vendor has been ever, and when and under what circumstances, accepted." But any such inquiry must be made at the risk of costs to be paid by the parties desiring it, and we must not be understood as giving any opinion as to its importance. There must be a general liberty to the Master to state special circumstances, and of course further directions and costs will be reserved.

No counsel asking the additional inquiries, the order made was to direct the inquiries originally mentioned in the judgment, whether there was any acknowledgment made by Read and Stephenson, or their agent, to the plaintiffs, or their agent.

LORD JUSTICE KNIGHT BRUCE.—The original decree in other respects fails by reason of the evidence now adduced, which was not adduced before. We give no opinion what we should have done without that evidence. We, instead of the decree as it stands, direct that inquiry, with liberty to state circumstances specially, no counsel asking for the whole or any part of the additional inquiries which we have stated our readiness to grant if desired. It must be distinctly remembered that this letter was not before the Court below, and that the judgment of Sir James Wigram did not

(9) 9 Sim. 219; s. c. 7 Law J. Rep. (N.S.) Chanc. 208.

therefore refer to it, and that it did not, nor could it, form any part of the materials upon which his Honour came to the conclusion he arrived at.

Besides the before-mentioned cases the following were cited:—

At law,—

Nepean v. Doe d. Knight, 2 Mee. & W. 894; s. c. 7 Law J. Rep. (n.s.) Exch. 335.

Garrard v. Tuck, 19 Law J. Rep. (n.s.) C.P. 232.

Hall v. Surtees, 5 B. & Ald. 687.

Taylor v. Horde, 1 Burr. 60.

Doe d. Thompson v. Thompson, 6 Ad. & E. 721; s. c. 6 Law J. Rep. (n.s.) K.B. 167.

Doe v. Rock, 4 Man. & G. 30.

In equity,—

Beckford v. Wade, 17 Ves. 87.

Phillipo v. Munnings, 2 M. & Cr. 309.

Bond v. Hopkins, 1 Sch. & Lef. 422.

Wrixon v. Vise, 3 D. & War. 104.

Berrington v. Evans, 1 You. & C. 434.

Hunter v. Nockolds, 1 Hall & Twells, 644; s. c. 1 Mac. & Gor. 640; 19 Law J. Rep. (n.s.) Chanc. 177.

KINDERSLEY, V.C. { *Ex parte DAVIES, in re*
Nov. 6, 10. { THE WILTS, SOMER-
SET AND WEYMOUTH
RAILWAY COMPANY.

Will—Construction—Estate Tail—Executory Devise.

A testator gave the residue of his property, both real and personal, to his son Matthew, his heirs, executors, administrators and assigns, with a proviso that in case his son Matthew should die without leaving any lawful issue of his body, such part of his residuary estate as might be in the nature of freehold should, at his death, be divided into two equal parts, one half part whereof he gave to his son Charles and the other half to his daughter Frances:—Held, that the testator's son Matthew took an estate in fee in the freeholds, with an executory devise over to take effect in the event of his dying without issue living at the time of his death.

In this case it appeared that the Wilts, Somerset and Weymouth Railway Com-

pany having required, for the purposes of their railway, certain pieces or parcels of land devised by the will of Matthew Davies, amounting to two acres and two roods, and being desirous of purchasing the same,—in pursuance of the Lands Clauses Consolidation Act, it was agreed by the petitioner, Matthew Davies, the son of the testator, and the solicitor of the company, that the purchase-money to be paid for the same should be determined by the valuation of two surveyors, and that such purchase-money should be paid into the Bank for the benefit of the several parties interested according to the provisions of the said act; and that, thereupon, the petitioner should execute a conveyance of the said pieces of land to the company in pursuance of the powers of the said act; that accordingly, a valuation was made, and the purchase-money to be paid for the said land was determined at the sum of 525*l.*, which amount was shortly afterwards paid into the Bank by the company and a conveyance of the land was executed by the petitioner.

This petition was now presented by Matthew Davies, the son, praying that the said sum of 525*l.* might be paid out to him: but a question was raised under the will of Matthew Davies the father, as to whether the petitioner was entitled to an estate tail in the property so taken by the railway company or to an estate in fee, subject to an executory devise over in the event of his dying without leaving issue living at his death.

It appeared by the will of Matthew Davies, dated the 23rd of October 1832, that the testator gave the residue of his property in the following terms:—"And as to the remainder of my residuary estate, both real and personal, not hereinbefore disposed of, I give, devise, and bequeath the same (subject to the proviso hereinafter contained) unto my said son Matthew, his heirs, executors, administrators and assigns; provided also, and it is my will that in case he, my said son Matthew, shall die without leaving any lawful issue of his body, that such part of my said residuary estate so given to him as before mentioned, as may be in the nature of freehold situate in Warminster aforesaid, and Westbury in the said county, shall, at

his death, be divided into two equal parts or shares: one equal half part or share of such freehold property I give, devise, and bequeath unto my said son Charles, his heirs and assigns, and the other half part or share thereof I give, devise, and bequeath unto my said daughter Frances, her heirs and assigns; he, my said son Matthew, having it in his power to give sufficient to the children of my said daughter Anne, out of the personal estate which he has and will have at the death of his mother."

Mr. Malins and *Mr. Berkeley* appeared in support of the petition, and contended that the estate limited to Matthew Davies the son under the will was an estate tail. The following cases were cited:—

Walter v. Drew, 1 Comyns, 372.

Doe d. Cock v. Cooper, 1 East, 229.

Dunk v. Fenner, 2 R. & M. 557.

Ginger v. White, Wils. 348.

Mr. Selwyn, contra, submitted that the petitioner took an estate in fee, with an executory devise over, to take effect in the event of his dying without issue living at his death, and cited—

Doe d. King v. Frost, 3 B. & Ald. 546.

Broadhurst v. Morris, 2 B. & Ad. 1;

s. c. 9 Law J. Rep. K.B. 27.

Doe d. Smith v. Webber, 1 B. & Ald. 713.

Lytton v. Lytton, 4 Bro. C.C. 441.

Nichols v. Hooper, 1 P. Wms. 198.

Baker v. Tucker, 3 House of Lords Cases, 106.

KINDERSLEY, V.C.—This petition depends upon the construction of the will of Matthew Davies, and the question is, whether the devisee of the testator, who was his son, takes an estate in fee with an executory devise, to take effect in the event of his dying without issue living at the time of his death, or whether he takes an estate tail with a remainder limited upon it. By the will, the testator, after giving certain specific gifts, not material to the present question, devises in this way. He devises all the rest, residue, and remainder of his money, securities for money, goods, chattels and effects, and of all his estates, both real and personal, to his wife and his two sons Matthew and

Charles, and his daughter Frances, on the following trusts: To permit and suffer his wife to take the rents, &c. during her life, subject to the proviso after mentioned; then at her death he gave the sum of 2,500*l.*, part of his residuary estate, to his son Charles on certain conditions as to executing the trusts of the will, and then he gave another sum of 4,000*l.* to his trustees and executors upon certain trusts for the benefit of his daughter Frances; and another sum of 3,000*l.* among the children of his deceased daughter Anne, and then follows the devise upon which the question immediately turns, "and as to the remainder of my residuary estate both real and personal not hereinbefore disposed of, I give, devise, and bequeath the same (subject to the proviso hereinafter contained) unto my son Matthew Davies, his heirs, executors, administrators and assigns,"—so that it is a devise of all the residue: a gift of the realty and personalty to Matthew Davies. "Provided also, and it is my will that in case he, my said son Matthew Davies, shall die without leaving any lawful issue of his body, that such part of my said residuary estate so given to him as before mentioned as may be in the nature of freehold, situate in Warminster and Westbury, shall at his death be divided into two equal parts or shares; one equal half part or share of such freehold I give, devise, and bequeath unto my said son Charles Davies, his heirs and assigns, and the other half part or share thereof I give, devise and bequeath unto my said daughter Frances, her heirs and assigns;" then he adds this clause, which was, after the arguments had taken place, and when I was prepared to give my judgment, called to my attention. Although I still continue of the same opinion as I then was, it is still of service as I shall hereafter shew. "He, my said son Matthew, having it in his power to give sufficient to the children of his said sister Anne out of the personal estate which he has and will have at the death of his mother." The question is, whether Matthew in respect of the freehold part only of the general residue devised to him, takes an estate in fee with an executory devise to take effect only in the event of his leaving issue living at his death, or an estate tail?

The general principles applicable to

the construction of a will with respect to a question of this sort is this, as I understand the cases that were cited upon it: that you are to look at the whole will, to see whether you are satisfied upon the general effect of the will that the period to which the testator is pointing, when he speaks of the dying without any lawful issue of his body, was meant by him to be the precise period of the death of the devisee, or whether upon the context of the will, his intention was that it should take effect after an indefinite failure of issue. Now, in the case before me there is no question but by the first devise, Matthew Davies would be tenant in fee of the freehold as well as absolute owner of the personal property. If he has an estate tail, it is by these words: "lawful issue of his body," and no doubt according to the law before the Will Act, as far as relates to real estate in distinction of personalty, these words, "In case he shall die without leaving any lawful issue of his body," made him tenant in tail, and the word "leaving" did not fix the time to his death; but that was not the case with personalty. I am now, however, to interpret the law as it stood before the Will Act, and without reference to that at all.

With respect to the cases cited I will refer to two or three principal ones to see how they help us in the matter. *Walter v. Drew* was a case in *Comyns*, in which a testator devised "in case his eldest son should die and leave no issue of his body," then after his decease he gave the lands to the youngest son and his heirs. It is to be observed that there was no direct devise to the eldest son at all, and he would take no estate unless the Court gave it him by implication. The Court considered that he did take an estate by implication, until he should die and leave no issue of his body—in other words, an estate tail, and the other words used were not considered sufficient to shew that the time of his decease was the time pointed out by the testator. We know it is clear that a contingent remainder or executory devise, if it can take effect by way of remainder at all might do so by way of executory devise, and the Court came to the conclusion that there was an estate tail in remainder to the

youngest son and his heirs,—not that I think that case at all governs the present. There was another case of *Broadhurst v. Morris*, and that arose upon a case that was sent from a court of equity for the opinion of a court of law, in a suit for specific performance, and the question was whether the vendor had such an estate as to make a good title to a purchaser. The limitation there was this: a devise to "William Broadhurst and to his children lawfully begotten for ever." Stopping there for a moment, it was decided, and I think rightly, to be an estate tail; the same thing as if he had devised to William Broadhurst, and the heirs of his body; then came this, "but in default of such issue at his decease to Alexander Bridgok;" now that sentence might be read two ways by altering the comma: thus, "but in default of such issue at his decease, to Alexander Bridgok," or "in default of such issue, at his decease to Alexander Bridgok." No opinion was given what estate the devisee over took; the only question was, what estate did the first devisee William Broadhurst take? And, on looking at the arguments of counsel, the case having been very ably argued by Mr. Cowling and Mr. Preston on either side, it did not appear to turn on whether it was an executory devise or not, but whether William Broadhurst took an estate for life only or an estate tail? The Court thought that it was an estate tail, and it appears to me to be extremely probable, as no reasons are given at all for the decision, which in opinions from a court of law is often the case, that coming to the conclusion as they rightly did, that it was an estate tail in William Broadhurst, the question would be this: whether the limitation over to Alexander Bridgok was a limitation to take effect by way of executory devise in defeazance of the estate tail at his death, or whether it was to take effect by way of contingent remainder, contingent upon the event of the estate tail determining in a particular mode by the dying without issue living at his death; the only difference would then be, that that would be a contingent remainder; no reasons being given I can only surmise; if there had been any comment upon it, very likely it would have been of the nature I have mentioned; but that

authority does not appear to me to govern this case. The only other case that was referred to, and which in my opinion is the most material to the present one, and upon which I think it necessary to make an observation, is that of *Doe v. Frost*. There the limitation was to "William Frost and his heirs for ever," that was a clear devise in fee; then there was this limitation over, "if William Frost should have no children, child, or issue, the said estate is on the decease of the said William Frost to become the property of the heir-at-law, subject to such legacies as he, William Frost, may leave by will." The words there were "on the decease," and here "at the decease," and I confess I do not see any distinction between the two. The decision in that case was that William Frost took an estate in fee, with an executory devise in the event of his dying without leaving children at his decease. The words "subject to such legacies," &c. were said to be the reason for the decision, but when I look at the judgment of all the learned Judges who decided it, Chief Justice Abbott, Justices Bayley, Holroyd and Best, I see that as regards Bayley and Holroyd, each of them thought it was an estate in fee with an executory devise, independently of the clause relating to the legacies. Mr. Justice Bayley says, the clause as to the legacies corroborates the rest of the gift. Holroyd does not refer to the clause, but puts it entirely upon the words "on the decease;" it satisfied his mind that the testator intended to give a fee, but the fee so far limited that if the devisee died without issue living at his death, then there was an executory devise over. Chief Justice Abbott expressed the same opinion, and Justice Best merely said, that he concurred with the other Judges.

If from the will in *Doe v. Frost* you expunge the clause as to "legacies," I confess I do not see any distinction between that case and this; and I must conclude that the Judges would have decided as they did in that case, in this, had it come before them, and I confess I feel strongly satisfied that the testator was referring to the period of the death of the devisee, as the period at which he thought of failure of issue, and that then there should be a devise over. There is a different clause here as to the subject

of the devise, if the devisee gave something to other parties. The testator had three children living at his death, and the children of a deceased daughter "Anne," and no other member of his family was referred to. Now, what is he doing? He has first given the whole real and personal estate to his wife for her life, and the whole residue after her death to other parties, and certain sums are to be appropriated upon certain trusts for the benefit of his issue, and he devises all the rest and residue to his son Matthew, and 3,000*l.* is given to one and 4,000*l.* to another for the benefit of his other children, and all the rest to the eldest son, and it is given to him absolutely, in terms, and he does not put any limit to the absolute gift as to the estates at Warminster and Westbury in the former part of the will: "If he should die without leaving lawful issue," then a valuable estate is to go to his son Charles and his daughter Frances, and not giving any share to the children of Anne. Then, he adds this: "He, my said son Matthew, having it in his power if he thinks proper out of the personal estate, which he will have on the death of his mother;" he does not say by will, nor does he refer to its being out of the estate which he is devising over, but when he had put in the clause, gave an additional power because he had given the whole of the personalty to him: but inasmuch as he gave half to Charles and half to Frances, and not any to the children of his daughter Anne, it is the same as if he said, I do not include the children of my daughter Anne, because Matthew has it in his power out of the personal estate to make such provision as he thinks fit for the children of Anne. That I think was in his mind. It might also have been in his mind that Matthew might die without issue; if he died leaving issue, then of course you could not expect him to give; having the means, of course points to "by will," though he has not said so with respect to the children of Anne.

I do not decide this case on the last clause. The matter which influenced my mind in coming to the conclusion was on the whole will, and particularly that part to which the testator points by reason of the failure of issue of Matthew on the precise period of the death

of Matthew. The order, therefore, cannot be made in the terms of the prayer of the petition, as my opinion is, that Matthew Davies takes an estate in fee subject to an executory devise over in case he shall die without issue living at the time of his death.

LORDS JUSTICES. } THE ATTORNEY GENERAL
 1851. } v. THE CORPORATION OF
 Nov. 3, 4. } NORWICH.

Municipal Corporation Act—Borough Fund.

The 92nd section of the statute 5 & 6 Will. 4. c. 76. enabled the surplus of the borough fund to be applied for the public benefit of the inhabitants and improvement of the borough. By an act subsequently passed, the corporation of the city of N. were authorized to levy certain tonnage dues to be applied in a specified manner, and after they were satisfied, the remainder to be applied to certain purposes, some of which were the same as those to which the surplus of the borough fund was made applicable; and distinct accounts were directed to be kept of the tonnage dues and borough fund. The treasurer mixed the two funds at his bankers. The corporation proposed to obtain an act of parliament for improving a river flowing through the city, and applied money from the funds at the bankers in paying certain expenses. An information was filed by the Attorney General, at the relation of rate-payers, praying an injunction to restrain this application to parliament at the expense of the borough fund, and the same was granted: and on appeal from that decision, the appeal motion was refused, with costs.

The borough fund is a trust fund, and is so constituted by the Municipal Corporation Act.

This was an information filed by the Attorney General, at the relation of three rate-payers of the city of Norwich, against the mayor, aldermen and citizens of that city, and against the treasurer and the town clerk, setting forth (among other things) that the corporation was subject to the regulations of the statute 5 & 6 Will. 4. c. 76. (the Municipal Corporations Act),

and that it had then and since and at the time of filing the information (1848) had real and personal estate, and funds, dues and revenues; and according to the said act the rents and profits, interest, dividends and annual proceeds of such real and personal estate, funds, dues and revenues, and such other income as in the said statute mentioned, formed and constituted the fund called "the borough fund," applicable only to the purposes of the payment of such expenses as in the said statute mentioned in connexion with the said city; that the borough fund had never been sufficient for such purposes without the aid of borough rates, which, from time to time, had been levied for such purposes; that the navigable river Wensum, Wenson or Yare passed or flowed through or near the city, and thence to Great Yarmouth, and that a branch thereof, called the Trowse Hithe, was within a mile from the city; that over part of this river and the branch the corporation had jurisdiction; that the corporation were promoting a bill in parliament for enabling them more effectually to improve and maintain the navigation of the said river and branch, to levy tolls, &c., to alter, amend and enlarge the powers of certain acts, and among them to repeal so much of the statute of the second year of the reign of Queen Victoria as related to tonnage dues thereby authorized to be levied, and to provide a new mode of application thereof and other purposes; that the corporation had expended 2,662*l.* out of the borough fund in paying the expenses of surveys, &c. for the purpose of procuring the intended act. The information then prayed (among other things) an injunction to restrain the defendants from promoting the said bill, or any other bill for the purposes aforesaid, by means or at the expense of the borough fund.

The injunction was granted on notice of motion, and after a discussion (1). The answer was put in on the 20th of April 1848, and it stated that the projected improvement would tend greatly to the benefit of the inhabitants of Norwich by facilitating the access of shipping to that city, and increasing the trade thereof; and

(1) So stated by Mr. Stuart, although that does not appear by the report of the case, 16 Sim. 226.

that the defendants were authorized by a local act of parliament (2 & 3 Vict. c. lxii.) to levy certain tonnage dues, and to apply them for the purposes specified in that act, and after the performance of those purposes, for widening the streets of Norwich and removing projecting buildings and other obstructions therein, and for removing projecting buildings and banks on the sides of the river, and other obstructions to the navigation thereof; and that there was a surplus arising from the tonnage dues which was applicable to the improvement of the city, and the navigation of the river, but there was not, nor had there been, since the passing of the Municipal Corporations Reform Act, any surplus of the borough fund; and that the treasurer of the corporation was in the habit of receiving the tonnage dues as well as the other revenues of the corporation which formed the borough fund, and of paying them to his bankers in such manner that the same were all blended in one account; and that he had paid 2,662*l.* by cheques on his bankers to engineers and surveyors whom the corporation had employed to make surveys and plans of the river, and of the intended improvements in order to enable them to procure the passing of the proposed bill through parliament; and the answer submitted that as the improvements intended to be made under the powers of the proposed act would tend greatly to benefit the city and the inhabitants thereof, and as the local act contemplated the improvement of the navigation of the river as one of the objects to which the surplus of the tonnage dues should be applied, and as there was a surplus arising from those dues, the obtaining of an act for the improvement of the navigation was an object to which the borough fund, and more particularly the fund arising from the dues, might be properly applied, it being intended that the amount so applied should be repaid out of the first monies to be raised under the powers of the proposed act.

The 92nd section of the Municipal Corporations Reform Act enacts that the borough fund shall be applied towards payment of the salaries of the mayor, recorder, town clerk and treasurer of the corporation, the expenses of preparing burgess lists, ward lists, and notices, and

of prosecuting, maintaining and punishing offenders, &c., and in case it shall be more than sufficient for those purposes the surplus shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough.

The local act relating to the tonnage dues, after mentioning the purposes to which those dues are to be applied in the first instance, concludes thus—"Lastly, after the performance of all the purposes hereinbefore mentioned, for or towards making any improvements in the said city of Norwich, and particularly for widening the streets and the roads and ways in and leading to the said city and removing projecting buildings and other obstructions therein, and for removing projecting buildings and banks on the sides of the river running through the said city and other obstructions to the navigation thereof."

On the 4th of May 1848, the case came before Sir Lancelot Shadwell, when, in support of the injunction, the following cases were cited:—

The Attorney General v. the Mayor, &c. of Liverpool, 1 Myl. & Cr. 171; s. c. 7 Law J. Rep. (N.S.) Chanc. 51.

The Attorney General v. the Corporation of Lichfield, 13 Sim. 547.

On behalf of the corporation, their treasurer and town clerk, the following cases were relied on:—

The Attorney General v. the Mayor, &c. of Norwich, 2 Myl. & Cr. 406.

Ware v. the Grand Junction Waterworks Company, 2 Russ. & M. 470; s. c. 9 Law J. Rep. Chanc. 169.

Bright v. North, 2 Phill. 216; s. c. 16 Law J. Rep. (N.S.) Chanc. 255.

Parker v. the River Dunn Navigation Company, 1 De G. & Sm. 192.

The Attorney General v. the Manchester and Leeds Railway Company, 1 Rail. Cas. 436.

On that occasion, the Vice Chancellor of England, after referring to the 92nd section of the Municipal Corporation Act and to the clause set forth of the local act, said, he considered that the same observation might be made with respect to both those

enactments, namely, that they had reference to the state of the law as it existed when they were made, and that they did not authorize the corporation to apply the funds in obtaining powers which were not then vested in them, and could not be vested in them except by an act of parliament specially passed for the purpose.

His Honour then, upon the question of costs, declared that if this Court had sanctioned the application to parliament, it would have allowed the corporation the expenses of the application; but if trustees, whether they are a public body or private individuals, thought proper to apply to parliament without the sanction of the Court to enable them to carry into effect a project which, however beneficial it might be, might eventually fail, the Court would not allow them to retain their expenses out of the trust fund; and his Honour continued the injunction.

Mr. Stuart, Mr. Lee and Mr. Brooksbank now appeared in support of an appeal from this order, and contended that as, by the local act, the corporation had authority to levy tonnage dues, and to apply them to certain specified purposes, and afterwards "in removing projecting banks on the sides of the river and other obstructions to the navigation thereof;" and there being a surplus of the tonnage dues, which surplus formed part of the borough fund, the proposed works, if sanctioned by parliament, would be both legitimately within the intention of the local act and most beneficial to the inhabitants of Norwich. The ground of the Vice Chancellor of England's judgment seemed to be erroneous; for treating the tonnage dues on the same footing as part of the borough fund, his Honour held that as there was no surplus of the borough fund so constituted, there was no power in the corporation to apply the money as they proposed to do. The tonnage dues themselves, except as to any surplus of them, were, however, no part of the borough fund. Besides the cases referred to in the Court below, the case of *The Attorney General v. Andrews* (2) was observed on and distinguished from the

present. The effect of obtaining the act would be, to create a surplus of the borough fund, the absence of a surplus of which at this time the Vice Chancellor of England made the ground of refusing permission to go to parliament. It was not a wise or prudent exercise of the discretion of the Court of Chancery to restrain the subject from going to parliament for its sanction to the performance of a great public work, and if the relators were to succeed in such a case, as well might any two out of ten thousand rate-payers have prevented the application for the local act already in existence.

Mr. Bethell, Mr. Walker and Mr. Rogers were for the relators, and in answer to a question from Lord Justice Knight Bruce, submitted to a declaration that, without prejudice to any question of costs and without prejudice to any question whatever, the order and injunction were not to be considered or treated as restraining or relating to the expenditure or application of the borough fund or any part thereof to or for any other purpose than for seeking or applying for or endeavouring to obtain the act of parliament for the purpose of enabling or authorizing the widening, &c. of the river Wensum, and, &c. It was also declared that the injunction did not relate to the expenditure or application in any manner of the tonnage dues.

Mr. F. S. Williams appeared for the treasurer and the town clerk, but did not support the appeal.

LORD JUSTICE KNIGHT BRUCE.—The declaration being agreed to, that Sir Lancelot Shadwell's order only prevents the application of the borough fund to the purpose of soliciting their act of parliament; and it being admitted that that order does not relate to the tonnage dues or their expenditure, the case is reduced to one of costs, and to whether the corporation are justified in applying any part of the borough fund in soliciting such an act as this? What would have been our decision if there had been a surplus of that fund we do not say. There is no surplus of the borough fund. We are of opinion that, in the absence of such a surplus, the proposed application of the borough fund to the purpose of soliciting the act of parliament, the subject-

(2) 2 M. & G. 225; s.c. 2 Hall & Twells, 431; 20 Law J. Rep. (N.S.) Chanc. 467.

matter of dispute, would be substantially in contravention of the Municipal Corporations Act, which act created that fund and constituted it a trust fund. We think that the application of any part of it to the proposed purposes would be a misapplication of that trust fund; and, constituted as the fund is, it is the province of the Court to restrain such application, and on account of the particular nature of the trust and of the property, to do so at the instance of the Attorney General. With such a declaration, therefore, as I have mentioned, the motion, we think, ought to be refused; but whether with or without costs we shall presently determine.

LORD JUSTICE LORD CRANWORTH.—As I entirely concur in the view of the nature and constitution of this fund which has been expressed by my learned Brother, and as upon these points the general result of my judgment would be the same as his, it would be a waste of time were I to repeat his observations in any language of my own. I may, however, say, that cases, as well before the Court of Queen's Bench as before Lord Cottenham, shew that, under certain circumstances, there are purposes, not enumerated in the 92nd section of the Municipal Corporations Act, to which the corporation are entitled to apply the borough fund; but then those are purposes which, although not enumerated or expressed in the section, are plainly and of necessity within the scope and spirit of the act.

The several counsel for the corporation then addressed the Court, contending that, although the motion was refused, still, as the order below had been, in effect, varied by the declaration now made by the Court, a variation which could not have been made without an appeal, the motion ought, therefore, to be refused, without costs. The Vice Chancellor of England had treated the borough fund and the tonnage dues on the same footing, in which this Court did not agree. Then, the corporation might not be able to pay the costs, and a *distringas* might issue, and the effect of the decree of the Court would be, that the funds of the corporation could not be applied in payment of the costs, leaving the members of the corporation liable.

LORD JUSTICE KNIGHT BRUCE.—Expressing my own individual opinion only, I think that although I consider the words of the Vice Chancellor of England's judgment have rendered the declaration now made necessary to prevent all future disputes on this particular matter,—to shew that the question of the borough fund was that only in contest,—yet the motion ought to be refused, with costs.

LORD JUSTICE LORD CRANWORTH.—I quite agree with the decision as to the costs; but I go still farther, for I cannot say I see any reason for the declaration which has been made. It has been argued that the surplus of the tonnage dues forms *ipso facto* part of the borough fund; but that is a fallacy, for every shilling of the tonnage dues is made applicable to certain specified purposes, not as part of the borough fund, but as tonnage dues applicable to purposes some of which are identical with the destination of the borough fund. On the whole, I agree that the appeal, having entirely failed, must be dismissed, with costs.

LORDS JUSTICES. }
1851. } *In re KNOWLES.*
Nov. 24. }

Payment of Money out of Court—Administration, whether Diocesan or Prerogative—Trustees Relief Act.

Trustees and executors of personal estate situate wholly in the diocese of C. sold and realized the same. The will was proved in the diocesan court. One of the trustees and executors died in the lifetime of the other, and on the death of the other trustee and executor letters of administration to his estate were taken out in the same court by A, B. and C. One of the parties entitled to a share, under the will of the testator, died intestate, possessed of no other property, and letters of administration to his estate were taken out by his next-of-kin in the same court. A, B. and C. paid the share into court, under the statute 10 & 11 Vict. c. 96. The person entitled to the share petitioned for its payment out of court, and the same was directed, notwithstanding that prerogative letters of administration were not taken out.

This was a petition presented in the matter of the statute 10 & 11 Vict. c. 96, the "Trustees Relief Act," and in the matter of the trusts of the will of Thomas Knowles, deceased. The facts were these:—Thomas Knowles, of Walton-on-the-Hill, Lancashire, by his will, dated the 16th of February 1810, after directing the payment of all his debts, funeral expenses, and charges of probate, gave, devised and bequeathed all his real and personal estate and effects to William Harvey and James Harvey, both of Liverpool, in the county of Lancaster, their heirs, executors, administrators and assigns, upon trust to sell the same, and out of the produce to pay certain legacies, and to divide and distribute the residue into four equal parts, and put and place them out at interest, and pay the dividends, interest and annual produce of one share to his son Michael Knowles for his life, and after his death upon trust to divide the capital among all his children, who being sons or a son should attain the age of twenty-one years, or die under that age leaving issue at their or his decease, or born in due time afterwards; or who being daughters or a daughter should attain that age, or marry, in equal shares; and if but one such child, in trust for that one child; and if no child, then the share was to be divided among his, the testator's two other sons and daughter in the same manner. The trusts of the other three-fourths were in favour of the other two sons and the daughter, with similar cross-trusts over for the benefit of the testator's sons and daughters in each case where there should be no child who took a vested interest.

William Harvey and James Harvey were appointed executors. The testator died in April 1811, and his will was proved by both executors on the 30th of May following in the Consistory Court of the Bishop of Chester. The trustees and executors realized the assets, paid all the debts and legacies and testamentary expenses. All the four children of the testator, three sons and one daughter, had issue living at their deaths, and all but Michael received their respective shares of the residue. William Harvey died in 1838. James Harvey died in 1841, and letters of administration of his goods, chattels and credits were on the

3rd of June in that year granted by the Consistory Court of the Bishop of Chester to Robert Ellison Harvey, Thomas Mather and Thomas Harvey.

Michael Knowles had seven children, three of whom died in his lifetime under the age of twenty-one years and without having been married, the other four attained the age of twenty-one years. Michael Knowles died in September 1834. Thomas Knowles, one of the four surviving children of Michael, left England during his father's lifetime, and never afterwards returned to this country, and he died in America without issue, and letters of administration in August 1848 of his goods, chattels, credits and effects were granted by the Consistory Court of the Bishop of Chester to William Knowles, his brother, and one of his next-of-kin.

The share of Thomas Knowles, the son of Michael, one of the four children of the testator, amounted, after some deductions, to 378*l.* 3*s.* 1*d.*; and that sum Robert Ellison Harvey, Thomas Mather, and Thomas Harvey, the administrators of James Harvey, the surviving executor of the testator's will, paid into court on the 10th of March 1851, under the provisions of the Trustees Relief Act, and the same was placed to an account particularly designated.

William Knowles, another brother and a sister of Thomas Knowles, were his only next-of-kin. William Knowles and the other next-of-kin, all of whom resided in the county of Lancaster, presented their petition entitled in the matter of the act and in the matter of the trusts of the will of Thomas Knowles, praying that the sum of 378*l.* 3*s.* 1*d.* then standing in the Bank books to the credit of the Accountant General, in the matter of the act and of the trusts of the will, might be paid to the petitioner, William Knowles, as the administrator and sole legal personal representative of the intestate Thomas Knowles.

At the hearing of the petition, on the 26th of July 1851, Vice Chancellor Knight Bruce directed the production of certain evidence, and on the 1st of August made the order as prayed. The Registrar, however (Mr. Colville, jun.), required the production of prerogative letters of administration to the estate of Thomas Knowles

the intestate. This point was mentioned to His Honour, who agreed at that time in the view of the Registrar, and observed that if the practice of requiring prerogative letters of administration before paying money out of court, was to be altered, it ought to be done by the Lord Chancellor, and suggested that the question might be mentioned to His Lordship, and his opinion taken, or be put into his paper on some stated day for argument. During the long vacation of 1851 the Vice Chancellor Knight Bruce was appointed one of the Lords Justices of Appeal. On the 5th of November 1851 the matter was mentioned to the Lord Chancellor, when his Lordship said, that as Lord Justice Knight Bruce was now in a different jurisdiction to that which he exercised when he made the order, and as the Court of Appeal exercised the same jurisdiction as his Lordship, he, the Lord Chancellor, considered that the question had better be considered and adjudicated on by the Lords Justices. Accordingly, on the 22nd of November, the matter was brought before the notice of the Court of Appeal, when the petition was directed to be in the paper of the 24th of the same month, and Mr. Colville, jun. to attend the Court.

Mr. E. F. Smith now appeared in support of the petition, and submitted that a prerogative administration was wholly needless. It was to be observed that the administration was taken out before the money was paid in, and, in fact, was taken out with a view to satisfy the trustees that the title was complete; but they on some suggestion of others or ideas of their own, considered that the title was not completed by that act, and paid the money into court.

Mr. Colville, jun. (the Registrar), in answer to a question from the Court, stated, that it was the universal practice of the office to require the production of prerogative probates or prerogative letters of administration, before money once in court could be paid out. The money paid in was always considered as *bona notabilia* out of the diocese in which the testator or intestate died.

LORD JUSTICE KNIGHT BRUCE. — All things being as they are stated on these

affidavits to be, this fund being from first to last, and wholly and entirely Cestrian, if ever there was a case in which the rule requiring prerogative probates and prerogative letters of administration might be relaxed, that is the present case. I think that rule, strict as it is, and perhaps properly strict, may be dispensed with, and that this fund may be paid out on these diocesan letters of administration. In agreeing to make such an order, it must be most distinctly understood that it is made on the particular state of circumstances of this case, and that the general rule as to prerogative probates and letters of administration being requisite remains in all respects untouched.

LORD JUSTICE LORD CRANWORTH. — I agree in that course. The diocesan letters of administration were, in fact, taken out before the money was paid into court; and I confess that, in agreeing with my learned Brother in the order now to be made, I should have been willing to make it even if the letters of administration had been taken out after, instead of before, the payment of the money into court. It is, however, unnecessary now to decide that; and the order, therefore, will be that the fund be paid to the petitioner on the diocesan letters of administration.

LD. CRANWORTH, V.C. 1851. April 25.	}	THE BLIND SCHOOL v. GOREN.
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Payment of Money out of Court—Motion.

The Court will not make an order for payment of money out of court, except upon petition, however small the sum may be.

In this case a small sum, amounting to about 90l., had been carried over to the separate account of an infant. The infant had attained the age of twenty-one; and

Mr. Rasch now applied, upon motion, to have the money paid out to the infant. It was submitted that the Court could make such an order, on the authority of

Heathcote v. Edwards (1). It was true that a similar motion had been refused in another case of *Garratt v. Niblock* (2), but the sum in this case was very small, and the right of the infant was perfectly clear, and if the Court could make the order on motion, instead of petition, it would be a material saving in so small a fund. The expense of obtaining the money out of court upon motion would be about 7*l.*, and on petition as much as 13*l.*

LORD CRANWORTH, V.C. said it was contrary to the practice of the Court to allow money to be paid out on motion. The case of *Heathcote v. Edwards* only shewed what the practice was in the time of Lord Eldon, but it was very clear that a contrary rule had prevailed in this court for a great many years. He could not therefore, make an order for payment of money out of court, except upon petition.

LD. CRANWORTH, }
V.C. }
1851. } *In re COOKE.*
July 29. }

Baron and Feme—Petition—Payment of Money to Husband.

A sum of money had been paid into court to the account of a female infant, a ward of court. The infant married, and a petition was presented by her and her husband for payment of the money out of court to the husband, upon the authority of two cases cited. The Court disapproved of the principle upon which the previous cases had been decided; but allowed the petition on affidavits that it would be beneficial for the husband to receive the money.

In this case a sum of money had been paid into court under the Legacy Duty Act to the account of an infant, and guardians had been appointed upon petition, to whom the income had been regularly paid for the maintenance of the infant. The infant married one year before she came of age, with the consent of her guardians, but

without any application having been made to the Court for its sanction to the marriage.

A petition was now presented by the husband and wife for payment of the fund out of court to the husband, with the consent of the wife.

LORD CRANWORTH, V.C. said as the young lady was a ward of court, the consent of the Court ought to have been obtained to her marriage, and under these circumstances he thought the money ought to be settled upon the wife.

Mr. Younge, in support of the petition, cited *Leeds v. Barnardiston* (1) and *Bennett v. Biddles* (2), in which similar orders had been made, and also read affidavits by the husband and the guardians, shewing that it was desirable that the money should be paid to the husband. The amount of the fund was 227*l.*

LORD CRANWORTH, V.C. said he could not approve of the principle upon which the two cases of *Leeds v. Barnardiston* and *Bennett v. Biddles* had been decided. He could only suppose that they went upon some facts not stated in the reports. He thought, however, upon looking at the affidavits filed in this case it would be beneficial that the husband should receive the fund.

The order was made accordingly.

KINDERSLEY, V.C. } WINTHROP v. ELDER-
Nov. 17. } TON.

Outlawry—Plea—Court of Bankruptcy.

Upon a plea of outlawry, it was held that an order of the Court of Bankruptcy directing the plaintiff to prepare and file his accounts by a certain day, and the certificate and proclamation of the Court, that he had failed to surrender himself on that day, did not amount to a formal judgment of outlawry such as would support the plea.—Plea overruled.

(1) Jac. 504.
(2) 5 Beav. 143.

(1) 4 Sim. 538.
(2) 10 Jurist, 534.

This was a bill filed by the plaintiff against his solicitor for an injunction to restrain the defendant from continuing an action at law, commenced against him for an alleged balance of an account. The defendant put in a plea of outlawry to the bill, alleging that on the 29th of June 1848, the plaintiff was outlawed by the Court of Bankruptcy in London, as by the said outlawry, on proceedings in the said Court of Bankruptcy filed as of record or the office copy thereof, would appear, and which said outlawry still remained in full force and unreversed; and the defendant, therefore, submitted that he was not bound to answer the plaintiff's bill.

The evidence as to the outlawry was, that by an order made on the 13th of June 1848, by the Commissioner of Bankrupts under the act of the 7 & 8 Vict. c. 111. entitled 'An act for facilitating the winding-up the affairs of joint-stock companies unable to meet their pecuniary engagements,' the plaintiff and another gentleman, who were two of the directors of a company called "The Merchant Traders' Ship Loan and Insurance Association," were ordered to prepare the balance sheets and accounts of such association, and to file the same in the said court, and deliver a copy thereof to the official assignee ten days at least before the 29th of June, or such other day as the Court should appoint for the last examination of the fiat against the above association. It further appeared that, on the 29th of June, a proclamation was issued by the Court of Bankruptcy, declaring that the plaintiff and the other gentleman included in the above order of the 13th of June did not surrender themselves on the day appointed for that purpose. An order for winding up the affairs of the above company had since been made by the Court of Chancery, and the proceedings under the fiat in bankruptcy had, in pursuance of the provisions of the Winding-up Act of 1848, been transferred from the Court of Bankruptcy to the Master in Chancery who was charged with the winding-up order.

Mr. W. Cooper appeared in support of the plea, and contended that the order of the Court of Bankruptcy directing the

plaintiff to file his balance sheets and accounts and the proclamation, in consequence of his failing to surrender upon the day appointed by the Court, were equivalent to a judgment of outlawry at law. The Court of Bankruptcy had power under the 5 & 6 Vict. c. 122. and the Bankrupt Law Consolidation Act of 1849, to declare a bankrupt who did not surrender a felon, and he was liable to be punished as such.

Mr. Bethell and Mr. Glasse appeared for the bill, and contended that the above proceedings of the Court of Bankruptcy did not constitute an outlawry such as would support the plea.

KINDERSLEY, V.C.—The grounds upon which this plea has been put in are, that the plaintiff has been outlawed by the Court of Bankruptcy for not surrendering, as appears by the order and proclamation of the Court of Bankruptcy. The question is, whether the matters stated in the plea do constitute an outlawry or state of facts from which an outlawry can be inferred. I cannot understand that there can be any outlawry which is not a formal judgment of outlawry; and it does not appear to me that what is here stated amounts to a judgment of outlawry. There is nothing more than an order for the plaintiff to pass his accounts on a certain day, and then there is a certificate that the plaintiff did not surrender himself in pursuance of such order, and to that certificate the words "proclaimed, H. Stacey," are added. I cannot think that this is equivalent to the formal proclamations consequent upon a judgment of outlawry; the plea must, therefore, be overruled, with costs.

TURNER, V.C. }
1851. }
July 26, 28, 29; } RUSSELL v. JACKSON.
Dec. 2. }

Solicitor and Client—Privileged Communications—Depositions, Suppression of.

The rule which protects from disclosure confidential communications between solicitor and client is not founded on the ground of confidence between them, but on that of necessity for the existence of the rule to enable the client

properly to defend, or prosecute his rights and interests. Therefore, the rule is inapplicable in cases of testamentary dispositions, and as between parties claiming under the testator; and where a question is raised, whether the executors are or are not trustees for the next-of-kin, the evidence of the solicitor who prepared the will as to what passed between himself and the testator, or his agent on the subject of the will, is admissible, on behalf of the next-of-kin, and will not be suppressed on the application of the executors on the ground of privilege; but all communications between the executors and the same solicitor, acting as their solicitor, on the subject of the will of the testator and after his death, are privileged.

Evidence otherwise admissible will not be rejected on the ground that it may disclose an illegal purpose.

Semble—The existence of an illegal purpose will, as in a case of fraud, prevent the privilege attaching; because it is as little the part or duty of a solicitor to advise his client how to evade the law, as it is to contrive a fraud.

This was a motion by the defendants, William Jackson and Thomas Acton Jackson, the executors of J. Russell the testator in the cause, to suppress the depositions of the solicitor of the executors, and formerly of the testator. The bill was filed by one of the testator's next-of-kin, and stated that the testator, by his will, of the 8th of July 1850, gave the residue of his property to the defendants, the executors, as a testimony of his regard and esteem for them, and as a compensation for the trouble they would have in the execution of his will. The bill alleged that the residue was given to the executors upon a secret trust to found a socialist school at Birmingham, and upon an understanding that the executors would carry such trust into execution. The solicitor of the testator, who prepared the will, and continued to act as the solicitor of the executors, was examined as a witness under a commission issued in the cause, and in answer to the 13th interrogatory under that commission deposed that the testator had given the residue of his property to the executors upon a secret trust; but the witness demurred to that part of

the interrogatory which inquired into the nature of the trust, and also to other parts of the interrogatories relating to the instructions from which he had prepared the will, and to communications on the subject between himself and the testator, and subsequently between himself and the executors. The ground of the demurrer was, that the witness had acted in the matter as solicitor for the testator and the executors. The demurrer was set down for argument, and overruled in the absence of counsel to support it. A second commission was then issued, under which the witness was again examined, and he then stated to the effect that the general purport and effect of the instructions received by him from the testator for the preparation of his will were declaratory of his intention to leave his property for the purpose of establishing a school at Birmingham for the education of children in the doctrines of socialism, so far as the witness recollected, according to the principles of Robert Owen; that the instructions contained a scheme upon which the testator intended the proposed school to be conducted; that on receiving the instructions (which as appeared from his examination under the first commission were brought to him by the defendant W. Jackson) the witness intimated a doubt whether the law would permit such disposition of the testator's property as contemplated by the scheme; that, on subsequently seeing the testator in the presence of the defendants, W. Jackson and T. A. Jackson, the witness referred to the written instructions of the testator, and repeated his doubts of the legality of the intended disposition of the testator's property; that the testator then stated that having confidence in the two defendants, he would leave his property to them absolutely, being satisfied that they would carry out his intention; that the defendant, W. Jackson, assented to this, and the defendant, T. A. Jackson, did not dissent from it; that in preparing the draft the witness inserted powers of sale in the will which would not have been necessary, but for the purpose agreed upon between the testator and the two defendants, the executors; that at the time the witness delivered the original instructions and the will to the defendant, W. Jackson, the witness told the

latter that he would require the instructions to enable him (the defendant) to carry out the testator's intentions.

The present motion was for the suppression of the above depositions.

Mr. Rolt and *Mr. White*, for the executors, in support of the motion.

Mr. Malins and *Mr. Speed*, for the plaintiff; and—

The Solicitor General, *Mr. Walker* and *Mr. W. M. James*, for the several next-of-kin of the testator, opposed the motion.

On behalf of the trustees, and in support of the motion, it was argued, first, that the above communications between the testator and his solicitor were privileged and ought not to be disclosed; that this privilege never ceased—*Wilson v. Rastall* (1); that it extended to every purpose—*Cromack v. Heathcote* (2), *Doe d. Shellard v. Harris* (3), *Herring v. Cloberry* (4); and survived after the death of the client for the benefit of those claiming under him—*Earl Cholmondeley v. Lord Clinton* (5), *Chant v. Brown* (6). Secondly, that the trustees were not bound to disclose the trusts—*Wheatley v. Williams* (7), *Turquand v. Knight* (8); and that if there had been any fraud or attempt to evade the law, the facts must be proved *aliunde*.

Upon the general question of privileged communications between client and solicitor the following authorities were cited—

Cholmondeley v. Clinton, (supra).

Beer v. Ward, Jac. 77.

Greenough v. Gaskell, 1 Myl. & K. 98.

Flight v. Robinson, 8 Beav. 22; s. c.

13 Law J. Rep. (n.s.) Chanc. 425.

For the plaintiff, and some of the defendants (the testator's next-of-kin), and in opposition to the motion, it was contended

(1) 4 Term Rep. 753.

(2) 2 Brod. & B. 4.

(3) 5 Car. & P. 592.

(4) 1 Ph. 91; s. c. 11 Law J. Rep. (n.s.) Chanc. 149.

(5) 19 Ves. 261.

(6) 7 Hare. 79.

(7) 1 Moo. & W. 533; s. c. 5 Law J. Rep. (n.s.) Exch. 237.

(8) 2 Moo. & W. 102; s. c. 6 Law J. Rep. (n.s.) Exch. 4.

that the doctrine of privilege did not apply, because it was not part of a solicitor's duty to contrive an evasion of the law, or a fraud—*Follett v. Jefferyes* (9); that the depositions related to matters of fact, and not to confidential communications between solicitor and client for the purpose of obtaining legal advice—*Walker v. Wildman* (10), *Bramwell v. Lucas* (11) and *Desborough v. Rawlins* (12); and that if the privilege existed, it would prevail for the benefit of all claiming under or adversely to the testator, not merely in favour of the executors and trustees to the exclusion of the next-of-kin, and therefore in suits for establishing wills or rectifying settlements, the solicitor might be examined by the heir-at-law, or parties claiming under the settlement—*The Duke of Bedford v. the Marquis of Abercorn* (13).

Dec. 2.—TURNER, V.C.—This was a motion on behalf of the trustees of the will of J. Russell, the testator in the cause, to suppress the depositions of the witness, under the following circumstances.—[His Honour detailed the facts to the effect above stated.]—The question is, whether the statements thus made by the witness, or any of them, ought to be received in evidence against the defendants, the Jacksons. The question must be considered separately with respect to the communications had in the lifetime of the testator, and to those had after his decease; but I do not think, with reference to the communications had in the testator's lifetime, that any distinction can properly be made between those had with the testator, and those had with the defendant, W. Jackson; for I think the latter, in the communications had with the solicitor, must be considered to have acted as the agent of the testator, and to have been the channel of communication between him and the witness, and that the protection which the law throws around communications of this nature extends to those had through the medium of an agent, as far as

(9) 1 Sim. (n.s.) 1; s. c. 20 Law J. Rep. (n.s.) Chanc. 65.

(10) 6 Mad. 47.

(11) 2 B. & C. 745; s. c. 2 Law J. Rep. K.B. 161; 4 Dowl. & R. 367.

(12) 8 Myl. & Cr. 515; s. c. 7 Law J. Rep. (n.s.) Chanc. 171.

(13) 1 Myl. & Cr. 312; s. c. 5 Law J. Rep. (n.s.) Chanc. 230.

it would extend to those had with a principal.

As to the communications had with the solicitor in the lifetime of the testator, I think the evidence ought to be admitted. It is evident that the rule which protects from disclosure confidential communications between solicitor and client, does not rest simply upon the confidence reposed by the client in the solicitor, for such rule does not exist in other cases, in which at least an equal confidence is reposed—in those cases, for instance, of a medical adviser and his patient, and a clergyman and a prisoner. The rule seems to rest, not on confidence, but upon the necessity there is for carrying out the rule. Lord Brougham, in *Greenough v. Gaskell* (supra), has given the true foundation of the rule. His Lordship, in his judgment in that case is reported to have said, "The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case" (14).

This, then, being the foundation of the rule, the Court, when called upon to apply it, must have regard to the foundation on which it rests, and must not extend it to cases which do not fall within the mischief it was designed to meet. When the rights and interests of clients, or those claiming under them, come into collision with the rights and interests of third parties, there

is not any difficulty in applying the rule. If it were not applied in those cases, the client could never safely state to his solicitor the true position of his case, but would be driven to speculate as to what it would be his interest to conceal or divulge. The prosecution or defence of his rights would not be adapted to the circumstances as they really existed, and courts of justice would be embarrassed by imperfect information arising from imperfect communications. But when we pass from cases of conflict between the rights of a client and parties claiming under him, and those of third persons, to cases of testamentary disposition, do the same reasons apply? The disclosure in such cases can affect no right or interest of the client, and the apprehension of it can present no impediment to a full statement of his case to his solicitor (unless he were contemplating an illegal disposition, a case to which I shall presently refer), and the disclosures when made would expose the Court to no greater difficulty than it has in all cases where the views and intentions of persons, or the objects for which the disposition is made, are unknown. In the case, therefore, of a testamentary disposition, the very foundation of the rule seems to be wanting, and, in the absence of any illegal purpose being entertained by the testator, there does not appear to be any ground for applying the rule to such a case.

Can it be said, then, that the communication is to be protected, because it may lead to the disclosure of an illegal purpose? I think not, and that evidence otherwise admissible cannot be rejected on such a ground. On the contrary, I am very much disposed to think that the existence of an illegal purpose would prevent any privilege attaching to the communications. When a solicitor is a party to a fraud, there is no privilege attaching to communications between the client and him upon the subject of the fraud, because to contrive fraud is no part of a solicitor's duty; and I think it can as little be said that it is part of a solicitor's duty to advise his client as to the means of evading the law.

Another view of the case is, that the protection which the rule gives is the pro-

(14) 1 Myl. & K. 103.

tection of the client ; and it cannot be said to be for the protection of the client that evidence should be rejected, the effect of which would be to prove a trust created by him, and to destroy a claim to take beneficially by the parties accepting the trust.

One argument for the defendants (the executors) was, that the privilege did not terminate with the death of the client, that it belonged to a purchaser from the client, and that this must equally apply to the case of a volunteer under him; in fact, that the privilege followed the legal interest, and vested in the executors claiming under the will, and not in the next-of-kin claiming adversely to it. That the privilege does not in all cases terminate with the death of the party I entertain no doubt, and that it belongs to parties claiming under the client as aforesaid and those claiming adversely to him I entertain as little doubt, but it does not therefore follow that it belongs to the executors of the party as against his next-of-kin in such a case as the present. In the one case where the question is, whether the property belongs to the client or his estate, indeed, the rule may well apply for the protection of the client's interest; but in the other case where the question is, to which of two parties claiming under the client the property in question belongs, it seems to me arbitrary to hold that the privilege belongs to one rather than to the other. The privilege being one which follows the legal interest, it must be subject to the same incidents to which the legal interest is subject, and if the legal interest is subject to a trust the privilege must be subject to it also; and in that view of the case, to permit the defendants (the executors) to avail themselves of the privilege would be to permit them by the use of the privilege to exclude the question, whether they are trustees of it or not.

These are the views I entertain of the question without reference to the authorities. Those which were cited on the part of the defendants (the executors) do not appear to me to affect the question. General remarks found in the books must, of course, be understood with reference to the cases in which they are found, and none of the cases

at all approach the present, and were all cases arising between the clients or parties claiming under them and adverse claimants. There are, however, cases which I think approach more nearly to the present case, and in which the Court received and acted upon such evidence as that objected to without hesitation. Thus, in *The Duke of Bedford v. the Marquis of Abercorn* (supra), the Court received and relied upon the evidence of the solicitor as to the intention of the parties to marriage articles, and directed a settlement differing from the articles, mainly on the faith of such evidence; and in *Nourse v. Finch* (15), where the question was, whether the executors were trustees for the next-of-kin of undisposed-of residue, the evidence of the solicitor who had prepared the will as to what had passed between him and the testator was received and minutely commented upon in the judgment. Those cases, and particularly the latter, have a strong bearing on the present; and on the authority of them, or of the principal of them, my opinion is, that the evidence of communications which took place in the testator's lifetime must be received.

With respect to the evidence as to the communication which passed between the solicitor and William Jackson upon the occasion when the instructions were delivered to him after the death of the testator, I think the case stands upon a different footing. That was clearly a communication between solicitor and client in the course of professional business, and all principle and all authority are against the reception of the evidence in respect of it. The depositions to this extent ought to be suppressed.

I grant the motion so far as it relates to the communications between the witness and the defendant W. Jackson after the death of the testator; but refuse it so far as it respects the communications had in the lifetime of the testator. The question is one of great importance. I give no costs.

Order accordingly. Costs of the motion to be costs in the cause.

KINDERSLEY, V.C. } *In re SPOONER'S*
 NOV. 12. } TRUST.

Power—Appointment—Wills Act—Residuary Legatee.

*A testatrix, having a general power of appointment, upon her death, over a sum of 2,000*l.*, after referring to the power, directed and appointed that the said sum should, after her death, be paid to her four daughters and her two sons, John and Joseph; and the testatrix appointed her son Joseph her executor, and constituted him her residuary legatee. Before the death of the testatrix, her son John died, whereby his sixth share lapsed:—Held, that such sixth share passed by the residuary clause in the will to Joseph, under the provisions of the Wills Act.*

This petition stated that Thomas Spooner, deceased, by his will, dated the 4th of March 1833, amongst other bequests, directed his executors to invest 2,000*l.* in Bank 3*l.* per cent. annuities, and to pay the dividends thereof to Mrs. Ann Duncan, a widow, for her life, and after her decease to transfer the annuities unto such person or persons or in such shares or proportions as Ann Duncan should, by her will or any codicil thereto, to be respectively signed in the presence of at least one witness, direct and appoint; and the testator appointed four persons executors of his will, and he declared that at present he left the residue of his personal estate undisposed of. The testator died in March 1839, without having revoked or altered his will, leaving Mary Spooner, his widow, Jane Turner, Hannah Middleton and Ann Duncan his next-of-kin. After the death of the testator, his executors invested the sum of 2,000*l.*, part of his personal estate, in the purchase of 2,209*l.* 15*s.* 11*d.* 3*l.* per cent. consols, in their names, and paid the dividends thereof to Ann Duncan during her life.

Ann Duncan, by her will, dated the 13th of August 1841, after referring to the power in that behalf given to her by the will of Thomas Spooner deceased, directed and appointed that the sum of 2,000*l.*, in which she had a life interest under such will, and the said Bank annuities on which the same might be

invested, should, after her decease, be paid and transferred to her daughters, the petitioner, Isabella Mountz, widow, Mary Ann Duncan, Rachel Duncan and Dora Duncan, spinster, and her son, John Duncan, and her son, the petitioner, the Rev. Joseph Duncan, share and share alike, reserving, nevertheless, out of the said bequests, the sum of 300*l.* to make provision to produce an annuity of 30*l.*, to be paid by her executors unto her son James Duncan. And as to any further or other sum of money or other property to which she then was or might thereafter become entitled under the will of the said Thomas Spooner, the said testatrix left the same to be divided amongst such of her children as might be then living, share and share alike. And the said testatrix appointed her said son, the Rev. Joseph Duncan, and John Woolsey, Esq. executors of her said will, and she constituted her son, the Rev. Joseph Duncan, her residuary legatee.

Ann Duncan died in August 1850, and at that time her estate was entitled to a proportionate part of the dividends which became due at the half-yearly day of payment next after her death. The executors of Thomas Spooner paid to the petitioner, Joseph Duncan, as the executor of Ann Duncan, the sum of 9*l.* 1*s.* 10*d.* as the proportionate part of such dividends from the last day of payment up to the day of her decease, and the sum of 23*l.* 1*s.* 9*d.*, the balance of the said dividends, amounting to 32*l.* 3*s.* 7*d.*, remained in their hands. John Duncan, one of the sons of the testatrix Ann Duncan, died without issue in her lifetime, and thereby the sixth share of the said sum of 2,209*l.* 15*s.* 11*d.* lapsed, and fell into the residue bequeathed to the petitioner Joseph Duncan; that the executors of Thomas Spooner then paid into court, under the act for the relief of trustees, the said sums of 23*l.* 1*s.* 9*d.* and 2,209*l.* 15*s.* 11*d.* The petitioners, who were the surviving children of Ann Duncan, prayed that the residue of the said two sums, so paid into court, after setting apart the sum of 300*l.* for the purchase of the annuity given by Ann Duncan to her son James Duncan, and after payment of costs, should be paid over to the petitioners in equal

sixth parts, and that the sixth part given to John Duncan, deceased, might be paid to Joseph Duncan, the residuary legatee.

The question raised upon this petition was, whether the sixth part of the fund given by Ann Duncan to her son John Duncan, and which lapsed by his death during her lifetime, was payable to the persons entitled to the residuary personal estate of the testator, Mr. Spooner, as having been unappointed by Ann Duncan, or whether it went to Joseph Duncan, who was the residuary legatee under the will of Ann Duncan.

Mr. Lewin appeared for the petitioners, and contended that the share appointed to John Duncan, by the will passed under the residuary bequest contained in Mrs. Duncan's will, to her son Joseph Duncan; that this was the result of the 27th section of the Wills Act, 1 Vict. c. 26, which provided that any bequest of personal estate of a testator, or of personal property described in a general manner, should include personal estate which the testator might have power to appoint in any manner which he might think proper, unless a contrary intention should appear by the will; that such sixth part, which Mrs. Duncan had ineffectually appointed to her son John, being personal estate, which she had power to appoint in any manner she might think proper, passed under her residuary bequest; that no contrary intention appeared by the will of the testatrix, who must be taken to have known that by a general rule applicable to wills, any bequest which failed by the death of the legatee in her lifetime, would pass under the residuary gift, if any such were contained in the will. The following cases were cited in support of this argument:—

Easum v. Appleford, 10 Sim. 274; s.c. 5 Myl. & Cr. 56; 10 Law J. Rep. (N.S.) Chanc. 81.

Cartier v. Taggart, 16 Sim. 423.

Jenour v. Jenour, 10 Ves. 562.

Mr. Chandless appeared for the widow and next-of-kin of Mr. Spooner, and contended that they were entitled to the sixth part of the fund which lapsed by the death of John Duncan, such share having been unappointed by his will.

KINDERSLEY, V.C.—The first question is with reference to the residuary bequest, and upon every authority I apprehend that the words "constituting my son, the Rev. Joseph Duncan, my residuary legatee" must mean the same thing as if the testatrix had said, "I give all the rest and residue of my personal estate to my son, the Rev. Joseph Duncan," and if a testator gives all the rest and residue of his personal estate to A. B, he intends to give and does give everything he has not disposed of by his will. If by any reason a gift is rendered inoperative, the effect of the residuary bequest is to give everything not disposed of. It is no argument to say he has only given to the residuary legatee after the particular bequests. That is the case irrespective of any power. Now, the effect of the Wills Act is to make a general bequest operate the same as if the testator, referring to the power, had purported to make the bequest under it. Therefore, even if the testatrix had not referred to the power at all, or made any specific gift of the 2,000*l.*, the residuary bequest of her own personal estate would have operated as a gift of the 2,000*l.*, over which she had a general power of appointment. If it would do so, it appears to me on the universal construction of a residuary bequest, it must carry every part of the particular fund over which she has power of appointment, and which, although she has attempted to appoint, she has not effectually appointed by reason of the death of the party. I do not see any expression of intention that the residuary bequest was not meant to carry all; and I think that Ann Duncan having made an appointment of the 2,000*l.* in favour of several persons as tenants in common, one of whom has died in the lifetime of the testatrix, and having appointed, by will, the Rev. Joseph Duncan, her son, her residuary legatee, he is entitled to that share which would have gone to John Duncan, but which has lapsed by his death. As to costs, I think the particular fund ought to bear the costs properly incurred in relation to the execution of the trusts.

KINDERSLEY, V.C. }
Dec. 9, 10, 11, 23. } SOLTAU v. DE HELD.

Nuisance, Public and Private — Bell-ringing—Demurrer—Injunction.

The plaintiff, in the year 1817, became the lessee of a dwelling-house, which formerly constituted part of a large mansion, the other part of which was also occupied as a dwelling-house till the year 1848, when it was purchased on behalf of a Roman Catholic community, who converted the lower rooms into a chapel, and erected a bell at the top of the house, which bell was rung at various times every day, commencing at five o'clock in the morning. Subsequently a chapel capable of containing 400 persons was built in front of the house so adjoining to the plaintiff's house, and a belfry was erected containing six large-sized bells. These bells were also rung very frequently. The plaintiff brought an action against the defendant, who was priest of this Catholic chapel, on the ground that the bells were a nuisance, and recovered 40s. damages. The bells were afterwards rung only on Sundays for five periods of five minutes each. The plaintiff filed his bill for an injunction to restrain the ringing:—Held, upon demurrer for want of equity, that a bill might be filed by an individual alleging a private nuisance, although the nuisance might at the same time be public.

Held, also, that the plaintiff, having brought his action for damages in respect of the ringing of bells, though to a greater extent than was subsequently practised, need not commence a fresh action for every modified form of bell-ringing: but that if the plaintiff had not obtained a verdict at law, that was no ground of demurrer to a bill for an injunction. The demurrer was therefore overruled.

The demurrer being overruled, the plaintiff moved for an injunction to restrain the ringing of these bells, which was granted so far as they occasioned an annoyance to the plaintiff or his family.

This case came on first upon a general demurrer for want of equity, and, upon the demurrer being overruled, a motion was then made on behalf of the plaintiff for an injunction.

The bill stated, that previously to the

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25th of March 1817 the late Lord Teignmouth resided in a mansion-house, with pleasure-grounds and appurtenances thereto belonging, situate in Park Road, Clapham, then called Acre Lane, and which mansion-house, after Lord Teignmouth ceased to reside there, was converted into two dwelling-houses, but without there being any party-wall between them. That on the 25th of March 1817 the plaintiff, William Soltau, became the purchaser of one of these houses for the residue of a term of sixty-nine years, at the yearly rent of 130*l*. That the plaintiff had ever since resided in this house with his family. That the adjoining house, which was so separated from his, was occupied between 1817 and 1848 as a place of residence. That in July 1848, this last-mentioned house was purchased on behalf of a religious order or society of persons, professing the Roman Catholic religion, called the Redemptorist Fathers, and they determined to set apart a portion of the building for religious worship, and accordingly appropriated the ground-floor to that purpose, and appointed the Rev. Frederick De Held, the defendant to this suit, to officiate as priest, and to exercise the rites of his religion. That since the month of July 1848, the said house was called St. Mary's Catholic Chapel; that in August 1848 the said Frederick De Held, or some other person superintending the performance of religious worship in this chapel, caused a wooden frame to be erected on the roof of the house, and suspended a bell thereto; that such bell was tolled and rung for five days in the week five times every day; that it was rung six times on Saturday, and oftener on Sunday: the ringing ordinarily commenced as early as five o'clock, and continued for ten minutes or thereabouts, to the great discomfort and annoyance of the plaintiff and the other members of his family; that on the 12th of October 1848, the plaintiff wrote a letter to the superiors of the said Roman Catholic establishment, which was to the following effect:—"Sir, or Sirs,—As well on the part of myself and neighbours as the parish generally, I have to complain of the great annoyance of the bell you have caused to be erected on the roof of your house, and which is loudly tolled as early as five

o'clock, and very frequently afterwards during the morning, afternoon and evening. We hope, on your receiving this representation, you will take immediate measures to abate the great nuisance, and thereby relieve me and my neighbours and the rest of the inhabitants of this parish from any further disturbance. I am Sir, or Sirs, Your obedient servant, W. Soltau." That no answer was returned to this letter; that the plaintiff had recently discovered that the said Redemptorist Fathers on the 8th of November 1848 caused a notice to be given under the provisions of the 31 Geo. 3. c. 32, that this house was intended to be used as a Roman Catholic chapel, and it was accordingly registered as directed by the act. That notwithstanding the plaintiff's remonstrance, the bell of this chapel was continued to be tolled and rung as before, to the great annoyance of the plaintiff and also of his neighbours; and thereupon the plaintiff and several other persons determined to send a notice in writing with respect to the annoyance to Dr. Wiseman, who exercised ecclesiastical jurisdiction over the defendant as priest of the chapel. That such notice was to the following effect:—"To the superiors, directors, managers, and occupiers of the Roman Catholic House and Establishment, at Park Road, Clapham, and to all others whom it may concern.—We, the undersigned occupiers of dwelling-houses in the vicinity of the house and establishment above mentioned, desire to represent that we are subjected to a great inconvenience and annoyance from the loud and frequent ringing (often at unseasonable hours) of the large and harsh-sounding bell some time since erected upon an open frame on the roof of the said house. The practice we complain of is offensive alike to our ears and feelings, disturbs the quiet and comfort of our houses, molests us in our engagements whether of business, amusement or devotion, and is peculiarly injurious and distressing when members of our household happen to be invalids. It tends also to depreciate the value of our dwelling-houses. Under these circumstances we trust you will immediately take the present complaint into your serious consideration, and voluntarily redress the grievance instead of

constraining us to have recourse to the law to abate what we all from experience deem a very grave, indeed intolerable, nuisance. Dated, 21st of December 1848." That a copy of this document was served on Mr. Harting, the solicitor of Dr. Wiseman and of the defendant. That on the 1st of February 1849, the plaintiff's solicitor had an interview with Mr. Harting, who stated that he had seen Dr. Wiseman and some other persons on the subject of the complaint, and he then admitted that the said bell was rung five times a-day five days in the week, six times on Saturdays, and somewhat oftener on Sundays, but that the said bell was never rung for any but public purposes, that is to say, purposes interesting to the Catholic population, and not for any household purposes; that these public purposes were as follows, for five days in the week the Angelus bell was rung thrice as notice to all good Catholics to utter a prayer in honour of the Virgin, and twice a-day the bell sounded for mass. It was further stated that, in deference to the wishes intimated in the plaintiff's letter the hour of the early bell had been altered from five to six o'clock, and that willingly, if they could, they would meet the desires of the neighbours still further, but this they could not.

The bill then stated that in the month of May last a church capable of holding 400 persons was erected on the ground attached to the premises so used as a chapel and religious establishment, and such church was opened on the 14th of May 1851, and it had ever since been used for religious worship, and a steeple or tower 100 feet high was built as part of the church, and in March last six bells were placed in the steeple, and on the occasion of the church being opened, the bells were rung nearly the whole of the day; that this church was called the Church of our Immaculate Lady of Victories; that the bell in the chapel and the peal of bells in the new church were rung daily at the following times—the chapel bell was rung at five o'clock and a quarter to seven every morning, the steeple bell at a quarter to nine every morning and at a quarter before seven and a quarter past seven every evening, and on particular days the single bell and the peal of bells were rung much

oftener, and this was continued down to the time of the plaintiff obtaining a verdict in the action after mentioned; that when the peal of bells was rung, the noise was so great that it was impossible for the plaintiff or the members of his family to read, write or converse in his dwelling-house, and if it was continued, the plaintiff would be unable to reside any longer in his said house; that in consequence of the grievance suffered by the plaintiff, he applied to the defendant to desist from tolling and ringing these bells so as to occasion any annoyance to him and his neighbours, but this request having been refused, the plaintiff on the 28th of June 1851, commenced an action against the defendant in the Court of Exchequer to recover damages for the nuisance committed by means of the before-mentioned tolling and ringing of the bells. The trial came on for hearing, and the plaintiff obtained a verdict with 40s. damages and costs on the 13th of August 1851; that the bell attached to the chapel was some time after the commencement of the action removed from the roof to one of the sides; and that subsequently to the 13th of August last until the 9th of November, neither the bells of the church nor that of the chapel were tolled or rung; but on Sunday, the 9th of November last, the defendant caused the said bells to be tolled or rung as follows: one bell at a quarter before nine in the morning for six minutes, one bell at twenty minutes past ten o'clock for the same time, three bells at a quarter before eleven for the like space of time, one bell at half past six in the evening for five minutes, and three bells at ten minutes to seven for five minutes; and the bells were rung for the same number of times and for a like period on the 16th of November, the following Sunday. The bill charged that the defendant threatened and intended, not only to continue tolling or ringing the said bells every Sunday in the manner hereinbefore mentioned, but he also threatened and intended to ring peals of the six bells, and also to toll and ring on week days. The bill then charged that the weight of the peal of six bells amounted altogether to 28 cwt. 2 qrs. 14 lb., the largest bell being 9 cwt., and their size in diameter amounted to about 3 feet each; that the

ringing of these bells in the manner they were now rung caused considerable annoyance to the plaintiff and the members of his family, and during the time when some of the more weighty of the said bells were rung or tolled it was impossible for the plaintiff to read or converse without great difficulty; that the plaintiff had a daughter who for several years had been in a delicate state of health, and during the period the defendant caused the bells of the church to be so tolled and rung previously to the commencement of the action, the plaintiff was obliged to remove her to a more quiet place of residence; that the plaintiff had, since the action brought back his daughter to her home, but if the bells were now continued to be rung, he would be obliged again to remove her on account of the injury which her health would sustain by reason of such ringing and tolling. The bill charged that the ringing of the bells as they were now tolled and rung, would considerably diminish the value of the plaintiff's house, and he should be obliged to leave it, and would have great difficulty in disposing of it, except at a considerable pecuniary sacrifice. It was also stated that the distance of the plaintiff's bed-room from the bells of the chapel and church did not exceed twenty yards. The bill prayed that the defendant and all persons acting under his directions might be restrained by injunction from tolling or ringing the bell of the before-mentioned religious house or Catholic chapel, and from tolling and ringing the bells belonging to the Roman Catholic Church adjoining the said chapel called the Church of our Immaculate Lady of Victories, or any of such bells. The bill also prayed in the alternative that, at all events, the defendant and all persons acting under his direction might be restrained from tolling or ringing the said bells so as to disturb or annoy the plaintiff, but the motion for the injunction was confined to the first part of the prayer.

Mr. Campbell and *Mr. Bagshawe*, in support of the demurrer, submitted, as the first ground of demurrer, that the foundation on which the plaintiff rested his case was, that the ringing of the bells constituted an annoyance to himself and a nuisance to

his neighbours and the public at large, but he did not state a special instance of annoyance to himself more than would be suffered by all his neighbours. The case stated was, therefore, public, and the remedy was consequently by information filed by the Attorney General on behalf of the public. There were three grounds of nuisance: public, private, and a combination of both. In the first of these, the Court of equity would only interfere when the Attorney General prosecuted. If the nuisance were private then the remedy was by bill, but if the nuisance were both public and private then the plaintiff must file a bill, and there must also be an information by the Attorney General. This was only a bill by a single plaintiff against a single defendant, although the plaintiff stated that the nuisance affected the whole neighbourhood. To maintain this bill the plaintiff must make out that he was the only person injured, which was not the case made by him. This principle had been established to prevent a multiplicity of actions; but if the plaintiff could maintain this bill singly, so could every inhabitant maintain a similar bill. The principles were elementary and were laid down in *Black. Com.* vol. iii. p. 219. It was also supported in *Iveson v. Moor* (1), where it was held that an action would not lie for a general nuisance when a particular damage only was done; in this case the plaintiff might possibly have more inconvenience, but could have no more damage than was public. The following cases were also cited upon this point—*The Attorney General v. Nichol* (2), *The Fishmongers' Company v. the East India Company* (3), *Baines v. Baker* (4), *The Attorney General v. Johnson* (5), *Squire v. Campbell* (6), *Crowder v. Tinkler* (7), *Hudson v. Maddison* (8), *Haines v. Taylor* (9), *The Attorney General v. the Foundling Hospital* (10), and

(1) Comyns, 58.

(2) 16 Ves. 338.

(3) 1 Dickens, 163.

(4) Amb. 158; s. c. nom. Anon. 3 Atk. 750.

(5) 2 Wils. 87.

(6) 1 Myl. & Cr. 459; s. c. 6 Law J. Rep. (N.S.) Chanc. 41.

(7) 19 Ves. 617.

(8) 12 Sim. 416; s. c. 11 Law J. Rep. (N.S.) Chanc. 55.

(9) 10 Beav. 75.

(10) 4 Bro. C.C. 165.

Coulson v. White (11). The second ground of demurrer was, that assuming the plaintiff had a single right to come to the Court to complain of a public nuisance, still he could not maintain his bill until he had established his right at law. The grievance now complained of was different from that upon which the plaintiff had brought his action. The old case was the continual ringing of bells at inconvenient hours. The Court of law decided that that was a nuisance, but now the case was simply that of the bells being rung five times and five minutes each time, and that on Sundays only. This was no greater nuisance than was caused by every parish church. The object the plaintiff had in view was evidently to stop the ringing altogether, but this was entirely opposed to the law of the land. Every class of religionists had a right to ring bells so long as they did not create an annoyance to other people, but it was not simply a personal inconvenience such as might be supposed would be suffered by a person of a nervous temperament that would give a right to stop the ringing of church bells. It was true that the bill contained an allegation that the defendant threatened to ring the bells oftener than at present, but to give the plaintiff a right to file a bill for an injunction, he must state such a case as would entitle him to sustain an action at law and to obtain substantial damages, but it could not be supposed that any jury would give damages where the case was one founded only upon threats.

Mr. Malins and *Mr. Tripp*, in support of the bill, said there were two objections raised by this demurrer; one as to the right of an individual alleging an injury to himself to come to this Court when the nuisance was also a public nuisance, and the other as to the plaintiff's right being established at law. On the first point, there could be no doubt that a person who had sustained an injury and conceived himself aggrieved might come to this Court to restrain a nuisance, although it was also a public nuisance. If the nuisance were only public an individual could not sue, but if it was private as well as public the individual who suffered might sue in his individual capacity. This prin-

(11) 3 Atk. 21.

ciple was laid down in *Mitford's Pleadings*, 168, in *Crouder v. Tinkler*, *Spencer v. the London and Birmingham Railway Company* (12), *Sampson v. Smith* (13), *Haines v. Taylor*, *The Attorney General v. Forbes* (14), and *Walter v. Selfe* (15). On the next point, it was contended, that the plaintiff had established his right at law. The right had been tried as to the ringing of a single bell and a peal of bells. It was said that the amount of ringing was different now to what it was when the action was tried, and that therefore a new case was established, but they might as well urge that putting a new clapper to the bell would make a new case, or they might diminish the amount of ringing by a minute or more, and so establish a new case as often as they pleased: such an argument was without foundation. The constant ringing of bells was invariably a nuisance, but with respect to the parish churches the annoyance was very different, since they did not commence as the defendant's bells did at five or six o'clock in the morning. The following cases were also cited on the second ground of demurrer—*Weller v. Smeaton* (16), *The Attorney General v. Cleaver* (17), and *Elmhirst v. Spencer* (18).

This was not a religious question in any manner; but these bells were rung in defiance of the laws of the country and the wishes of the neighbours. For the last 300 years, the Roman Catholics had not been allowed to ring a peal of bells, and they had been very well able to do without it, but now it was contended that the ringing was necessary for religious purposes. The 31 Geo. 3. c. 32. was referred to, under which act the Catholics were subject to numerous restrictions. The 11th section provided that no priest should be allowed to officiate in a chapel with a steeple and bell. It was said that by the 2 & 3 Will. 4. c. 115. permission was given to the Catholics to ring bells, but it would be found that no such power was given by

(12) 8 Sim. 193; a. c. 7 Law J. Rep. (N.S.) Chanc. 281.

(13) 8 Sim. 272; a. c. 7 Law J. Rep. (N.S.) Chanc. 260.

(14) 2 Myl. & Cr. 123.

(15) 20 Law J. Rep. (N.S.) Chanc. 433.

(16) 1 Cox, 102.

(17) 18 Ves. 211.

(18) 2 Mac. & G. 45.

that act. It was a fact that many attempts had been made by the Catholics to repeal the act of Geo. 3, but it had never yet been effected.

Mr. Campbell was heard in reply.

KINDERSLEY, V.C.—In expressing my opinion upon the demurrer, I should, under ordinary circumstances, state the grounds upon which I formed that opinion; but having arrived at the conclusion that this demurrer ought to be overruled, I think it better to abstain from making any further observations upon the case, because when the motion for an injunction is brought on, some of the expressions I should use might possibly be supposed to prejudice the arguments addressed to the motion. I shall, therefore, simply overrule the demurrer, and shall give my full opinion after the motion has been heard.

Mr. Malins and *Mr. Tripp* then moved for an injunction in the terms of the first part of the prayer; and several affidavits were read, which, so far as material, were commented upon by the Vice Chancellor in his judgment. The facts, however, were not controverted, and the case was precisely the same as the case upon the argument for the demurrer.

Mr. Campbell and *Mr. Bagshawe* opposed the motion.

Mr. Malins having been heard in reply, the Court reserved its judgment.

Dec. 23.—KINDERSLEY, V.C.—This case comes before me in the first instance by way of demurrer, and that demurrer being overruled, it comes on in the next place by way of motion for an injunction. On overruling the demurrer, I abstained from expressing any reasons for so doing at the time, from an apprehension that I might intimate some opinion or drop some expression that might prejudice the argument of the motion on one side or the other. I now proceed to state my reasons for having overruled the demurrer, and then I shall proceed to give my opinion on the motion.

The demurrer is a general demurrer for want of equity, and of course by that demurrer the defendant undertakes to shew that upon the statements contained in the

bill, the plaintiff would not at the hearing be entitled to any relief. Now, the statements in the bill, which I may state in substance without reading them through in detail, are these. [The Vice Chancellor then stated the substance of the bill, which has already been fully set forth.] Now, the grounds of demurrer to this bill are these. The first ground of demurrer is, that this is a public nuisance, and therefore that the suit should have been an information by the Attorney General; and that it is not competent to the plaintiff, the nuisance being a public nuisance, to file a bill as for a private nuisance.

Now, with regard to that ground of demurrer, I confess it appears to me, to say the least, extremely questionable whether this is a public nuisance at all. In the view which I take of the case, it is scarcely, if at all, material to consider whether it be or be not a public nuisance, but, as I have said I entertain very great doubt whether it be a public nuisance—whether an indictment would lie for it as a public nuisance. I conceive that to constitute a public nuisance the thing complained of must be such as in its nature or its consequences is a nuisance, an injury or a damage to all persons who come within the sphere of its operation, though it may be in greater or less degrees. For example, take the case of the operations of a manufactory, in the course of which operations there are emitted volumes of noxious smoke or of poisonous effluvia. Now, to all persons who are at all within the reach of those operations, it is more or less objectionable, more or less a nuisance in the popular sense of the term. It is true that to those who are nearer to it, more immediately and nearer within the sphere of its operations, it may be a greater inconvenience than it is to those who are more remote from it, but still to all who are at all within the reach, it is in some degree, greater or less, a nuisance or an inconvenience. Take another ordinary, perhaps the most ordinary, case of a public nuisance, the stopping of the Queen's highway; that is a nuisance to all who may have occasion to travel that highway. It may be a much greater nuisance, no doubt, to a person who may have to travel it every day of his life, than it is to a person who has to travel that

way once a year or once in five years; but to whomever may come within reach of the thing complained of, it is more or less a nuisance. But if the thing complained of be such that, although it is a great nuisance to those who are more immediately within the sphere of its operation, it is no nuisance at all, no inconvenience whatever, nay, it may be even advantageous or pleasurable to those who are more removed from it, there, I conceive, it does not come within the meaning of a public nuisance.

Now, a chime of bells may be, and no doubt is, an extreme nuisance, and perhaps an intolerable nuisance, to a person who lives within a very few feet or yards of those bells, but to a person who lives at a distance from them, although he is within reach of the sound, though he is within the sphere of their operations, within the influence of their effect, so far from its being a nuisance, or an inconvenience, it may be a positive pleasure. For I cannot concur with the proposition that in all circumstances and under all conditions, the sound of bells must be a nuisance. I am sure the mass of mankind must be conscious of very pleasurable sensations arising from the sound of village bells at a distance on a fine summer's evening, and every man's reading will supply him with passages from poets and other writers dwelling upon that as a positive pleasure. And it is rather curious that one of the very witnesses—I refer to this not for the purpose of a fact at all—but one of the witnesses who was examined on the trial on the part of the plaintiff, and who deposed strongly to its being an intolerable nuisance when he was in Mr. Soltan's house, says, "But where I live, at Clapham, which is about a furlong from the bells, and with the intervention of trees, so far from its being a nuisance to me, it is a positive gratification, and I confess I should be extremely sorry if they were done away with." I only mention that by way of illustration, that in this case to some persons within the sphere of the effect of these bells it may be no nuisance at all, and no doubt is no nuisance; and therefore I very much doubt, indeed my opinion is, that this could not be indicted as a public nuisance; but as I have

said, it is of very little moment, in the view I take of it, whether it be or not. I may further make this observation, that it does not follow because a thing complained of is a nuisance to several individuals, that therefore it is a public nuisance. One may illustrate that very simply, by supposing the case of a man building up a wall which has the effect of grievously darkening the ancient lights of half a dozen different dwelling-houses. It does not follow because there are half a dozen persons or a dozen persons suffering by the darkening of their ancient light by the one act, that therefore it would be a public nuisance which you could indict at the suit of the Crown, or for which the Attorney General could file an information in this court. It is a private nuisance to each of the several individuals aggrieved.

However, in the further observations on this ground of demurrer, I will proceed on the assumption that it is a public nuisance, that is to say, that the defendant is right in his contention that it is a public nuisance, and let us see what the consequence will be if it be so. Now, of course, in the case of a public nuisance, no doubt the remedy to get rid of the public nuisance is indictment at law. The remedy at law is indictment; the remedy in equity in the case of a public nuisance, is no doubt information at the suit of the Attorney General; and so in the case of private nuisance the remedy at law is action; the remedy in equity is bill; and this is the distinction which is pointed out in those passages cited by Mr. Campbell from the 3rd volume of *Blackstone's Commentaries*, and from *Mitford's Pleadings*—a very obvious, clear and recognized distinction. But it is evident that that which is a public nuisance may be also a private nuisance to a particular individual, by inflicting on him some special and particular damage: and if it be both, that is, if it be in its nature a public nuisance and at the same time does inflict on a particular individual a special and particular damage, may not that individual have his private remedy at law by action, or in equity by bill? Because that is the question which is to be determined with respect to this ground of demurrer. The defendant's counsel insist that he cannot, and several

cases were cited in support of this proposition.

Now, on referring to those cases, it appears to me they do not support that proposition. The case which was first cited, and which is a very important case, *Iveson v. Moor*, from *Comyns's Reports*, was a case in which the Judges of the King's Bench were divided in opinion; but it was considered by the counsel citing this case that they had the authority of Lord Holt—a very high authority—for the proposition, that the individual could not maintain an action at law for the damage to himself where it was the case of a public nuisance. Now, on examining the case, so far from supporting the proposition, it proves directly the contrary. I think it right just to refer to the details of that case rather particularly. The case is reported not only in *Comyns*, but it is reported much more fully and at large in the first volume of *Lord Raymond's Reports*, and it is also reported in Chief Justice Holt's own reports (19). Now what was the case? It was this—that the plaintiff and defendants were the owners of two adjoining collieries, and the action was an action on the case; the declaration alleged that the plaintiff had dug from his own colliery a considerable quantity of coals, which he had for sale, 200 loads—but the declaration alleged that the defendants, in order to alienate and seduce customers and buyers from the plaintiff's colliery, and to appropriate those customers and procure them to go to the defendant Moore's colliery, stopped up a certain place in, through, and over which, the highway led, and it so continued stopped for a month, so that the carts for conveying the plaintiff's coals could not pass that way. Now, so far, that is clearly a public nuisance, stopping up the Queen's highway. But then the declaration went on with a *per quod*, alleging the special damage *per quod* the plaintiff, during all that time, lost the benefit and profit of his colliery, and the coals dug out of his said colliery—*magnopere depretiati et deteriorati devenerunt, pro defectu emptorum ex causa prædicta sic impeditorum et obstructorum*,—for want of buyers, who were thus

(19) *Iveson v. Moore*, 1 Ld. Raym. 486; s. c. Holt, 10.

hindered by the aforesaid cause. That was the way in which he lay the special damage to himself. The jury found a verdict for the plaintiff, and it was moved in arrest of judgment that the action could not be sustained, and a rule was obtained to shew cause why the judgment should not be entered for the defendants, instead of for the plaintiff. Now, the Judges of the Court of King's Bench were equally divided in opinion as to whether judgment ought to be for the plaintiff or for the defendants. Gould and Turton thought that judgment should be for the plaintiff. Rokeby and Holt were of a contrary opinion, and thought judgment should be for the defendants. But why? Not because either of them entertained the least doubt as to whether an individual could, although it was a public nuisance, maintain an action for the special damage to himself, but because they considered that the special damage was not laid in the declaration with sufficient accuracy and minuteness, and only on that ground. Now Rokeby, who coincided with Holt, expresses himself distinctly, and begins his judgment with the very proposition which is against the contention of the defendant. Rokeby, J. said that "he would admit that no particular person could have an action for the general stopping of a way, first, because the offender is punishable at the King's suit; secondly, because multiplicity of actions is to be avoided, and if one man may have an action, for the same reason a hundred thousand may. But if the stopping be a particular damage to a particular person, he may have an action, but then the particular and special damage must be particularly and certainly alleged, which is wanting in this action, and therefore it does not lie." So Holt in the same way gives his reasons at great length. He says he considers first the question whether an action would lie for the mere stopping the way, on the ground that the plaintiff's coal mine was situate near to the highway. He says no; it is a public nuisance. But then he considers whether there ought not to be further some special damage to support the action, and whether this damage is specially enough shewn, and so, without reading through

his whole judgment, it is clear that both he and Rokeby concurred with the other Judges in opinion that the action would lie, provided the *per quod* in the declaration laid the special damage with sufficient accuracy and particularity. But further, when I look at Holt's own report of the matter, it is put beyond all question, but he concludes by mentioning this as the result of the whole case. He says, "In this case, it was agreed by the whole Court that where an action arises from a public nuisance there must be a special damage, for he that did the nuisance is punishable at the suit of the public by indictment or information, and to allow all private persons their actions without special damage would create an infinite multiplicity of suits." And further than this, it appears by the note which is appended to the report in Lord Raymond, by the reporter, that this took place:—there was the rule to shew cause why the verdict should not be entered for the plaintiff. The Judges being equally divided, that rule could not be discharged, and the rule could not be made absolute; neither while that rule was pending could there be judgment either way. The case was in that dilemma that it could never be disposed of at all so long as the Judges were equally divided on the point, whether the special damage would sufficiently lie, and therefore it was arranged and agreed to by Lord Holt that the case should be re-argued before the four Judges of the Common Pleas and the four Barons of the Exchequer. It was so argued before them, and the eight were unanimously of opinion that the action lay, and that the special damage was sufficiently laid, and that judgment should be for the plaintiff.

Now that case appears to be a case of no slight importance. It was the opinion of all the twelve Judges at that time, with Lord Holt at their head, that in the case of the clearest public nuisance, a case beyond all question a case of public nuisance, a particular individual may have a particular action for a damage sustained, provided in his declaration he lays that damage with sufficient particularity in the *per quod*, and of course supports it by sufficient evidence. Therefore, that case so far from establishing the proposi-

tion contended for by the defendant, establishes directly the contrary.

Another case which was cited is a case of *Baines v. Baker*, cited from *Ambler*, and reported as an anonymous case in the third volume of *Atkyns*, which was the case with respect to the erection of the Small Pox Hospital. It was a bill to restrain the erection of the Small Pox Hospital in Cold Bath Fields. Both the reports in *Ambler* and *Atkyns* are extremely jejune and bad, and unfortunately there is no trace of the facts of the case in the Registrar's book, and there is not one word of the facts stated either by *Ambler* or by *Atkyns*. It appears that the plaintiff contended as far as one can collect from the cases (though they are very unsatisfactory) that the intended erection of this Small Pox Hospital spread dismay and terror through the neighbourhood, and that he was the owner of some houses in Cold Bath Fields, and that his tenants—he was not himself a resident there apparently, but his tenants—were giving him notice to quit the houses. That was the only way in which any special damage was alleged at all as far as I can collect from the case. But the Lord Chancellor, Lord Hardwicke, says that is not a private nuisance. The terror of a thing is not a private nuisance, nor is it a public nuisance. It is neither one thing nor the other, and he refused the injunction. But I confess I cannot collect from that case that he expressed any opinion that if it were a public nuisance, and at the same time a special damage arose to the plaintiff from it, which he could shew, that he might not come into a court of equity to restrain that nuisance.

Another case cited was the case of *The Attorney General v. the Foundling Hospital*, and I really do not know why that case was cited, because it has nothing to do with either public nuisance or private nuisance; it was only the case of an information filed by the Attorney General on behalf of the charity, the Foundling Hospital, to restrain the persons who had the management of that hospital from dealing with charity property by building upon it in a way that was alleged to be a breach of trust and mismanagement of charity property. It was not a question of nuisance at all.

The Fishmongers' Company v. the East India Company, cited from *Dickens*, only shews that the Fishmongers' Company could maintain a bill for an injunction to restrain the defendants, the East India Company, another corporation, from building a wall so as to darken ancient lights, but the distance was so great that it was considered not to amount to a nuisance. It was seventeen feet, which in a town was considered no nuisance at all.

In *The Attorney General v. Nichol*, that was an information by the Attorney General only because it was on behalf of a charity, not on the ground of public nuisance, for an injunction to restrain the defendants from building a wall which would darken ancient lights of the Scottish Hospital. The injunction, having been granted *ex parte*, was dissolved because it did not appear that there was a sufficient degree of nearness of the wall to the light to constitute a nuisance.

In *Crowder v. Tinkler*, which was the case of the powder mills, that was a bill by a private individual on the ground that the erection of a certain powder mill or corning mill for the manufacture of powder within a certain distance of his premises endangered the safety of his property, and the Lord Chancellor directed the plaintiff to indict the building as a nuisance—observe, that is, a public nuisance, and in the mean time he put the defendant on terms as to how he should use the mills, with liberty to apply on the result of that trial. That proves the contrary of the proposition contended for, because that was a public nuisance. Lord Eldon directed it to be tried as a public nuisance, by directing an indictment to be brought, yet he sustained the bill—ordered the motion to stand over till the result of the trial of the indictment, and any party was to be at liberty to apply. It appeared in that case that there was great conflict of affidavit as to whether it was likely to prove a nuisance or not.

Hudson v. Maddison was the case of five persons joining together to complain of an act which was a separate nuisance to each of them; and it was held that the five could not join together. That was all; but that was determined only on the ground on which *Jones v. Garcia del Rio* (20) was determined,

(20) Turn. & R. 297.

which was the case of the Peruvian loan, where one person filed a bill on behalf of himself and all the other shareholders. It was decided in that case that the bill did not lie on behalf of himself and all others, because each one was a separate creditor of the Peruvian government or the individual acting for the Peruvian government. *Squire v. Campbell*, another case cited, was the case of the erection of the statue of George the Third near Pall Mall East; and I suppose that was cited because it appears the Attorney General was a defendant. There, Lord Cottenham held that that was not a public nuisance, because it did not obstruct the carriage-way, and it was not a private nuisance because the only private mischief was that it might diminish the value of a man's house, which was no ground of nuisance, or might shut out a pleasant prospect, which was not a ground of nuisance; but the Attorney General was made a party, not in respect of nuisance at all, but because the freehold of the spot on which the statue was erected being in the Crown, the plaintiff thought it better to make the Attorney General a party to sustain that interest, and not on the ground at all that the Attorney General was a necessary party to such a suit. *The Attorney General v. Cleaver*, another case cited, was an information by the Attorney General. Now, here was a public nuisance; it was to restrain the manufacture of soap on the ground of its being a public nuisance to the inhabitants of Battersea and Chelsea. That was an information by the Attorney General; but that proves nothing. It only shews that where the object is to restrain it as a public nuisance, that must be done by information; but it does not at all shew that an individual may not have a bill if he proves special damage arising to himself out of a public nuisance. There, Lord Eldon ordered the motion to stand over, and in the mean time directed an indictment to be tried. These are the cases cited in support of the proposition that the bill does not lie. Now, several cases have been referred to on the part of the plaintiff—*Spencer v. the London and Birmingham Railway Company*, *Sampson v. Smith*, *Haines v. Taylor* and *Walter v. Selfe*; in all of which and in many other

cases that might be cited it has been held and acted on, over and over and over again, that if an individual sustains a special and particular damage from an act he may have a bill; if it be such a case as a court of equity will interfere in at all, he may have the interference of the Court on a bill, although the act complained of be in its nature a public nuisance. There were two other cases cited—*The Attorney General v. Forbes* and *The Attorney General v. Johnson*. These cases only shew this, that there may be both an information and a bill; that is, that the Attorney General may file an information to restrain it as a public nuisance, and the particular individual who sustains particular injury may join as plaintiff as well as relator, and have the remedy for himself also in the same suit. I am of opinion, therefore, that the first ground of demurrer is not tenable.

The next ground of demurrer insisted upon was that the plaintiff has not established his right at law. Now, it is true that equity will only interfere in case of nuisance where the thing complained of is a nuisance at law; there is no such thing as an equitable nuisance; but is it a ground of demurrer that the matter has not yet been tried at law? It may be ground, and is ground very often, for refusing an injunction upon the motion; but is it ground of demurrer? No, I am not aware of any cases in which it has been so determined. I find as far back as the time of Lord Hardwicke in *Morris v. Berkeley* (21), that was a motion in relation to the obstruction of the plaintiff's ancient lights. It had not been tried at law. So far from saying that the bill would not lie because it had not been tried at law, Lord Hardwicke actually granted the injunction, but directed a trial, and after the trial any party was to be at liberty to apply. In *Elmhirst v. Spencer* Lord Cottenham expresses himself thus—"The plaintiff before he can ask for an injunction must prove that he has sustained such a substantial injury by the acts of the defendants as would have entitled him to a verdict at law in an action for damages." And then, in another part of the same judgment, he says, "This Court will

not take upon itself to adjudicate upon the question whether this is a nuisance or not; that must be ascertained in a court of law, as laid down by Lord Eldon in *The Attorney General v. Cleaver*." Now what did Lord Eldon do in *The Attorney General v. Cleaver*? Why, in that case, which was a public nuisance, he directed the indictment, which had been already brought and was pending, to be prosecuted; he spoke to one of the Judges to expedite the trial and ordered the motion to stand over until the hearing of it. Therefore, Lord Cottenham, in that case, is referring to the principle that you cannot ask for the injunction if there be a question about your legal right—about its being at law a nuisance. But I do not know where it is laid down that a bill will not lie, that is, that it is ground of demurrer because the action has not yet been brought. However, whether that be so or not, in fact the plaintiff has recovered at law, the thing has been tried at law, but this ingenious argument is suggested—it is said, "True, there has been an action at law, but this which is now being done, which you call a nuisance, has never been tried at law. When the trial took place at law, we were ringing bells every day in the week, we were beginning at five o'clock in the morning and we were ringing a considerable period of time on each occasion, but now we are doing much less; we are only ringing them on Sundays; we are ringing them a fewer number of times; we are not ringing them so long at a time; therefore go and bring your action for this, and see whether this is a nuisance. You have not tried this." Now, if that argument were to prevail, only see what it would come to. Supposing that, after the trial of the action, the defendant had done this—instead of ringing seven days in the week he had rung six, or instead of beginning at five o'clock in the morning he had begun at six, or instead of ringing for a quarter of an hour he had rung ten minutes each time, and when the plaintiff came into equity to restrain him he had said, "You have not tried this; when you brought your action I rang for seven days in the week, I only ring six now; I began at five o'clock, I now only begin at six in the morning," and so on. Well, if that were

yielded to and another action brought and damages recovered, he would reduce the number of days ringing from six to five. "Now you have not tried this same thing," and so on *toties quoties*. It is clear the argument, pushed to its legitimate conclusion, must result in that which is contrary to all reason and to all justice. The thing has been tried, because what is it you are to try at law? You are to try (if it be a question) whether the plaintiff's right in his house be such as to entitle him to come into equity at all, and you are also to try whether the ringing of these bells is in its nature at law considered a nuisance. That has been tried, but the exact extent or quantum of injury or nuisance inflicted is a question which does not require repeated trials in order to satisfy the rule of the Court; that as to a nuisance, that being a matter of law only, the law is to determine what is nuisance. But upon the demurrer the whole question upon this ground is put an end to by an allegation in the bill, which this demurrer of course admits to be true,—it is this: that whatever be the extent of the ringing now practised, that is, on the 9th and 16th of November, those two Sundays, and no doubt on subsequent Sundays, whatever be the case in that respect, the bill alleges, and the demurrer admits, that the defendant threatens and intends not only to continue tolling or ringing the last-mentioned bells on Sunday in the manner last aforesaid, but he also threatens and intends to ring peals of the said six bells, and also to toll and ring on week-days, and he also threatens and intends to toll and ring the bell of the before-mentioned chapel or religious house; so that he admits that what is now being done is only an instalment of that which he not only reserves to himself the right to do, but which he actually intends to do: to ring as he rang before, every day in the week, to ring peals on six bells, to ring just as he pleases. Therefore, upon the demurrer it is quite clear the argument that the plaintiff has not established his right at law is one which cannot be maintained.

Now, there was one point raised by the plaintiff which I do not think it necessary to go into. The plaintiff insisted that it was illegal for Roman Catholics to ring and toll bells in a steeple annexed to their

place of worship. It appears to me that whether that be so or not is perfectly immaterial to this case; because, even if it be illegal, I am not to grant an injunction to restrain an illegal act merely because it is illegal. I could not grant an injunction to restrain a man from smuggling, which is an illegal act. If it be illegal, the illegality of it is no ground for my interfering. Therefore I do not at all touch upon or go into the question, whether, under the numerous acts of parliament relating to the Roman Catholics, it be or be not now lawful to have a steeple and bells. For the reasons which I have mentioned I overrule the demurrer.

Now, I proceed to give my opinion with regard to the motion, and many of the observations which I have made upon the demurrer necessarily more or less apply to the motion, for I find that almost without exception, or with very trivial exceptions, the facts as alleged by the bill are verified by affidavit, and are, in fact, not in contradiction. There are slight discrepancies; for example, the bill alleges that on some occasions the period of the ringing was six minutes, when the defendant says, in fact, it was five minutes; it was rather exaggerated by the plaintiff. Therefore, of course, in those instances I take it according to the defendant's statement, and not according to the statement of the bill. But in all respects, I think almost without exception, there is no discrepancy in the statement as to the facts of the case. I have already stated these facts, and therefore I need not repeat them. But I may observe, the six bells having been erected in the steeple about the month of May when the chapel was opened, those bells are, according to the description of the size (which is not in contradiction) and their weight, very large bells, they are not the ordinary sized chapel bells which are used in most chapels, and used perhaps in most of the district churches in and near London, but are very large, unusually large, bells; and the effect is thus described of the ringing of those bells antecedently to the trial by Mr. Soltau in his affidavit, and not in any way contradicted. He says, that "when a peal of the bells of the said Roman Catholic Church was rung the noise was so great that it was impossible for me or the

members of my family to read, write, or converse in my dwelling-house. And I further say that the tolling and ringing of the said bell and bells was and is an intolerable nuisance to me; and if the said bell or bells is or are permitted to be tolled or rung in the manner in which the same was so tolled and rung as aforesaid, it will be impossible for me to continue to reside any longer in my said house." That is the description of the effect produced by the ringing of the bells as it was practised antecedently to the verdict in August last. An application having been made to the defendant to desist before an action was brought, and being refused, the action was brought, and I have already stated the result of that action. It appears that the chapel bell has been since removed from the top of the building to the side,—and to the side, as I understand, farthest away, most remote from the plaintiff's house, which is on the other side. Now, the affidavits having described as the bill describes the present ringing, that is, the ringing on the 9th and 16th of November, correcting it from six minutes to five minutes, as the defendant alleges it,—which I do, of course, taking it according to the defendant's statement,—the effect of the ringing, as it is now practised, is thus described in the affidavit of Mr. Soltau. He says, "And I further say that the tolling and ringing of the said bells of the said Roman Catholic Church, in the manner in which they were so tolled and rung on the said 9th day of November instant, and the 16th day of November instant, caused considerable annoyance to myself, and disturbed the devotions of the members of my family. And that during the time or times when some of the more weighty of the said bells are rung or tolled, it is impossible for me to read without great difficulty." Then he mentions the fact of his daughter having been removed from the house, which I do not dwell upon, and he proceeds thus: "And I further say that the tolling and ringing of the said bells on the said 9th and 16th days of November 1851 was a great annoyance and nuisance to me and my family. And I further say that, if the said bells of the said church are permitted to be tolled and rung in the manner in which they were

so tolled and rung on the 9th and 16th of November as aforesaid, the value of my said dwelling-house and premises will be considerably diminished, and that if I and my family are compelled to leave, I could only dispose of it at a great pecuniary sacrifice. And I further say that, the distance of my bed-room from the bell of the said chapel and the bells of the said church does not exceed twenty yards."

There is another affidavit also, the affidavit of Mr. Gadsden, in support of the plaintiff's allegation, which thus states the nuisance as it now exists according to the present practice of ringing. "I further say that I have heard the said bells as they now ring and toll since the 13th of August, when I was in the plaintiff's residence on the 30th of November now last past—that 30th of November being a Sunday—and I consider the ringing and tolling of the said bells, both as they were rung and tolled prior to the said 13th day of August 1851, and as they are now rung and tolled, to be peculiarly annoying and distressing to any person occupying the residence of the said plaintiff, and in my opinion the value thereof is greatly decreased by reason of such ringing and tolling." Then he goes on to state, "That if the said bells were not rung and tolled as aforesaid, in my opinion the said house would still let for 130*l.* per annum, the rent which I am informed the said plaintiff now pays for it. And I say that I consider from the peculiar position of the said church with reference to the plaintiff's residence, that any ringing or tolling the bells of the said church, even on a Sunday only, as they are now rung and tolled, would have the effect of deteriorating the value thereof, because I do not believe any private gentleman or lady, or any person who could afford to pay such a rent would become a tenant thereof." That is the account given of the effect of the present nuisance. Now, it struck me at the time, that I should have expected more persons to have been brought forward to depose to the fact of the nuisance. There is the affidavit of the plaintiff, and the affidavit of Mr. Gadsden; but when I consider that, in fact, there is no controversy about it, and that there is no contradictory evidence, then it appears to me that the

plaintiff was perfectly justified in saying if there had been witnesses brought to contradict it, I might then have brought forward half a dozen more witnesses, as I did at the trial—I might have brought forward a number of witnesses; but if it is not denied, it is not necessary for me to do more than to have my own affidavit and the affidavit of one disinterested person deposing distinctly to the effect of the nuisance. When I say it is not denied, there is an affidavit on the part of the defendant, of Mr. Wright, which states this. After stating an attempt to let the plaintiff's house, he says, "And I say that I live near the church in the said pleadings mentioned, and within full hearing of the bells in the said pleadings also mentioned; and I say that I do not consider them any nuisance. And I say that I know from frequent communication with my neighbours that the said bells are not considered a nuisance to persons generally." And then he adds this, "And I say that the four Protestant Churches in Clapham aforesaid have and use bells which ring several times for half an hour at a time on Sundays, and twice on Wednesdays and Fridays, besides frequent ringings during the day for deaths and funerals." Now, that is the only affidavit which at all contradicts the fact of this being a nuisance. The affidavit of Mr. Weld, the priest, does not, and I think very properly, say it is not a nuisance, but he addresses himself to other matters which I shall have occasion to advert to presently. Now, what does this amount to? This is a gentleman who says, "I live near the church;" the whole question is, how near? He says, "I live within full hearing of the bells." Yes; but how near to the bells? He says that his neighbours do not consider it a nuisance. But where do those neighbours live? How near to the bells? It really comes round to what I observed upon the demurrer, that the chiming of these bells, which may be and is a great nuisance to a person living as near as the plaintiff lives, may be not only no nuisance, but an actual source of pleasurable sensations to those who are more remote. Therefore, as Mr. Wright has not thought fit to tell me how near he lives, I am left to conjecture. It may be 10 yards,

100 yards, 500 yards or 1,000 yards. Although it may be so near the church that he may hear the bells, yet he may hear them in a way which I can easily conceive would be extremely pleasurable, or, at all events, no nuisance. Then, with respect to the neighbours, we have no means of knowing who those neighbours are, or how near they live, except that they say they do not consider it a nuisance. Therefore, I consider the fact of its being a nuisance sufficiently established by the affidavits which have been made on the part of the plaintiff. But really one ought to take into consideration the actual circumstances proved, and not at all disputed, that these bells are bells of a most unusual size, varying from $4\frac{1}{2}$ cwt. in weight to upwards of 9 cwt., which is the largest, varying from 2 feet 3 inches in diameter, the smallest, to 3 feet 3 inches in diameter; that these bells are placed in a steeple which is almost in front of the plaintiff's house, and within the front court-yard, now divided into two in consequence of the division of the house into two, but which was once the court-yard of the whole house when it was occupied as one house. When you consider those circumstances, it really is hardly necessary for persons to say by affidavit, that it must be an intolerable nuisance to have those large bells ringing, even for a short period of time, and even on Sundays ringing so near to the dwelling-rooms and bed-rooms of the plaintiff's house. And it is to be remembered that the plaintiff has not gone to the bells, the bells have come to the plaintiff. The bells have been put there when the plaintiff has had the enjoyment of his house for upwards of thirty years, and has still got upwards of thirty years to run of his lease.

Then I may further observe in connexion with this point, that the affidavits verify also, and this is not contradicted, the allegation in the bill as to the intention of the defendant not to confine himself to the ringing which has taken place on the 9th and 16th of November, but to ring all the bells in peals, to ring every day, to ring the chapel bell, in short to ring as often and as much as he pleased, and as he did before the trial. That is stated according to belief. The plaintiff says, "I am informed and believe that the

defendant threatens and intends to do so," and there is no contradiction to that whatever. I think it is, I must say, creditable to Mr. Weld and to the defendant that they do not come forward and say "I have no intention of doing so." It is clear (and they are right in that, according to their view of their rights) they are right in saying "we do reserve to ourselves the right of ringing as much as we please, for we think the law allows us to ring," therefore it was quite proper not to come forward with an affidavit to contradict that. I must take it therefore that there is the intention, or at all events, the reservation of the right to themselves on the part of the defendant and those gentlemen who are members of this body, to ring as much as they please.

Well, then it is said that part of what is alleged by the plaintiff as the mischief arising to him is the diminution of value of his house; and it is said, and said with perfect truth, by the defendant's counsel that many cases establish the proposition beyond all controversy that mere diminution in value does not constitute and is no ground for the Court interfering. But although it is perfectly true that mere diminution of value does not *per se* constitute nuisance: as, for example, it is no nuisance at law to build so as to shut out from a party a most beautiful prospect which he previously enjoyed, unless the buildings actually darken his ancient lights; and although he has enjoyed a most beautiful prospect from his windows and a most offensive building is erected on another man's ground, a grievous eyesore, which shuts out that beautiful prospect and greatly diminishes the value of his house, that is not at law a nuisance; but although that be so, surely the extent of the nuisance, if it be a nuisance, may be materially shewn by this, that so great is the annoyance, that no respectable person, that is, no person who can afford to live in such a house as this, would take it with such a nuisance, and the only person who could be expected to take it would be only one who would pay a very small rent, but to whom it was an object to have a very large house at a very small sum, and who would bear with the nuisance for the sake of the smaller rent which he paid. I say in that way the diminution of value is of very great mo-

ment, not as constituting a nuisance, but as an indication of the extent to which that is in itself a nuisance.

Under those circumstances, the question I have to ask myself and that I have to determine is this, a question which I cannot do better than state in the language of Lord Justice Knight Bruce when as Vice Chancellor he determined the case of *Walter v. Selfe*. That was the case of the brick-field in which he granted the injunction. He says, "The important point next for decision may properly, I conceive, be thus put:—ought this inconvenience to be considered in fact as more than fanciful, or as one of mere delicacy or fastidiousness, or as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober and simple notions among the English people?" That enunciates the question, I think, distinctly which is to be tried upon such an occasion as this, and I must add in the very words in which Vice Chancellor Knight Bruce goes on there—"And I am of opinion that this point is against the defendant:" that this is such an inconvenience, such an invasion of the domestic comfort and enjoyment of a man's home that he is entitled to come and ask this Court to interfere. And upon that point I would just refer to the language of Lord Eldon in the case of *The Attorney General v. Nichol*. He says, "the foundation of this jurisdiction, that is, interfering by injunction, is that head of mischief alluded to by Lord Hardwicke, that sort of material injury to the comfort of the existence of those who dwell in the neighbouring house, requiring the application of a power to prevent, as well as remedy, an evil for which damages more or less would be given in an action at law." That is the ground for the interference by injunction, and that is the ground upon which I conceive that I ought to grant an injunction in this case.

Before I finish I will just make an observation upon a point which was raised by the defendant, that in fact these bells are no more a nuisance than the bells of a parish church. It is said that there are four in this parish; the parish seems to have been divided into districts, and there are four parochial district churches or parish

churches: they have all their bells, they ring on Sundays and they ring on Wednesdays and Fridays, and if this be a nuisance why is not that a nuisance? Or if that be not a nuisance why is this a nuisance? Now, it seems to be overlooked, that this building to which these bells are attached, although called a church, called by those who have erected it and those who use it, a church, is not in the eye of the law a church; it is no church in law, it is no more a church than the chapel or meeting-house of any denomination of Protestant Dissenters. A church in law is, that building of which there is but one in the parish, or but one in the parochial district where the parish has been divided by act of parliament. It is a building of which the freehold both of the church and the churchyard is vested in the parson of the parish, and of which there are churchwardens; to which bells are an appendage recognized by law, the special property of which bells by law is vested in the churchwardens, but for the benefit of the parishioners at large; in respect of which bells it has been held that an action will lie by a succeeding churchwarden in his official capacity against the retiring churchwarden in trover to recover the very bells, on the ground of the special property vested by law in the churchwardens, and that you must in the action lay the property as being the property of the parishioners. The law recognizes the bells as an appendage to a parish church, and by law the churchwardens are to have the custody of the belfry in which the bells are suspended and tolled. Moreover, with regard to churches, unless in special cases of churches founded by the Crown, or special cases of churches founded by act of parliament, not parish churches, they are under the jurisdiction of the Bishop of the diocese. There is but one church in each parish or in each district, which is under the jurisdiction of the Bishop of the diocese. There is but one Bishop of the diocese. Is it said that this building is under the jurisdiction of the Bishop of Winchester, in whose diocese, I believe, Clapham is situate? Certainly not. It is but a chapel, it is no church, it has no privilege, it has no legal privilege of ringing bells in the same way that a parish church has the privilege of having bells or ringing bells. I do not mean in what I

say in the slightest degree to intimate that it is unlawful for Roman Catholics to have bells attached to their places of worship. I avoid that question entirely, which I have hitherto avoided. But it seems to be assumed that this stands on the footing of a parish church, and therefore that it is as much privileged and entitled to have bells, whether a nuisance or not, as a parish church. For that reason I have made these observations.

Now, another observation that was made was, that there has been acquiescence here, and that, therefore, the plaintiff is not entitled to the injunction. I must say a case less of acquiescence I have seldom met with; as soon as the nuisance from the single bell on the roof of the house began, a respectful letter was addressed to the superior or superiors of this establishment, requesting that it might not be continued. That being disregarded another was sent, and it was thought better to let that be sent to Cardinal Wiseman in the hope that he might interfere; an interview was had between the solicitors, and that resulted in nothing but a statement from Mr. Harting, the solicitor for the defendant, that they could do no more than alter the hour from five to six o'clock. Mr. Soltan bore that as well as he could; but when in May last came the six bells in the tower for the first time, does he lie by? So far from it he brings his action on the 28th of June; that is diligently prosecuted; the trial is on the 13th of August, the judgment is entered up on the 10th of November in the following term, and on the 21st of November he files his bill, after having again applied, in consequence of the renewal of the ringing, to have it discontinued, and met with a refusal. Now, a case less of acquiescence I have seldom met with. It appears to me that the plaintiff has diligently asserted his rights. I think he is entitled to an injunction, but not quite in the terms in which it is asked by the notice of motion. The bill asks for an injunction to restrain the ringing of these bells altogether, or, in the alternative, to restrain the ringing of them so as to constitute a nuisance or an annoyance to the plaintiff. It appears to me that the latter form, very nearly, is the form in which the injunction ought to be granted. Therefore, I shall order an injunction to issue to

restrain the defendant, and all persons acting under his direction or by his authority, from tolling or ringing the bells in the plaintiff's bill mentioned (because the prayer is confined to the said bells), or any of them, so as to occasion any nuisance, disturbance, and annoyance to the plaintiff and his family residing in the plaintiff's dwelling-house in the bill mentioned.

Mr. Malins submitted whether the terms of the injunction might not involve an uncertainty.

KINDERSLEY, V.C.—I am aware they must, but I may mention that I am in this respect following what was done by the Vice Chancellor Knight Bruce in the case I referred to of *Walter v. Selfe*, the brick-field case. He issued an injunction in these terms, which no doubt is equally liable to uncertainty, that is to say, it may be questionable whether a certain degree of ringing may or may not occasion annoyance, disturbance, and nuisance to the plaintiff and his family, but the same thing will apply here. In that case he says: "let the defendant, his servants, workmen, and agents, be restrained by injunction from burning, or causing to be burnt, bricks on the defendant's strip of ground in the bill mentioned," not absolutely, but "so as to occasion damage or annoyance to the plaintiffs, or either of them, as owner or occupier of the messuage in the bill mentioned to be occupied by the plaintiff Charles Pressly, or injury or damage to the messuage," and so forth.

Mr. Malins said he was aware that that injunction had had the effect of stopping the brick-burning altogether.

KINDERSLEY, V.C.—That may be, and this may have the effect of stopping the ringing of the bells altogether. But I conceive I have no right to say, and I cannot say, that it is absolutely impossible that any one of these bells,—may not be rung so as to occasion no nuisance or annoyance to the plaintiff. It is possible: and therefore I do not think it right, to say that they shall never ring one of these bells again as long as those bells are in existence.

M.R.	} MORTIMER v. WATTS.
1851.	
Dec. 4.	
1852.	
Jan. 14.	

*Devise—Leasehold—Direction to renew
Insurance—Trustees—Discretion.*

A testator bequeathed leasehold premises, held for lives, to trustees upon trust, out of the rents and profits respectively, to pay and perform the rents and covenants, and if they thought it advantageous, that they should endeavour to effect renewals of the subsisting leases, or any of them, as they should think proper; and if they in their discretion should think fit or expedient, but not necessarily or peremptorily, effect and keep on foot insurances on the lives of the cestuis que vie, or any of them, and should effect such insurances in such sum as in the opinion of the trustees should be sufficient to enable them whenever a life dropped to effect a renewal, and should out of the rents and profits, or by mortgage thereof, or of any part thereof, raise money sufficient to effect the renewal of the leases so often as advisable. The testator died in 1849 leaving a son and two daughters, the latter of whom had issue. He was possessed of divers leasehold estates held at different rents, for various terms of years, if certain persons should so long live. Renewals of these leases had been made, but none of them contained any clause of renewal. Upon a special case under 13 & 14 Vict. c. 35,—Held, that a trust had been created, and that there was an imperative duty to renew if reasonable terms could be obtained: that they were not to sacrifice the tenants for life to the persons entitled in reversion: that they had a discretion to exercise in order to keep the estate in its present condition: that the trustees had a discretion to raise money by insuring the lives out of the rents and profits, or by mortgage, and that they were bound to exercise their discretion.

Nicholas Watts, by his will, dated the 31st of December 1845, gave to his wife Judith Watts for her life, if she should so long remain his widow, the dwelling-house and premises in which he then resided, and subject thereto, he directed that they should pass under the bequest of his leasehold estates.

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The testator then bequeathed all the residue of his personal estate, except leaseholds and chattels real, to George Ferris Whidborne Mortimer and John Bradford, upon trust, to collect the same and invest the proceeds, and, subject to the payment of an annuity of 500*l.* a-year to his wife during her widowhood, they were to stand possessed of the securities and the annual produce,—as to one fourth part thereof for the benefit of the testator's son Nicholas Watts, his wife and children; and as to one other fourth part thereof, upon trust for such persons as the testator's son William John Watts should by deed or will appoint; and as to one other fourth part thereof, upon trust for such persons as the testator's daughter Lucinda Diana, the wife of John Whidborne, with the consent of her present or any future husband, during her coverture, should by deed or will appoint, so that it did not lessen the life interest of her husband; and as to the remaining one-fourth, upon trust for such persons as the testator's daughter, Judith Elizabeth, the wife of Robert Moir, should by deed or will appoint, so that it did not lessen the life interest of her husband. And, in default of any appointment, upon trust for the separate use of J. E. Moir for life, and after her decease, upon trust for Robert Moir for life, and after the decease of both, then subject to any appointment either by deed or will, and to any provision which J. E. Moir might make for a future husband, upon trusts for the benefit of her children who should survive her, and being male should attain twenty-one, or die under that age leaving issue, or being females should attain twenty-one, or marry, and of the issue who should survive her, and attain twenty-one, of children of hers, who should die before her; but in case no child of the testator's said daughter or no such issue of any child should attain a vested interest in the stocks and securities under the trusts, then as to the said one-fourth upon trust for the person or persons who, at the time of the failure of such children and issue, should be her next-of-kin according to the Statute of Distributions.

And the testator devised all his freehold estates to G. F. W. Mortimer and J. Bradford and their heirs,—as to one fourth part there-

of to certain uses in favour of his son N. Watts, and of his son's children and issue, which were revoked by a subsequent codicil. And as to one other fourth part thereof to the use of William John Watts for life, without impeachment of waste, and after his decease, subject to any jointure he might limit for any woman he might marry, to the use of all and every the child and children, or such one or more exclusively, of W. J. Watts, or the issue of any such child or children, as W. J. Watts should appoint, and in default of such appointment, or so far as the same should not extend, to the use of all and every the child and children of the said W. J. Watts, their heirs and assigns, as tenants in common, but in default of any such child, children, or issue, the one fourth part of the freehold estates were to stand limited to the use of W. J. Watts, his heirs and assigns. And as to one other fourth part of the freehold estates to the use of G. F. W. Mortimer and J. Bradford and their heirs during the life of the testator's daughter Lucinda Diana Whidborne, without impeachment of waste, upon trust to pay the rents and profits as they became due to such persons as she by writing should appoint, and in default thereof, unto her for her separate use, with remainder to her husband for life, and after the decease of both of them, but subject to any provision his daughter might make out of the rents for any future husband, to the use of all and every or such one or more exclusively of the child and children of Lucinda Diana Whidborne, whether by her present or any future husband, or the issue of any such child or children as she should appoint, and in default thereof to the use of all and every the child and children of L. D. Whidborne, their heirs and assigns, as tenants in common, but in default of any such child, children, or issue, to such uses within the law of perpetuities as L. D. Whidborne, should appoint, with remainder to the use of L. D. Whidborne, her heirs and assigns; and as to the remaining one-fourth of the freehold estate to the use of G. F. W. Mortimer and J. Bradford and their heirs, upon trusts for the benefit of Judith Elizabeth Moir, her husband Robert Moir, and her children, in terms precisely similar to

those limited for L. D. Whidborne, her husband and children.

The will then proceeded as follows:—
 "I give and bequeath all my leasehold and chattels, messuages, &c., whatsoever and wheresoever, including any messuages, &c., which I may hold or be entitled to under any lease for lives absolute unto G. F. W. Mortimer and J. Bradford, their heirs, executors, administrators and assigns, according to the nature and quality thereof respectively, for the respective estates and interests which I shall have therein at the time of my decease, upon trust that the said G. F. W. Mortimer and J. Bradford, and the survivor of them, and the heirs, executors, administrators or assigns of such survivor, do and shall, out of the rents and profits of the messuages, &c., respectively pay and perform the rents and covenants of and relating to the said tenements respectively which shall be subsisting at the time of my decease, or which shall be reserved or contained in any renewed lease of any of the said tenements, &c., and which from time to time ought to be paid, observed, and performed on the part of the lessees; and upon trust, if they the said trustees or trustee for the time being shall think it proper or advantageous as to any of the said tenements, &c. which are customarily or may be renewed, that the said trustees or trustee for the time being shall or lawfully may endeavour to effect renewals of the subsisting leases of the said tenements, &c. or any of them upon such terms as they shall think proper" so that the said premises may, during the continuance of the trusts of this my will so far as the circumstances of the case will admit be respectively held for three lives, for a long term determinable on three lives, or for twenty-one years absolute according to the usual terms of renewal, "and in order thereto do and shall if they or he in their or his discretion think fit or expedient, but not necessarily or peremptorily, effect and keep on foot insurances on the lives of the respective *cestuis que vie* or any of them named in such of the subsisting leases for the time being of the said tenements, &c. or any of such leases as shall be held on lives or years determinable on lives or on the lives of such of the *cestuis que vie* as shall be insurable at reasonable premiums, and

shall or may effect such insurances in such sum as in the opinion of the said trustees or trustee for the time being, shall be sufficient to enable them or him, whenever such life shall drop or fail, to effect a renewal of the subsisting lease in which the life insured shall have been named a *cestui que vie*, and do and shall apply the money to be obtained or received on the insurance of such life or lives as aforesaid in effecting a renewal of the subsisting lease in which such life or lives shall have been named a *cestui que vie* if such renewals can be effected on such reasonable terms as the said trustees or trustee shall approve," and shall pay the surplus of such money, or the whole thereof if such renewal cannot be effected, to the person or persons who, under the trusts hereinafter declared or referred to, shall, for the time being, be in the possession of the said leasehold tenements, &c., or beneficially entitled to the rents and profits thereof, "and shall or may, out of the rents and profits of the said leasehold premises respectively, or by mortgage thereof or of any part thereof, raise money sufficient to effect the renewal of any of the subsisting leases of the said tenements, &c. for the time being when and so often as a renewal shall be advisable, and if, from not insuring, or from the insufficiency of the money arising from any such insurance, or from any other cause, there shall be no funds or insufficient funds for the purpose, then do and shall apply the money to be raised in or towards effecting such renewal or renewals accordingly;" and for the purpose of effecting such renewal or renewals aforesaid, the trustees were empowered to surrender the subsisting leases and accept new leases to be held upon such trusts as would nearest correspond with the uses and trusts expressed and declared of the freehold manor, messuages, &c. The will also contained a power for Nicholas Watts and W. J. Watts to jointure any women they might marry, and to create terms of years to secure payment, and it appointed G. F. W. Mortimer and J. Bradford executors.

On the 19th of August 1846 the testator, by a codicil, appointed William Miskin a trustee, devisee in trust, and executor of his will.

On the 22nd of May 1848 the testator,

by another codicil, recited that his son Nicholas was dead, leaving N. Watts, an only child, an infant, and revoked the trusts and limitations in his will concerning the fourth part of his personal estate, the one-fourth of his freehold estates, and the one-fourth part of his leasehold estates, &c. held for lives absolute, in favour of his said son Nicholas and his children and issue, and directed "first, that the trustees of his will should receive and take the annual produce, rents and profits arising from the one-fourth of his personal, freehold, chattel real, and lifehold estates respectively as the same should become due, and invest the net amount thereof and the resulting income arising therefrom respectively in the stocks or funds of Great Britain until the said grandson should attain his age of twenty-five years, or die under that age, so that the same should during that period, or until that event, be accumulated in the nature of compound interest," and stand possessed of the one-fourth of his personal estate, and the investment upon trust in case his grandson should live to attain the age of twenty-five years, then and from thenceforth to pay the annual produce and income thereof respectively unto his grandson for life, and after his decease to stand possessed of the one-fourth of his personal estate with the sum of the accumulations, upon trust for the children or child or other issue of his grandson (such other issue being born in the lifetime of his grandson), as his grandson, after he should have attained his age of twenty-five years, should appoint; and in default of such appointment upon trust for the children and remote issue of his grandson; but in case his said grandson should die under the age of twenty-five without leaving any child surviving him, and so also in case no issue of any child of his grandson should attain a vested interest in the accumulations under the trusts or powers thereinbefore contained, the trustees were to stand possessed thereof in three equal parts upon the trusts declared in his will of the other three-fourth parts of his personal estate. And as concerning the one-fourth of the real estate being freehold he declared, subject to the trust for accumulation, that his trustees should stand seised thereof to the use of his grandson N. Watts for life without impeachment for

waste, and after his decease to the use of the child and children of his grandson, or the issue of any such child or children as his grandson, after he should attain twenty-five, should appoint, and in default of such appointment to the use of all and every the child and children of his grandson, their heirs and assigns, as tenants in common; but if all and every the child and children of his grandson should die in his lifetime without leaving lawful issue living at the decease of his grandson, or if any such child and children of his grandson should survive him, and being sons, should all die under the age of twenty-one years, and without leaving lawful issue living at his or their deaths, or being surviving daughters they should all die under twenty-one, without having been married, then the one-fourth of the real estates, in three equal parts, was to stand limited to the uses declared in his will concerning the three other fourth parts. And as concerning the one-fourth of all his leasehold and chattel real estates devised by his will the testator declared that, subject to the trusts for the payment of rents, performance of covenants in the leases thereof respectively reserved and contained and renewal of leases of the same respectively, and also subject to the trusts or directions for the accumulations of the surplus rents, the trustees of his will were to stand possessed thereof during the continuance of the leases for which the same should be held, either at the time of his decease or by virtue of such renewals as aforesaid, upon such trusts as would best and nearest correspond with the uses declared of the one-fourth of his real estates. It was also declared that the trustees might in their discretion until his grandson should attain twenty-five, if he and his mother should so long live, pay out of the income and rents directed to be accumulated the annual sum of 200*l.* for the maintenance of his grandson.

The testator died the 3rd of May 1849, and his will was proved by G. F. W. Mortimer and William Miskin only, John Bradford having renounced and disclaimed the devises and trusts. The parties interested in the reversion of the one fourth part of the testator's personal estate in case his grandson should die without any child, children or issue, released all claim to it.

The testator's son W. J. Watts had never been married. Lucinda D. Whidborne had an only child a daughter, an infant, and Judith E. Moir had an only child a son, an infant, but neither of them had executed the powers of appointment given by the testator's will in favour of their respective children. The testator's grandson N. Watts was still an infant.

The testator was possessed of divers leasehold estates held at different rents for various terms of years if certain persons therein severally mentioned should so long live, these leases had been several times renewed, but none of them contained any clause binding the lessors to renew, but it had been the ordinary practice, upon its being applied for, to renew the leases, by granting from time to time, when a life dropped, a reversionary term determinable on the failure of another life, so as to make the current lives three in number. It appeared that the lessors by a re-settlement of the estates were prevented from renewing the leases of lands containing more than two acres. It was believed that the lives on which the existing leases depended were insurable, and the personal estate of the testator was supposed to be ample for the payment of debts, &c.

The questions for the consideration of the Court related to the duties of the trustees of the testator's will with reference to the renewal of the leases for years, determinable upon lives, which formed part of the testator's estate, and were, first, whether the trustees were bound to renew them, or any, and which of them, from time to time, when a life dropped, supposing them to be able to obtain renewals on terms not disadvantageous to the testator's estate, and whether they might exercise an absolute discretion as to the making or not making such renewals. Secondly, whether they were bound to take any, and if any what, particular means of raising or procuring, by way of insurance or otherwise, out of the present rents and profits, a fund to meet the expenses of such renewals when the occasion for them should arise.

Mr. Wickens appeared for the trustees.

Mr. Roupell, for the defendants Judith Watts, William J. Watts, Mr. and Mrs.

Whidborne, and Mr. and Mrs. Robert Moir.—The question is, whether the trustees have or have not a discretion to exercise; they could not compel the lessor to enter into any contract binding him to renew; this property must, therefore, be considered as leaseholds in their ordinary state, given to tenants for life, with remainder to other parties, if anything of the term remained. It is, from the whole tenour of the will, clear that the discretion was given to the trustees, as it must be placed somewhere, but that no trust was created beyond the existing leases, unless the trustees thought fit to renew.

Mr. Freeling, for the infant children of Mr. and Mrs. Whidborne and Mr. and Mrs. Moir.—The trustees are bound to renew the leases if they can do so upon terms not disadvantageous to the testator's estate. They cannot exercise an arbitrary and uncontrouled discretion, and cannot refuse an advantageous renewal; and assuming that a renewal would clearly be a benefit to the estate, cannot the Court, notwithstanding the words of discretion in the will, compel the trustees to renew? In *Lord Milington v. Earl Mulgrave* (1) it was held upon demurrer that trustees, to whom a discretion was given of renewing leases, had not an arbitrary power of renewal, but must renew when most for the benefit of the *cestui que trust*.

Mr. Shapter, for the testator's grandson, Nicholas Watts.—If the testator contemplated the continuance of the estate for the benefit of all persons interested under his will, then though it may confer discretionary powers upon the trustees, the Court will consider the intention, as the general purpose contemplated by the will, and will compel them to renew if it is possible, and support the trusts, and carry out the intention of the testator. A discretionary power was given by will to trustees to invest a fund in real or personal estate; it was to be collected from the whole will that it was to be invested in real estate, and though it was never invested, the Court considered that it was to be regarded as real estate—*Cowley v.*

Haristonge (2). The Court, therefore, controuls the discretion given to the trustees in favour of the general intentions of the testator—*Sug. on Real Property*, 462. In *Fordyce v. Bridges* (3) a testator directed his trustees to invest his personal estate on lands in England or Scotland; the limitations of which were to be different. Lord Langdale considered this to be a discretion of such a nature that the Court could not execute it; but nothing finally turned upon this point, as upon appeal the Lord Chancellor considered that there had been a cesser of the discretionary power, and that it was incapable of being exercised, so that the uninvested fund became divisible in equal moieties between the two objects. Upon a settlement of personal estate by the father of a wife in trust for her for life, with remainder to her children equally, as tenants in common, and in default of a child attaining a vested interest in trust for the husband, with a discretion that after the wife's death the trustees should apply this income at their discretion for the maintenance and education of the children during their minorities, the Court considered that it had a right to interfere and controul the trustees, and it held after the wife's death that the husband was entitled to require that the income should be applied for the maintenance and education of the children, though he was himself able to maintain and educate them—*Stocken v. Stocken* (4), *Prendergast v. Prendergast* (5), *Costabadie v. Costabadie* (6), *O'Reilly v. Alderson* (7). The testator intended to benefit parties beyond the life estates; he contemplated that the children would succeed to the property; all that he did was to leave the mode of renewal optional. The renewal itself was intended to be imperative. Any accumulations for renewal must be precarious, but the burthens, however that might be done, ought to be equal, and proportionate sums of

(2) 1 Dow, 361.

(3) 10 Beav. 90; 2 Phil. 497; a. c. 17 Law J. Rep. (n.s.) Chanc. 185.

(4) 4 Sim. 152; a. c. 2 Myl. & K. 489; 4 Myl. & Cr. 95; 7 Law J. Rep. (n.s.) Chanc. 305.

(5) 14 Jur. 989.

(6) 6 Hare, 413; a. c. 16 Law J. Rep. (n.s.) Chanc. 259.

(7) 8 Hare, 101.

(1) 3 Madd. 491.

money ought to be set apart for that purpose. In *Greenwood v. Evans* (8) and *Earl of Shaftesbury v. the Duke of Marlborough* (9) the Court, by consent of parties, sanctioned a reference to the Master to ascertain whether it would be for the benefit of all parties that the fines for renewal should be provided for by insuring the lives of the *cestuis que vie*—*Reeves v. Creswick* (10).

Mr. Roupell, in reply.

THE MASTER OF THE ROLLS.—The question in this case arises upon the construction of a clause in the will of the testator, empowering the trustees to renew certain leaseholds. I reserved my judgment, merely for the desire I had to read the clause in the will, which is somewhat long and complicated, not because I thought that any real difficulty arises upon the construction of the clause. The question is, whether the clause gives a mere discretionary power to the trustees to renew the leaseholds, or whether, in fact, it imposes a trust upon them, which the Court would execute if they did not. Now, I am of opinion that it imposes a trust upon them; and I will state the reasons why I have come to that conclusion. There is a distinction, familiar to all persons practising in courts of equity, between a mere discretionary power in trustees and a trust to be executed by them, though it may sometimes assume the shape of a power. Where there is a mere discretion in trustees to be executed simply as they think fit, this Court will not interfere with their discretion. If the trustees do not themselves execute the trust, the Court will not execute it in their place. But the only difficulty has arisen from the circumstance that the clause is in its form discretionary, and the reason for this is obvious. It is, I apprehend, the custom of conveyancers, when the testator directs that leasehold estates for lives, which are renewable, shall be renewed by the trustees, not to make it compulsory upon the trustees to renew, but to give them a discretion in the matter to do it

upon such terms as they shall think fit; for unless the testator or the framer of the instrument was to adopt that course, the effect would be, that it would be placing the estate, and the persons interested in the estate, in the power of the lessor to ask for such terms as he might think fit.

Now, bearing that in mind, we come to the words of the first clause. I pause here to point out what appears to me to be the object, which I have before referred to, of giving the discretion to the trustees. If it had been compulsory to the trustees to renew, if they could by possibility have obtained a renewal, it would have compelled them to pay any sum, or at least any reasonable sum, which the lessor might have demanded. Upon that subject it appears to me that the testator, giving them a discretion in the matter, gives them a discretion as to the terms; and I shall point out presently in what way I think that discretion ought to be exercised; and the trust is of importance when compared with other words of the instrument. It is upon trust that they shall, if they think proper, renew and endeavour to effect renewals, "upon such terms as they shall think proper;" which means, that it is their duty, provided they can get fit and reasonable terms, to renew the leaseholds; and then it goes on in this way: "So that,"—now this is the object for which that renewal is to be effected,—"So that the said premises may, during the continuance of the trusts of this my will, so far as the circumstances of the case will admit, be respectively held for three lives, or for a long term determinable on three lives, or for twenty-one years absolute, or according to the usual terms of renewal." That is the object for which it is to be done; and it is an expression which is frequently found, that they are to do so for the benefit of the estate, that is, for the benefit of all persons interested in the estate, in the same manner as the person would do it if he were the owner in fee simple of the estate; and the manner in which the Court would execute a trust of this description, if the trustee were unable or refused to execute it, would be, that it would refer it to the Master to know whether it was for the benefit of all persons interested, supposing them to be under

(8) 4 Beav. 44.

(9) 2 Myl. & K. 111; 5 C. 3 Law J. Rep. (N.S.) Chanc. 30.

(10) 3 You. & C. Exch. 715.

disabilities and not consenting in the matter, whether it was for the interest of all persons interested in the estate that these renewals should be effected. It is evident that the trustees are not to sacrifice the tenants for life to the persons interested in the reversion, but that they are to exercise their discretion in such manner as they consider most beneficial for keeping the estate in its present condition. That will answer the first question, which is, whether the trustees are bound to renew the leaseholds or any or which of them, supposing them to be unable to renew some of them in consequence of its being disadvantageous to the testator's estate, and that is to say, that they have not a mere discretionary power to renew upon their arbitrary will and pleasure. The power given by the testator is this: it is an absolute trust to exercise their discretion; and then, if in their discretion they should think it desirable to effect such renewals, they are bound to do so.

The second question is, whether they are bound to take any means, by insurance or mortgage of the leasehold premises or out of the present rents and profits, to meet the expense of such renewals when the occasion for them shall arise. The latter part of this clause confirms the observations that I have made with respect to the clause primarily, namely, that it is imperative upon them to exercise the discretion given them to renew. I think that the same discretion applies to them for the purpose of raising the monies either by insurances of lives or in such manner as is pointed out by this clause, as they shall think most advisable at the time; that it is their duty to exercise that discretion, and if it cannot be done without great injury to the estate, then it would not be necessary that such insurances should be effected and such money should be raised, but that they must exercise in this matter that discretion for the purpose of obtaining the money in the shape or in the manner most beneficial to all parties concerned. This latter part of the clause it is not necessary for me more particularly to refer to. I foresee that some difficulty may arise as to the payment of the surplus, but no question now arises upon that. The second question depends very much upon

the first, and this is a discretion which is to be exercised.

Mr. Roupell.—That clause also gives a power of sale and mortgage for that purpose. There seem to be three trusts in the trustees, to raise the money either by insurance, mortgage, or sale, and that would give a trust to exercise the discretion in any of those modes.

THE MASTER OF THE ROLLS.—In any of those modes which they may consider most beneficial, always considering that the main object is, as far as possible, to keep the estate in the condition that it was when the testator left it. That is the primary consideration (11).

TURNER, V.C. } *In re FIELD'S MORTGAGE.*
Nov. 7.

Devise—Mortgage—Legal Estate.

A devise (since the Wills Act) by mortgagee in fee of (inter alia) the residue of his real property and securities, &c., after payment of his debts, &c., to residuary devisee for her own use and benefit, held to comprise the legal estate of mortgaged property of gavelkind tenure.

This was a petition under the Trustee Act 1850 for a vesting order in the executor of a deceased mortgagee of two undivided third parts of the legal estate of the mortgaged property. The petition was presented by the mortgagors and the executor of the mortgagee in fee of gavelkind lands. It stated *inter alia* that the mortgagee died in March 1851; by his will of November 1850, he devised all the residue of his estate, personal and real property, monies, securities, and all other his effects which should remain after paying his just debts, funeral and testamentary expenses, unto his wife for her sole use and benefit; that he left three sons, two of whom were infants, his co-heirs in gavel-

(11) In *Holmes v. Henty*, 4 Cl. & F. 99, a majority of trustees of a savings bank were held liable for the misapplication of 592l. 15s. of the surplus funds which, in their discretion, they had applied to the widening a bridge over the river Arun.

kind; and that the petitioners were desirous that the two undivided third parts of the legal estate in the mortgaged premises which had descended to the two infants might be vested in the executor of the mortgagee to enable him and the adult co-heir to convey such legal estate for the purposes mentioned in the petition.

Mr. Jessel, for the petition, submitted that the legal estate in the mortgaged premises did not pass by the residuary devise in the will of the mortgagee, and that it was now vested in his co-heirs in gavelkind. He cited *Silvester v. Jarman* (1).

TURNER, V.C. held, that the devise passed the legal estate, and that it did not vest in the mortgagee's co-heirs, and therefore declined to make any order on the petition.

PARKER, V.C. }
1851. }
Dec. 10. } BEAR v. SMITH.

Creditors' Suit—Reference to the Master—Decree—Stay of Proceedings.

A creditors' suit coming on for further directions, the fund applicable to the payment of the debts being small, a reference back to the Master to apportion it between the creditors was dispensed with, and the apportionment directed to be made by affidavit.

A creditor, who had brought an action against the executor of a debtor, received notice of a decree for the administration of his estates. After this notice, and before any application was made to stay his proceedings, he went on with the action, and obtained judgment:—Held, that he was entitled to the costs of his proceedings after notice of the decree.

This was a creditors' suit which came on for further directions.

Mr. Selwyn, for the plaintiff.

Mr. Hardy, for the other parties, stated that there were forty-two creditors, many of whose debts were for a small amount, and that the fund applicable to the pay-

ment of the debts was small; and asked that, in order to save expense, the usual reference back to the Master to apportion the fund between the creditors might be dispensed with, and that the proportions payable to the creditors might be verified by affidavit. He also asked that the amount payable to creditors whose shares should be under 10*l.* might be paid to the plaintiff's solicitor.

PARKER, V.C. said that, as the office of the Master was merely ministerial, and, taking into consideration the 28th section of Sir George Turner's Act (1), by which the Court was empowered to receive proofs by affidavit, he thought that the application might be granted. The decree would be that the costs should be taxed and paid, and that the amount payable for debts should be ascertained, and that this sum should be apportioned by the affidavit of the plaintiff and the executor, and that the Accountant General should be ordered to pay the amounts appearing by this affidavit, and that the amount payable to creditors whose shares should be less than 10*l.* should be paid to the plaintiff's solicitor, he undertaking duly to apply it.

In the same case a creditor had brought an action against the executor. Before he had obtained judgment he received notice of the decree in this suit, but no application was made to stay his proceeding in the action. After the notice he proceeded to obtain judgment.

Mr. Hardy (with the consent of all parties) submitted the question to the Court, whether the creditor, proceeding after notice of the decree, was entitled to the costs of his proceedings after notice of the decree.

PARKER, V.C. said that, no application having been made to stay the creditor, who went on with his action, he thought that the creditor had a right to do what he could for himself, and was entitled to the costs in question.

(1) 10 Price, 78.

(1) 13 & 14 Vict. c. 35.

M.R. }
Dec. 4. } MOORHOUSE v. COLVIN.

Contract—Marriage Portion—Letters—Reference to Will—Promise—Evidence.

*P. C. while in India made his will, leaving his daughter, who was born there, a lac of rupees. Upon the completion of her education, P. C. who had returned to England, sent her back to India, and on that occasion he wrote to a particular friend, to whose guardianship and charge he confided her, "In regard to her settlement in life I shall be naturally anxious." "You may assure the young gentleman she may choose that, on his marriage with her, he shall have 2,000*l.* sterling; nor will that be all; she is and shall be noticed in my will, but to what further amount I cannot say, owing to the present reduced, and reducing, state of interest, which puts it out of my power to determine at present what I may have to dispose of." H. M. having made proposals of marriage, was informed of the letter written by P. C. and also of the will he had made, and after some negotiations the marriage was solemnised in 1826, and in 1829 H. M. and his wife returned to England. In the same year P. C. who was a domiciled Scotchman, executed, in Edinburgh, another will, by which he gave all his real and personal property for the benefit of his wife and his two sons by her, and, in case of their dying without issue, he gave the whole to the issue of his daughter. P. C. died in 1831, without having made any provision for his daughter, leaving the will made by him in India in the state it was when he executed it; and upon a bill filed by his daughter, insisting that the testator had contracted to settle a lac of rupees upon her, and that the contract was contained in the letter written by him,—Held, that, in construing contracts, the Court must ascertain the real meaning of the words used; that when no definite or specific sum was mentioned or referred to, the Court cannot enforce any contract; that the testator had not afforded means of reference to any other document; that except from the answer of H. M. there was no evidence that he married on the faith and belief that a lac of rupees would be settled; and that it was not evidence to be acted upon in favour of the plaintiff against the estate of the testator,*

as previous to marriage it had been pointed out to H. M. that the letter did not state any precise sum; and that the testator had left himself unfettered by any contract: and the bill was dismissed, but without costs.

This suit was instituted by Susan Moorhouse, by her next friend, to obtain a declaration that her father Peter Cochrane was under a contract or agreement to bequeath to her by his will the sum of one lac of rupees, or 12,500*l.* sterling, to be settled upon the trusts of a settlement, dated the 19th of September 1826, and that the contract was contained in a letter written by P. Cochrane, and dated the 6th of July 1825. It also asked that the same might be declared to be a debt, and payable with interest out of the assets of the testator.

Peter Cochrane, a native of Scotland, was appointed a medical officer in the service of the East India Company, and resided in the East Indies from 1775 to about 1818.

Until about 1807 Ferukabad was an independent Indian state subject to Mohammedan laws, and was governed by its own native prince or rajah, and was not a British possession, or subject to English laws: and in 1800 while residing there Peter Cochrane contracted a marriage according to the Mohammedan laws with Beebe Peary Beegum, otherwise Beebe Raheem, a native of the East Indies.

The plaintiff, a child of that marriage, was born at Cawnpore on the 17th of December 1807: she always went by the name of Susan Cochrane, and both before and after 1813, Peter Cochrane told the plaintiff's mother and Alexander Colvin, of the firm of Colvin, Bazett & Co. of Calcutta, who were his agents, and William Thomas, the elder, that he intended to provide for her either by settling upon, or giving to her a lac of rupees.

In November 1808, P. Cochrane, being then in the East Indies, solemnized a marriage in the European form with Margaret Douglas Fearon, by whom he had issue two sons.

In 1813, Peter Cochrane sent the plaintiff to England to be educated, and she remained at school there until P. Cochrane in 1822 took her to Scotland, where, when not at school, she resided at his house.

In December 1818, Peter Cochrane contemplated retirement from the service of the East India Company, and while at Fort William, Bengal, he, on the 8th of December 1818, made a will, which, among several bequests, gave "to Miss Susan Cochrane, now at boarding school Brunswick Square, London, the sum of one lac of Sicca rupees, or 12,500*l.* sterling, clear of the legacy tax, which must be paid separately." The testator in another paragraph said "To Mrs. Cochrane, I could say nothing that would heighten her affections, or augment her attentions to her own children, but there is another, in whose welfare and prosperity I feel deeply interested, this is the little girl Susan Cochrane, mentioned in the second paragraph. To Mrs. Cochrane, therefore, I most earnestly recommend her, and conjure her to indulge the benevolent propensities of her nature in fostering the seeds of virtue and morality in this unprotected child; with a legacy of 12,500*l.* she need be a burthen to none, yet what would be the value of this without corresponding qualities and accomplishments? These can only be acquired by a liberal and well-conducted education. To Mrs. Cochrane, therefore, as a competent judge, I confidently commit the direction of her education, and, inspired by her precept and example, I doubt not but that she will acquire some of the many refinements and accomplishments, which render her so truly amiable, and which give her an enviable distinction in society. In music, vocal and instrumental, and drawing, and the more showy and ornamental branches of education, she must be made to excel, if possible; these are not, however, to be regarded as the principal; the study and knowledge of letters, I consider, of still greater importance, as thereby her understanding will be enlightened, her taste refined, and her morals strengthened and improved. As her fortune will be eligible, I would have her accomplishments to correspond, as nothing is so ridiculously contemptible as opulence allied with meanness, vulgarity or ignorance. Let such pains, therefore, be bestowed in teaching her to write, read, and speak with ease, fluency and grace, and with eloquence if attainable. Thus

accomplished, though her fortune will still be an object of prime acquisition with the covetous or needy adventurer, yet the man of honour and intelligence (and such, I hope, will ever meet her approbation) will draw the line of distinction, and prize her most for the superior excellence of her personal and mental endowments." If she should live to be married, the testator directed that her fortune might be settled on herself and her children. He also appointed executors, and earnestly recommended the little girl, Susan Cochrane, to their friendly protection.

This will was duly executed in duplicate, one of which was found uncanceled and undefaced among his papers after his death, except that in the paragraph bequeathing the lac of rupees the words "Miss Susan Cochrane" was struck through, and immediately above them, in the handwriting of the testator, the words "now Mrs. Moorhouse" were written. The other duplicate was left with his agents in India, and was in the same state as when executed.

The testator arrived in England in 1819, and soon after took up his residence in Scotland; and while there he caused another will to be prepared, which, however, he never executed, and by this he gave the plaintiff a lac of rupees. In 1825 he, with a view to her settlement in life, sent the plaintiff back to India, and placed her under the guardianship of William Thomas the elder, who was his intimate and confidential friend.

On the 6th of July 1825, Peter Cochrane wrote to Mr. Thomas, saying that, "Susan will be consigned to Sandy Colvin's care in the first instance. I shall advertise him of her approach, and instruct him to take the necessary measures to have her brought up from the vessel to Calcutta on the arrival of the ship, or before you can communicate with him in respect to bringing her up to Barrackpore, and other matters concerning her. I think the monthly sum of 150 rupees will be sufficient to cover all expenses, and that sum I shall instruct Sandy to pay her. You or Mrs. Thomas will, of course, direct the disbursement of it, and if upon any extraordinary occasion you should deem a little more necessary, I shall not object to it according to your discretion; but you must, in all instances,

and uniformly, enjoin her the most rigid economy, as she is young and, like most girls, ignorant of the value of money, and if left to her own bias would rather spend a thousand than a hundred. In regard to her settlement in life, I shall be naturally anxious to have her allied to a young man, always preferring the Company's service, without absolutely objecting to one of another class in other respects eligible, of character and conduct, of which I constitute you the proper judge, and shall enjoin her to pay due deference to your decrees. She is very accomplished, but to every young man that alone may not be a sufficient motive; you may then assure the young gentleman who may meet with your and Mrs. Thomas's approbation, that on his marriage with her he shall have 2,000*l.* sterling; nor will that be all; she is and shall be noticed in my will, but to what further amount I cannot say, owing to the present reduced and reducing state of interest, which puts it out of my power to determine at present what I may have to dispose of. I hope, however, that he will have no objection to admit of the 2,000*l.* and whatsoever else may follow being settled on herself and children; should she die before him without issue, he shall have the 2,000*l.* to himself. These conditions, I think, Thomas, are such that, coupled with the hand of a young, comely, and accomplished girl, a young man of respectability need not turn up his nose at."

Susan Cochrane arrived in India at the latter end of 1825, and as William Thomas the elder was upon service in the Burmah country, a considerable distance from Calcutta and Barrackpore, she was received by his son, William Thomas the younger, a lieutenant in the 13th regiment of infantry.

Henry Moorhouse was an ensign in the same regiment, and being upon terms of intimacy with William Thomas the younger, he was introduced to the plaintiff. He made known his attachment to the plaintiff, but considered it imprudent to contract a marriage, as neither of them had any fortune. W. Thomas the younger immediately informed Mr. Moorhouse of the letter of the 6th of July 1825, and of the provision made by the will in 1818, the amount of which Peter Cochrane had himself made known to William Thomas the younger;

he also informed his father of what he had done. Mr. Moorhouse, at the same time, wrote to William Thomas the elder, who was then at Calcutta, and referred him to Mr. Winter, who was a barrister practising there; and in a conversation between them, which Mr. Thomas afterwards communicated to Mr. Moorhouse, he told Mr. Winter that Miss Cochrane had no settled fortune, but that she was, with her father's other children, noticed and provided for in his will, but the amount was uncertain, owing to the state of the funds; but that Mr. Cochrane was possessed of considerable wealth, and that he had every reason to believe that Miss Cochrane's share of his property would not be inconsiderable. Mr. Winter subsequently informed Mr. Moorhouse that the letter did not state the amount of any future sum.

Some further negotiations were carried on, a notarial copy of the letter of the 6th of July 1825 was made and given to Henry Moorhouse, who also, on the 29th of September 1826, executed a settlement of whatever fortune his intended wife might be or become entitled to, for the benefit of herself and children, with remainder, in default of children, for the survivor of them, the said H. Moorhouse and Susan Cochrane.

On the 29th of September 1826 the marriage was duly solemnized, and upon the information being forwarded to Peter Cochrane, he approved of all that had been done.

Mr. and Mrs. Moorhouse returned to England in 1829, and were received by the testator, who expressed the warmest interest in their welfare.

On the 15th of October 1829 Peter Cochrane, who was a domiciled Scotchman, made his will in Edinburgh, and gave the whole of his property, real and personal, for the benefit of Margaret Douglas Cochrane and her two sons, and in case of their dying without issue, he gave it to the issue of the plaintiff, and appointed M. D. Cochrane, D. Colvin, and J. Colvin, and the senior partner for the time being of the firm of Colvin & Co., his executors.

The testator died on the 18th of June 1831, without having made any provision, by his will or otherwise, in favour of the plaintiff, and the executors having died,

Alexander Colvin, as the senior partner of the firm of Colvin & Co., became the executor, and proved the will.

The testator's two sons survived their mother, M. D. Cochrane, and died under the age of twenty-five, without having been married.

The plaintiff also had no children living at the death of the testator, and had not had any since. And the question now was, whether his estate was liable to pay the lac of rupees to the plaintiff.

Mr. Roupell and *Mr. Toller*, for the plaintiff.—The testator, the father of the plaintiff, had brought up his daughter with expectancies, which, while in India, he promulgated, and on leaving India he had solemnly carried out his intention by a will, and left her a lac of rupees, or 12,500*l.* What he intended to do, and what he had done was well known both to his agents and to his intimate and confidential friend, both of whom, it was natural to suppose, would act upon their instructions, and also upon the knowledge they possessed from communication with the plaintiff; to each of these gentlemen the testator had communicated his intention to leave the plaintiff a lac of rupees, and in the letter of the 6th of July 1825, in stating what the fortune of the plaintiff would be, he not only made express mention of the sum of 2,000*l.* (which had been paid), but distinctly alluded to communications made previously, but said that would not be all, and at the same time referred to the will he had executed, and which was found perfect at his death, with the name of Mrs. Moorhouse inserted instead of her maiden name; when this was inserted did not appear, but by a will, dated the 15th of October 1829, the testator had left all his property, both real and personal, to the wife and children of the second marriage. The marriage, however, of Mr. Moorhouse had been solemnized upon the faith of the letter of the 6th of July 1825, as well as upon the information given to him by the chosen guardian of the plaintiff and the agents of the testator; they acted upon the letter; they also made known the will, the contents of which was thereby imported into the agreement, and formed the contract upon which

the marriage was solemnized. It did not, however, appear that the testator had specifically carried out the contract, neither had he made any provision for the plaintiff or her husband, but the agreement made had become a debt due from the testator, which, as valuable consideration had been paid for it, would be enforced by this Court against his estate.

Luders v. Anstey, 4 Ves. 501; 5 Ibid. 213.

Randall v. Morgan, 12 Ibid. 67.

De Beil v. Thomson, 3 Beav. 469; on appeal, 12 Cl. & F. 45.

Swift v. Grazebrook, 12 Jur. 87.

Mr. James, for Henry Moorhouse, the plaintiff's husband.—The testator, by referring to his will, had directed his agents to communicate to a suitor that part of it which gave the lac of rupees to the plaintiff; it was the same, therefore, as if it had been written in the letter, which would be construed in a manner so as to shew that by referring to it no fraud was contemplated.

Mr. R. Palmer and *Mr. W. Morris* appeared for the defendant A. Colvin, but were not heard.

The MASTER OF THE ROLLS.—I think this case is clear. The testator had a daughter, who was born in a marriage made in India, which, though it may be held to be good in India, it is doubtful whether it would be good in England; but this lady stood to all intents and purposes towards the testator in the situation of a legitimate daughter; as such he treated her and educated her exactly as he would a daughter. In the year 1818 he made a will by which he left her a lac of rupees. Subsequently there was an intention to alter this will, but still to give her the same provision. Under those circumstances, she being educated as his daughter, with all the accomplishments and instruction of a lady, she went out to India to Mr. Thomas. The testator was very desirous that she should form an eligible marriage, and on any proposal of marriage he directed Mr. Thomas to make this communication to the gentleman who might seek to contract a marriage, but no communication would bind the testator unless it was made in accordance with its directions; if, therefore, the

scope of the authority was exceeded, it would not bind the testator. In his letter to Mr. Thomas, the testator said "You may assure the young gentleman who may meet with your and Mrs. Thomas's approbation, that, on his marriage with her, he shall have 2,000*l.* sterling; nor will that be all; she is, and shall be noticed in my will, but to what *further* amount I cannot precisely say, owing to the present reduced and reducing state of interest, which puts it out of my power to determine, at present, what I may have to dispose of. I hope, however, that he will have no objection to admit of the 2,000*l.* and whatever else may follow, being settled on herself and children; should she die before him without issue he shall have the 2,000*l.* to himself." The question I have to consider is, not whether this is a case of great hardship, which is possible, nor whether the gentleman may have married her upon the expectation and in the firm belief that there would be some additional fortune; but whether there is in this letter such a contract as this Court can enforce against him or against his estate, that is to say, against him if the contract was to take effect in his lifetime, or against his estate if it was to take effect after his decease. Considering that this gentleman was possessed of a very large fortune, that he had only two other children, it is manifest that he has made an extremely meagre provision for this young lady; but I can only deal with the question, whether this letter on a fair and reasonable construction created such a contract as will bind his assets.

It has been argued that I must look at this letter in conjunction with other circumstances and things, and it has been argued, as it was well known to Mr. Colvin, and probably to Dr. Thomas, that the testator who wrote that letter had by his will given to this lady a lac of rupees, that consequently when he stated in his letter "she is noticed in my will," it had immediate reference to that particular fact. If the letter could be read as meaning this, "He shall have 2,000*l.* sterling with her, nor will that be all; she has now by my will a lac of rupees, and she shall have that at least by any other will, but whatever 'further' I may have to give is doubtful," there would be no question at all but that

it would have constituted a contract such as this Court could enforce against his assets. But being perfectly well aware of what the extent of the legacy was, he not only does not permit them to inform the intended husband of that, but he expressly warned them to tell him that the amount was uncertain, as he expressly says, "but to what further amount I cannot precisely say." Now, I have no doubt that the word "further" there applied to the 2,000*l.* sterling. Having given the 2,000*l.* sterling, he adds "nor will that be all; she is, and shall be noticed in my will:" but to hold that this means in "addition to what I have given by my first will," would be a more extravagant construction than the Court would put on words of such a description, if it were possible to distort language so as to arrive at that result. It is manifest he is speaking of a provision further and in addition to the 2,000*l.* She is noticed in my present will, to what further amount I will not say, nor can it be ascertained, because I do not know what the amount of interest will allow me to give: that is expressly pointed out. But he expressly states, "she is and shall be noticed in my will," expressing an intention therefore to vary and alter the will, or to make a fresh will for that purpose, and then he states he is about to make a will in which the further amount he means to give is altogether uncertain, and is to depend entirely on his own will and pleasure. Is it possible to read those words in the way suggested, or to read them in such a manner as to bring them within the rule laid down in *Swift v. Grasebrook*, and to say it is a further provision? He expressly leaves out such a provision as he in his will and pleasure shall think fit. Suppose a testator said, "I will give to my child a fit and sufficient provision," the Court would ascertain that by means of a reference to the Master to ascertain what was a fit and proper provision. But, supposing the testator had said, "I will give to my child such a provision, and such only, as I shall choose," would it be proper then for the Court, if he gave nothing, to refer it to the Master to say what he ought to have given? It is manifest the Court could not have ascertained such an amount.

In many cases of contracts the Court

has treated them in a manner difficult to understand, because, on the construction of a contract, how can you construe the words differently from their import? Whether the contract is for the marriage of a daughter or a child, or whether it is a contract for the sale of an estate or for any other valuable consideration, what the Court has to ascertain is the real meaning of the words of the contract, which are always to be construed most strictly against the contracting party; and in these cases it has always been held, that if there has been nothing definite or specific mentioned with respect to the sum, a contract of this description cannot be enforced. *De Beil v. Thomson* was a strong case, and Sir Edward Sugden on the Laws of Real Property as administered in the House of Lords, p. 53, has expressed doubts upon the propriety of the decision. It is, however, a binding and concluding decision; but that case expressly states, "It was my intention to settle a sum of 10,000*l*." The cases with respect to ascertaining a fund are exactly the same on contracts of this description as on any other: if you can ascertain what the fund is by reference to any particular document, then of course the Court will prefer that particular sum. But what contract is there to settle or give any sum mentioned in any particular document? If he had said, "I have given her the sum which I have already mentioned in the will," that would have been a reference to a particular instrument, which would have enabled the Court to ascertain the amount; but he expressly states, "I will not be bound by such an amount; there is such an amount mentioned in such a document, but that is not to be the amount I shall give." I have no doubt upon the construction, and am of opinion that is a contract which this Court cannot enforce, however hard it may be.

It remains to consider whether Mr. Moorhouse married on the faith and upon the belief that this 12,500*l*. would be given by the will. Assuming that he did, I must say, that, except by his own answer, there is no evidence that he did, and that is evidence which, in favour of himself, this Court will not act upon against the estate of the testator. It is, however, contradicted by various circum-

stances, as Mr. Winter to whom the business was referred by Mr. Moorhouse, in writing a letter informing him of the nature of the communication, very accurately states the letter of the testator and expressly states that the amount was not mentioned in the letter, and from all the other evidence it appears that he did nothing more than act on mere vague belief and expectation that the testator would give him something. He trusted, no doubt to the honour of the testator, and to the belief that he would make such a provision as anybody would think proper for a daughter; but as the testator personally was not a party to the contract, and did not contract to do anything, it merely remained upon the honour of the testator, who has not thought fit to carry out the will as originally made: there is nothing by which this Court can compel him to make any provision in the absence of a contract which this Court can enforce, and I am of opinion that there is no such contract, and that the bill must be dismissed. It is a very hard case, and though against the rule I usually follow, I shall dismiss the bill *without costs*.

L.C.
1851.
May 3;
June 10. } KEKEWICH v. MARKER.

Settlement, Construction of—Trusts of Term for raising Charges—Tenant for Life without Impeachment of Waste—Injunction.

*Under a deed of settlement lands were limited to the use of trustees for 1,000 years, without impeachment of waste, upon trust, by cutting and selling the timber thereon, or by demising, mortgaging, or selling the premises, to raise three sums of 10,000*l*. each; and, subject to the said term, to the use of the settlor for life, without impeachment of waste, with remainder to A. B. for life, without impeachment of waste, with divers remainders over. After the death of the settlor, A. B. entered and claimed the right to cut the timber for his own use exclusively. Upon bill by the trustees, held, upon appeal, that, upon the true construction of the settlement, a discretionary power was given to the trustees to cut timber and apply the proceeds pro tanto in discharge of the*

sums to be raised; and that the rights of A. B. as tenant for life without impeachment of waste, were subordinate to the discretionary power given to the trustees; and an injunction was granted to restrain A. B. from cutting timber, on the ground that his so doing would interfere with the prior right given to the trustees.

This was a motion, by the plaintiffs, Samuel T. Kekewich and J. Pulman, who were trustees of a term for raising portions, for an injunction to restrain the defendant Henry William Marker, the tenant for life of the settled estates, from cutting timber.

The Vice Chancellor Lord Cranworth having refused the motion, it was now renewed, by way of appeal, before the Lord Chancellor.

By an indenture of settlement, dated the 11th of October 1844, certain real estates of which Margaretta Marker was the owner in fee, were settled by her to the use of the plaintiffs for the term of 1,000 years, without impeachment of waste, save only the cutting and felling of ornamental timber, and, subject to the said term, to the use of the settlor for life without impeachment of waste, save as aforesaid, with remainder to the use of Henry William Marker and his assigns for life, without impeachment of waste save as aforesaid, with remainder to his first and other sons in tail, with remainder to Thomas J. Marker and his assigns for life without impeachment of waste, with divers remainders over, and with an ultimate remainder to Henry William Marker, his heirs and assigns for ever. The declaration of the trusts of the term was as follows:—"Upon trust, in the first place, by cutting and felling, and selling and converting into money, all or any part or parts of the timber now standing and growing on the said lands, which is or shall be of full and ripe growth and not ornamental to the mansion at Combe aforesaid, or the pleasure grounds attached thereto, or any of the views or prospects of the same, of which timber it is hereby declared that enough of the most ornamental shall always remain to preserve the beauty of the place unimpaired, or by demising, mortgaging or selling the premises comprised in the said term, or any part or parts thereof (save and except the mansion-

house at Combe aforesaid, and the several manors, &c. situate in, &c., all of which are hereby expressly reserved from sale), and for all or any part of the said term, or by all or any of the said ways and means, or any other reasonable ways and means, forthwith to levy and raise the clear sum of 10,000*l.*, and to pay the same to the said Margaretta Marker, her executors, administrators, or assigns, &c.; and in the next place from and immediately after her decease, by all or any of the ways and means aforesaid, to levy and raise two several sums of 10,000*l.* and 10,000*l.*, and to pay the first of those two several sums of 10,000*l.* each unto the said Thomas John Marker, his executors, administrators and assigns, and to pay and apply the last of the two several sums of 10,000*l.* each, to such persons and in such manner as Margaret F. Smith" (a daughter of the settlor) "shall by any writing under her hand appoint; and in default thereof unto her the said Margaret F. Smith, her executors, administrators and assigns, for her and their absolute benefit, together with interest on the two last-mentioned sums at 4*l.* per cent. per annum, from the day of the decease of the said Margaretta Marker until the full payment thereof respectively."

Margaretta Marker died, in July 1846, before the first-named sum of 10,000*l.* had been raised, having by her will appointed Henry William Marker her executor and residuary legatee. Henry William Marker entered into possession of the settled estates as tenant for life under the settlement. Previously to the filing of the present bill, timber had been cut on the settled estates to the amount in value of nearly 2,000*l.*, and the proceeds had been received by H. W. Marker; but whether as executor of his mother and in part discharge of the said sum of 10,000*l.*, or in his own right as tenant for life, did not clearly appear. Disputes having arisen between the trustees and the tenant for life as to their respective rights of cutting timber, the present bill was in December 1850 filed by the trustees, praying that it might be declared that, according to the true meaning and construction of the settlement, the plaintiffs were entitled to exercise a discretionary power as to the mode in which these several sums of 10,000*l.* should be raised, and that

for the raising of the same they had a discretionary power to resort to the timber growing on the settled estates (other than ornamental timber); and that the right of the tenant for life to cut timber was subordinate to the discretionary power given to the plaintiffs; and that the defendant H. W. Marker might be restrained from cutting any such timber or selling or disposing thereof whilst the monies directed by the settlement to be raised by the plaintiffs, or any part thereof, should remain to be raised; the plaintiffs being ready and willing, and thereby offering forthwith to take all measures and proceedings necessary or proper in accordance with the trusts and discretionary power vested in them by the settlement for levying and raising the same; and that if H. W. Marker should proceed to sell any such timber before the said monies had been raised, that he might be restrained from receiving or applying to his own use the proceeds of such sale, and that the plaintiffs might be declared entitled to receive and apply the same, &c. and that H. W. Marker might be decreed to account for monies received by him on account of previous sales of timber, or which he might afterwards receive; and that, if necessary, the timber, other than ornamental timber, which the plaintiffs in the exercise of the discretionary power vested in them by the settlement, should desire to be cut for the purpose of satisfying the sums directed to be raised, might be cut and sold under the decree of the Court, and that proper directions might be given for raising the said monies, but without prejudice to the discretionary powers vested in the plaintiffs by the settlement as to the mode of raising the same.

A suit had been previously instituted (*Marker v. Kekewich*) by a tenant in tail in remainder, against the present plaintiffs, the trustees, insisting that the trustees were bound to resort to the timber for raising these charges before mortgaging or selling the inheritance. To this bill a demurrer was put in and allowed by Wigram, V.C. (19 Law J. Rep. (N.S.) Chanc. 493.)

Mr. Roll and *Mr. Fooks*, for the motion.—The estate of the tenant for life is subject to the term, and he takes in subordi-

nation to the exercise of the discretionary power given to the trustees, and the Court will not interfere with or exercise the discretion vested in the trustees.

Polley v. Seymour, 2 You. & C. 708; s. c. 7 Law J. Rep. (N.S.) Ex. Eq. 12.

Maberly v. Turton, 14 Ves. 499.

Brown v. Higgs, 8 Ves. 561.

Fordyce v. Bridges, 2 Phill. 497; s. c. 17 Law J. Rep. (N.S.) Chanc. 185.

Kearsley v. Woodcock, 3 Hare, 185.

Costabadie v. Costabadie, 6 Ibid. 410; s. c. 16 Law J. Rep. (N.S.) Chanc. 259.

French v. Davidson, 3 Mad. 396.

Gower v. Mainwaring, 2 Ves. sen. 87.

Maddison v. Andrew, 1 Ibid. 57.

Mr. Bethell and *Mr. Giffard*, for H. W. Marker, contra. — The trustees, by their bill, do not say when they wish to cut timber, but claim to reserve the exercise of their discretionary right to some indefinite time. They are not entitled to the injunction, for the tenant for life being unimpeachable for waste is entitled to cut timber—*Smythe v. Smythe* (1) and *Davies v. Wescomb* (2); and with respect to the trustees of the term, he is in the situation of a mortgagor in possession, in which case the mortgagee cannot restrain the mortgagor from cutting timber, if the security is ample, as it is in the present case—*Humphreys v. Harrison* (3), *Hippesley v. Spencer* (4), *Hampton v. Hodges* (5). Secondly, the rule of equity is, that an incumbrancer shall realize his security in a manner least injurious to other parties having interests. But by applying the doctrine contended for to the ordinary form of trusts for raising portions (2 *Sand. on Uses*, 255), the trustees, by entering into possession of the rents and profits, might oust the tenant for life of all interest; but this the Court would not permit.

Mr. Roll, in reply.—The answer to the last objection is, that the trusts in the present case are not in the ordinary form. To make the case of mortgagor and mortgagee analogous, you must suppose a power

(1) 2 Swanst. 251.

(2) 2 Sim. 425.

(3) 1 Jac. & W. 581.

(4) 5 Mad. 422.

(5) 8 Ves. 105, n. ed. 2.

given to the mortgagee to raise his money either by sale or by cutting timber at his discretion; here a discretion is given to the trustees in large terms, and their discretionary power overrides the rights of the tenant for life.

June 10.—The LORD CHANCELLOR (after stating the facts of the case) proceeded as follows:—It appears from the facts of this case, that after the death of the settlor, who was first tenant for life, the defendant was let into possession, and certain timber was felled, the proceeds of which were applied in part satisfaction of the first sum of 10,000*l.*, which was to be raised during the life of the first tenant for life, and which the defendant, the present tenant for life, is entitled to as the executor of the settlor. It does not distinctly appear under what circumstances the timber was felled, but it sufficiently appears that it was done with the assent of the trustees, but whether under their direction, or under the direction of the tenant for life with their assent, is somewhat uncertain; the proceeds were applied by the defendant in part satisfaction of the first sum of 10,000*l.* It appears that not very long after this, the defendant caused an advertisement to be inserted announcing that a sale was to be had of the timber upon the estates, and in consequence of that the trustees interfered and advanced their claim, insisting that they had a prior right and discretion to fell and appropriate the timber in further discharge of the sums which were required to be raised. The defendant, however, persisted that he, in respect of the exemption from waste annexed to his tenancy for life, was entitled to fell and apply the proceeds of this timber to his own benefit. The trustees then filed their bill, and applied for an injunction. That injunction was refused, with costs, by the Vice Chancellor Lord Cranworth, and this is an appeal from that decision.

I may here mention, that before the present suit was instituted, it appears that (the same solicitor being concerned for all parties) there had been a bill filed by one of the present defendants against the present plaintiffs, upon an allegation that the present plaintiffs intended to raise a portion of the sums of money mentioned

in the deed by throwing the whole burden upon the inheritance, and insisting that the plaintiffs were bound in the first instance to apply the timber in satisfaction, as far as the proceeds would extend, of the sums so to be raised, and praying for an injunction to restrain them from charging the whole of the sums upon the inheritance. That suit appears to me not to have been a very candid proceeding. It was a proceeding adopted with a view of getting the opinion of the Court as to the construction of the trusts of the term, and upon the right now asserted on the part of the plaintiffs to fell the timber, and apply the proceeds as I have stated; but instead of a bill being filed stating the real case and objects of the parties, it appears to have been supposed that some advantage would be obtained by reversing the question, and presenting the case as if the trustees were insisting that they were not bound to cut the timber at all, but were bound to throw the whole burden upon the inheritance, that being directly contrary to the truth. The case was heard, upon demurrer to the bill, before the Vice Chancellor Wigram, the question being whether the trustees were excluded from the exercise of all discretion as to the application of the timber, and were bound to throw the whole charge upon the inheritance. The judgment of the Vice Chancellor was that the trustees were not so bound, and he allowed the demurrer accordingly. In the course, however, of the judgment some expressions dropped from the Vice Chancellor which, no doubt, it was the object of the parties to elicit, consistent with the view now contended for on the part of the defendant, denoting an impression or an opinion that the tenant for life had a right to cut timber exclusive of the trustees.

The question, however, now before me is, whether or not the trustees of the term have a right to enter and cut the timber and apply the proceeds as far as they will extend (assuming, of course, that they cut fit and proper timber) in part satisfaction of the charges.

If they have that right, then I think they are entitled to the injunction; and their right depends upon the equitable construction of the power contained in the settlement, that power being exercised.

bond fide, and there being no special circumstances of *mala fides*, or any wanton or unreasonable discretion attempted to be exercised on the part of the trustees. My opinion is, that the trustees have that discretion, and that they are entitled to the injunction which is asked for, because the defendant is obviously about to do that which would operate as a destruction of the power given to the trustees, and the effect would be to deprive them of the exercise of that discretion which I think they have.

A great many cases were cited having more or less application to this case, but no one was cited, nor have I been able to find one, which arises out of a deed at all corresponding with the terms of the present deed. It has been stated in the course of the argument that the trusts of the term are expressed in the ordinary form, and I was referred to a precedent in *Sanders on Uses*, the form, however, of which is essentially different in all material respects from that now under discussion. The argument of the case before Lord Cranworth went also very much upon the terms of the deed being of the same import as those of various other deeds which have been the subject of decision as to the discretion of an executor.

I have taken some pains to ascertain this, and have caused various books of precedents to be searched, and procured the drafts of several of the most eminent draftsmen of the day, and I find the power is not in the usual form, but differs essentially from it.

It will be observed, that in this case the first limitation is to the use of the trustees of the term, and nothing can be more distinct and express than the terms of the trust with regard to the timber. They are, "upon trust in the first place" (the words 'in the first place' have no operation on the question, they only indicate the order in which the different sums are to be raised) "by cutting and felling, and selling and converting into money all or any part or parts of the timber now standing and growing on the said lands which is or shall be of full and ripe growth, and not ornamental to the mansion at Combe aforesaid, or the pleasure-grounds attached thereto, or any of the views or prospects of the same,

of which timber it is hereby declared that enough of the most ornamental shall always remain to preserve the beauty of the place unimpaired." Nothing, therefore, can be more distinct than the effect of these words : they import very clearly an anticipation on the part of the grantor of the estate, that the power would be exercised, more particularly when it is observed that the first estate for life is to the grantor herself, and that the first 10,000*l.* is to be raised forthwith. I think, therefore, that the intention of the grantor is perfectly clear and distinct, that in her judgment there was timber fit to be cut, and that she intended that the trustees should exercise their discretion in raising by means of the timber so much as it might be able to furnish towards the sums of money which are the objects of the settlement.

Now, if I am correct in this conclusion, I apprehend that it is perfectly clear, that in the absence of special circumstances raising equitable grounds, the general rule is, that a court of equity will not interfere, to controul and limit the exercise of a discretion which the owner of an estate has thought fit to vest in grantees or trustees named by such owner. The argument on the part of the tenant for life, giving it its full effect, tends, as it appears to me, to strike out the trust altogether with regard to the felling of timber, for he contends that, under the exemption from waste which is annexed to his life estate, he is entitled to cut all the timber, and apply it as part of the ordinary profits of the estate coming to him in respect of his life estate. Whilst, however, the defendant's argument is thus calculated to strike out that part of the deed which gives to the trustees the discretion contended for, it by no means follows that that discretionary power will interfere with the provision exempting the tenant for life from liability to waste.

Both provisions may stand together, for if the trustees do not think fit to exercise their discretion, the tenant for life may cut ; or, if they do cut all the timber, there will still be left a great deal for the exemption from waste to operate upon ; the tenant for life may work mines, take stones, and make considerable profits from those things which are a part of the in-

heritance, and which he would not be able to take without exemption.

In the course of the argument, very strong expressions were occasionally used, importing that the timber was part of the ordinary annual profits of the estate; but I apprehend that this is not so, and that the exemption from liability for waste is a special power to the tenant for life to appropriate a part of the inheritance, which standing timber of course is. If then, this tenant for life cut down many thousand pounds' worth of timber, the effect will be to relieve that portion of the inheritance from the burden of raising the sums charged. Now, the duty of the trustees is, to throw the burden of the principal upon the inheritance, and the tenant for life is to keep down the interest; but if the tenant for life may cut down the timber, which is a portion of the inheritance, to the extent contended for in this case, he gets relieved altogether from contributing to the charges in respect of that timber; and it appears to me hardly reasonable to suppose that it was intended that the tenant for life should have such power.

Having adverted to the equitable rule with regard to discretion where a discretion is found to exist, and having also adverted to the terms of this deed, which prove that the grantor intended to vest a discretion in the trustees, the question is, what are the equitable grounds on which this Court will be authorized to controul that discretion? The first point that presents itself is this: it is said, that the ordinary rule as to raising sums of money under a will or under a power will be found applicable to this case. Undoubtedly it is well settled that if trustees have a power to raise certain sums, it is their duty to charge the principal of these sums upon the inheritance, and to secure the application of the annual profits during the tenancy for life to keep down the interest. But in order to see how that rule applies to the present case, we must see what is the foundation of the rule. It is the presumed intention of the grantor. It is correctly said, that it is an irresistible presumption that a person professing to create certain estates and limiting certain interests, intends that each of the grantees of those estates or interests shall take some

certain profit, and that, if any other rule were maintained, the trustees might deprive a tenant for life of all profits whatever, which could not be the intention of the grantor.

Now, it is well known that the rule with regard to how much of the burdens of a charge upon an estate the tenant for life should bear, has varied. Originally a portion of the principal was thrown on the tenant for life; that was subsequently altered; and now the tenant for life is charged only with the burden of keeping down the interest, and the capital, as I have before stated, is charged upon the inheritance; that is done upon the ground of the presumed intention of the grantor, to which I have referred, and as the best mode of carrying that intention into effect. Applying, then, that view of the rule to the present case, what am I to infer was the intention of the grantor? It seems to me that she must have contemplated the exercise, if not of the right, at least of the discretion; and that if I were to adopt the argument of the defendant, I should defeat that intention, or not carry it into effect. If, however, I allow the trustees the discretion which I have mentioned, the tenant for life will still have all the ordinary profits of the estate, with respect to all those portions of the inheritance with which the trustees may not intermeddle; and I shall thus, as it seems to me, carry into effect the intention of the settlor, both with regard to the trustees, and with regard to the tenant for life. No case was cited at the bar, and I have been able to find none at all leading to the conclusion that this Court has ever controuled the execution of an express and clear trust; and it therefore appears to me that the ordinary rule which has been referred to, instead of leading to the conclusion that the trustees in this case have not the discretion, and ought not to be allowed to exercise the discretion which they contend for, rather tends to support their claim; the foundation of the rule being a presumed intention from the use of certain language, which language differs so essentially from that used here, that a different intention is to be necessarily presumed from that presumed in those cases to which the rule has been applied.

The right of the trustees has, however, been objected to on the principle of analogy. It is said that the trustees are but incumbrancers, that they are in the like situation as mortgagees, and that a mortgagor, while in possession, may fell timber, provided he does not impair the sufficiency of the security. Now, it appears to me that that case has no analogy to the present. The parties there have entered into a contract between themselves, which has known legal consequences attached to it; the mortgagor in equity is the owner of the estate, he is in possession as such, and is allowed to exercise all the rights of ownership not diminishing the security or rendering it insufficient; the tenant for life, however, is not the owner of the estate. In the case before me the tenancy for life is subordinate to the term, the first limitation being to the use of the trustees, and every part of the deed afterwards making the tenancy for life subject and subordinate to the trusts of the term; the tenant for life is, therefore, not in a situation like that of a mortgagor, upon whom the mortgagee can at any time enter and put an end to his power. No estate or interest is given in the timber, but a mere power to appropriate it, that power being subordinate to the power given to the trustees. Various authorities were also referred to for the purpose of shewing that a tenant for life, not impeachable of waste, was entitled to the proceeds of the timber where the trustees have cut. Three cases were mentioned, namely, *Smythe v. Smythe*, *Ferrand v. Wilson* (6), and *Davies v. Wescomb*, but they do not at all govern the present case. In *Smythe v. Smythe* the right to cut proper timber was not disputed; the only question was whether the timber was proper to be cut: the report contains no expression or sentence, that I have discovered, that has any bearing at all upon the present case. The next case, *Ferrand v. Wilson*, arose out of a very special and complicated will; the questions being whether a power to cut timber was a power which was to endure so long as to intrench on the rules against perpetuities, and whether the parties had not legal remedies which

they had lost under the effect of the Statute of Limitations; all that applies to the present case is, that the Vice Chancellor entered into a consideration whether the proceeds of the timber were, in that particular case, in a different situation or liable to a different application from ordinary annual profits; but there is no general principle deducible from that case which can be applied to the present, the whole question turning upon the construction of a term totally different from that now under consideration. In the remaining case of *Davies v. Wescomb*, the point of the whole decision was, that the trustees had no power to cut timber, and that by cutting timber they had deprived the tenant for life, without impeachment of waste, of the power of cutting, to which he was entitled; and the Court, therefore, gave him the proceeds of that timber. That decision was founded on the great case of *Cockerell v. Cholmeley* (7), which has some points material to the consideration of the present; in that case the trustee of Whitenights had a power to sell, and there was a tenant for life without impeachment of waste: the trustees being about to exercise the power which they had of either exchanging or selling the estate, the tenant for life unimpeachable for waste claimed the timber; that claim was conceded, and it was, therefore, arranged that the timber, and the land without the timber, should be valued separately, and that then the tenant for life should convey the timber to the purchaser, and the trustees convey the land; this arrangement was accordingly carried into effect, the tenant for life taking the value of the timber, and the trustees taking the value of the land; it was a most unfortunate case for the purchaser, for afterwards the person becoming entitled to the inheritance filed his bill, and the sale was set aside. It was insisted that the sale could not have been in conformity with the power, and that it was, therefore, a void sale, for that the trustees were only authorized to sell the estate entire, that they had no right to separate either the land from the timber, or the timber from the land, and that, as they had therefore sold the land without the timber, and permitted

(6) 4 Hare, 344; s. c. 16 Law J. Rep. (n.s.) Chanc. 41.

(7) 10 B. & C. 564.

the tenant for life, unimpeachable for waste, to sell the timber for his own benefit, it was not a sale corresponding with their power, and that it was a void sale. Such were the three cases which were cited and relied on as tending to shew some such interest in the tenant for life in the timber as precluded the conclusion as just and proper that the trustees possessed a discretion to cut.

The next point that was urged was, that this was a case that might be likened to the case of marshalling, or where the person has two funds to resort to, and another person has some rights in connexion with him on one of the funds, but no right on the other, and the Court makes the party who has the two funds have recourse to the one on which his competitor has no right or interest, and exhaust that before resorting to the fund which is common to both of them. I do not, however, conceive that the present case, where the tenant for life requires the remainder-man or the trustees to raise the charges upon the inheritance, and the remainder-man seeks to charge them upon the timber, is one to which this principle of marshalling applies. There, the object is, that full justice may be done to both parties, without interfering with, or prejudicing the rights of, or occasioning a loss to either of them; but here, if the tenant for life has a right to apply this timber, it is a loss to the remainder-man, or if the remainder-man has a right to have this timber, it is a loss to the tenant for life. One party must lose, and who it is to be must be determined by the intention of the grantor; and this drives us again to see what the grantor has done. We then find that the grantor has given the ordinary profits to the tenant for life, with exemption from waste, or a licence to appropriate a portion of the inheritance, subject to the prior right and discretion of the trustees for raising portions. It was further insisted that the tenant for life is the owner of the timber, but that is quite out of the question; he has nothing but a power, though when he has felled the timber under the power, it would become a chattel, and he would become owner of it. We are now, however, discussing the relative rights as to standing timber, and the case cannot, therefore, be

argued, or the claim to fell the timber supported upon any existing property in the timber as owner. It has been contended that a purchaser at an auction under the tenant for life has acquired a right which this Court cannot interfere with; but if the tenant for life has sold timber which he has no right to fell, a buyer can acquire no right or interest as against the party who has a right to fell; and there appears to me no ground whatever for the argument thus sought to be raised. Then it was said that there has been delay on the part of the trustees, but it does not appear to me that there is any ground for the assertion.

It was then said that the bill was not properly framed, and that it did not shew any intention or desire on the part of the trustees to cut. I think that this is a mistake, for the whole frame of the bill sufficiently discloses that the object of the trustees in interfering with the right claimed by the tenant for life, is for the express purpose of cutting the timber. It was further said that the timber being ripe and fit and proper to be cut, it is immaterial to the plaintiffs by whom it is cut. There is, however, this difference: if the tenant for life is allowed to cut, he appropriates the proceeds to his own benefit as part of his profits as tenant for life, and leaves the whole 80,000*l.* to be charged upon the inheritance—whereas, if the trustees cut, they apply the proceeds in a different manner, in a manner which diminishes the profits which the tenant for life would acquire by the exercise of the special power on his part, and so diminishes the charge upon the inheritance.

It is further to be observed, that the interests of the parties concerned are not identical. It is the interest of the tenant for life to cut within his lifetime, whereas the trustees have a duty which they ought to discharge with a fair consideration for all parties; they are bound so to exercise their power of felling as to make it available to the greatest extent in reducing the charge upon the inheritance, and in this both the tenant for life and the remainder-men are interested. Much may depend as to the value of the timber upon the time at which it is cut and the mode in which it is sold, and on various other particulars.

It therefore appears to me to be of great importance that the right to cut should be given to those who by law should possess it. Considering, then, that the trustees have the discretion to which I have referred, that they are charged with that discretion for the benefit of others and not for themselves, and that they may exercise that discretion, still leaving matter upon which the exemption from waste may operate in favour of the tenant for life, it appears to me that there is no ground whatever why this Court should interfere to controul their discretion.

Now, the tenant for life is about to destroy the right of the trustees, and to prevent the execution of their power; I think, therefore, that they are entitled to restrain him from so doing. It appears, however, that he has actually sold and entered into contracts for the sale of the timber. Such being the case, and the sale having very possibly been a prudent one, I should say, without at all desiring to controul their discretion, that it would well become the trustees to consider whether they might not adopt it as a sale by themselves. I shall, therefore, grant the injunction, with an understanding that the trustees are to undertake to account for the proceeds of the timber as the Court shall direct, and that if the cause proceeds to a hearing, the timber shall be then deemed to have been cut by those who had the power to cut. It may be as well to do this, though as the question is one of construction, depending upon principles which prevail in courts of equity, and as the whole matter is now before the Court, it is not likely that the present aspect and circumstances of the case will be at all varied at the hearing.

I have formed my opinion upon the general right, and I think I am bound to give effect to that opinion. Even if it should ultimately appear that whether it be the trustees who sell or the defendant who sells, the defendant will be entitled to the proceeds either as tenant for life, without impeachment for waste, or as executor of the settlor in respect of the first 10,000*l.*, I should still say the present application must be granted, the trustees undertaking to the effect that I have stated.

L.C.
Jan. 22, 23, 24; }
Nov. 25. } INNES v. SAYER.

Power—Charity—Appointment to Charitable Purposes—Informal Execution aided.

If the intention to exercise a power be clearly shewn, a Court of equity will, in favour of a charity, give effect to an informal or defective execution of the power. Therefore where a power to dispose of personality was directed to be exercised, amongst other modes, by the last will and testament, &c. of the donee, signed, sealed, published, and declared in the presence of two or more witnesses, and the donee, in exercise of the power, bequeathed part of the personality to certain charities by an unattested will (executed before the passing of the Wills Act), signed and sealed by the donee, but not in the presence of witnesses, and not published or declared, it was held (affirming the decree of the Court below,) to be a valid execution.

Held, also, that as the gifts were specific, the state of the testatrix's property at the time of her will and the time of her death might be looked at.

This was an appeal from the decree of Vice Chancellor Wigram, reported 18 *Law J. Rep.* (N.S.) Chanc. 274.

The sums of stock over which the testatrix had a power of appointment under the will of Thomas Innes were, 3,333*l.* 6*s.* 8*d.* consols, 1,666*l.* 13*s.* 4*d.*, 3*l.* 5*s.* per cent. annuities, 500*l.* 4*s.* 10*d.* reduced annuities, and 100*l.* long annuities. She had also at her death the sum of 12,909*l.* 19*s.*, 3*½l.* per cent. annuities standing in her own name. After the gift of the legacies to the several charities set out in the report of the case below, the will proceeded as follows:—
“To Harriett K. Innes my god-daughter I leave 500*l.* in the 3*l.* per cent. consols to be paid within six months after my death; the remainder in the 3*l.* per cents. and three separate sums in the new 3*½l.* per cents., with 100*l.* long annuities, and any other property I may die possessed of I leave to C. Sayer and B. Sayer, their executors, administrators, and assigns, upon trust,” &c.

Mr. ROLL and Mr. Faber, for the appeal.

The Attorney General, Mr. Wood, Mr. Lloyd, Mr. Glasse, Mr. Headlam, Mr. Cankrien, Mr. Pirie and Mr. Baggallay, for other parties.

Williams on Executors, 999.

1 *Sugden on Powers*, 390.

Lownds v. Lownds, 1 You. & J. 445.

Rich v. Cockell, 9 Ves. 369.

Lewis v. Lewellyn, Turn. & R. 104.

Jones v. Tucker, 2 Mer. 533.

Hughes v. Turner, 3 Myl. & K. 666 ;

s.c. 4 Law J. Rep. (N.S.) Chanc. 141.

Nannock v. Horton, 7 Ves. 390.

Webb v. Honor, 1 J. & W. 352.

Andrews v. Emmot, 2 Bro. C.C. 297.

Duke on Charitable Uses (Bridgman's ed.) 163.

Chapman v. Gibson, 3 Bro. C.C. 231.

Nov. 25. — The LORD CHANCELLOR, after stating the will and the facts of the case, proceeded as follows :—The question is whether these testamentary papers operated as an execution of the powers. The bill was filed by one of the four children of A. Innes (the residuary legatee of Thomas Innes), against the surviving executor, the treasurers of the several charities and other parties, praying that one fourth part of the sums of stock over which Judith Innes had a power of appointment might be transferred to the plaintiff. The Vice Chancellor by his decree, declared that the testatrix, by her will, intended to execute the power, and that the defective execution ought to be supplied in favour of the four charities. The plaintiff has appealed against this decree. The first question is, whether the will of Judith Innes operated as an execution of the powers respectively given by the will of her husband and her own marriage settlement. This question involves two others: first, whether she meant thereby to exercise the two powers; and, secondly, assuming that such was her intention, whether the Court will hold the powers to have been sufficiently executed in favour of the charities, notwithstanding the non-attestation of the will in conformity with the power.

With respect to her intention to execute the powers, I am of opinion that such intention may be collected from the

words of the will. The general rules relating to this subject are well established, but the point of difficulty is, whether the facts of this case do or do not fall within the established rule. The result of the authorities is appropriately and shortly stated in 1 *Sugden on Powers*, 373, 6th ed.—“A donee of a power may execute it without referring to it, or taking the slightest notice of it, provided that the intention to execute it appear;” and p. 385, “Where, however, the power is not referred to, the property comprised in it must be mentioned, so as to manifest that the disposition was intended to operate over it; the donee must do such an act as shews that he has in view the thing of which he had a power to dispose.” “Slight circumstances of conformity or reference will not amount to a sufficient indication of the intention,” p. 387. Such being the established rule, the question in this case is, whether the specific property, the subject of the power, is mentioned in the will in question. I think it is so mentioned, and I adopt the reasoning of the judgment below in support of that conclusion. The words “the remainder in the 3l. per cents.” shew that the legacies previously given were part of a larger amount of stock of that denomination and distinguish the case from a general gift of a sum of stock of that description, and it cannot be construed to import a direction to purchase stock of that description and amount. As the words, then, are only to be satisfied by referring them to specific stock existing either at the date of the will or of the death of the testatrix, it becomes necessary to inquire as to the existence of such stock at those times, and since there was no stock of her own existing at those times to which the words can be referred, but stock did then exist subject to the power both at the date of the will and the death, the Court must refer the words to that stock in order to give them some effect; and whether the will be regarded as speaking from its date, or the death of the testatrix, the result must be the same.

But it is contended that the words might be satisfied by referring them to stock which the testatrix supposed might exist at the time of her death. But

where there is no such stock, and no indication in the will of any intention to purchase such stock, or of any expectation of her becoming possessed of any such stock, it would be a most unnatural construction that she referred to such stock to be acquired; at all events, the most natural construction is, that she intended to refer to that specific fund which was existing at the date of the will. If this construction required further support, I think it is to be found in the next words—"and three separate sums in the new 3l. 10s. per cents.," which evidently mean the three specific sums existing at the date of the will. I do not consider that the subsequent words "and any other property I may die possessed of, of what nature or kind soever" affect the construction further than this, that they import an expectation that the specific stock previously described would exist at the time of her death, and that she had an intention to dispose of that and any other property she might die possessed of.

It was argued that extrinsic evidence of the state of the property at the date of her will, was not admissible in this case, and the Vice Chancellor Wigram's book on evidence was referred to: but, a contrary proposition is there mentioned—"For the purpose of determining the subject of disposition, a Court may inquire into every material fact relating to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the thing intended by the testator"—*Wigram's Evid.* p. 51, 3rd ed. There have been many cases in which the Court has held that a power was not executed where the words might have referred to the power, because the words might be fully satisfied by referring them to the testator's own property; and there have been many cases where the Court has refused to look at the extrinsic circumstances, because the bequest was not specific, as it is here. In *Lewis v. Lewellyn* a testator having a power of appointment over freeholds and copyholds, and having other freeholds of his own, but no copyholds, charged all his freehold and copyhold estate with the payment of his

debts, and, subject thereto, he devised and bequeathed all his real and personal estate. This was held to be a good execution of the power as to the copyholds only. In *Napier v. Napier* (1) a testator made a general devise of all his lands in nine parishes, in five of which only he had land in fee, in three others he had no land of his own, but there was land over which he had a power of appointment. In the remaining parish he had land in fee and also land over which he had a power of appointment. On the authority of *Lewis v. Lewellyn*, it was held, that the land in the parish which was the subject of the power did not pass. These cases only prove that when the testator has property of his own and a power of appointing other property, and the words used may be satisfied by referring them to his own property, they will not be referred to the power. In *Webb v. Honnor* it was held, that a bequest of the whole of the testator's personalty, "consisting of money invested in any of the public funds, household furniture," &c., did not operate as an execution of a power of appointment over a sum in the funds. The Master of the Rolls said, "In this instrument there is nothing to shew that the testator meant to dispose of anything but his own property; every part of it is satisfied by giving all that he was possessed of." So in *Hughes v. Turner*, *Jones v. Curry* (2), *Nannock v. Horton*. The case of *Andrews v. Emmot*, and others of that class are to the point, that you are not to inquire into the circumstances of the testator's property at the date of his will, to determine whether he was executing the power or not. The testator there did not refer either to the power or the subject of it. From some of these decisions, it might be inferred that in no instance could the Court take into account the state of the property in construing a will; but as Alderson, B. remarked, in *Davies v. Quarterman* (3), "All dicta should be construed according to the circumstances of the case in which they are found"; and the circumstances of these

(1) 1 Sim. 28; a. c. 5 Law J. Rep. Chanc. 65.

(2) 1 Swanst. 66.

(3) 4 You. & C. 292; a. c. 10 Law J. Rep. (N.S.) Ex. Eq. 17.

cases were that *prima facie* they were general gifts. But in *Shuttleworth v. Greaves* (4) Lord Cottenham said,—“In every specific devise or bequest, it is clearly competent and necessary to inquire as to the thing specifically devised or bequeathed.” And this doctrine was acted upon in *Mackinley v. Sison* (5), where it is questionable, however, whether the application of the doctrine was perfectly correct. Upon this point, therefore, I think the judgment of the Vice Chancellor was right and ought to be affirmed.

The next question is, as to the absence of attestation. The will contained a form of attestation and a note—“This will has not been witnessed, as I intend, if I am spared, to write it out fair.” It has been argued from this, that admitting she intended to execute the power, her intention was only inchoate. It is plain, however, from a note to a codicil wherein she states a certain interlineation or erasure had been made by herself, that she regarded as valid and effectual the dispositions made by her will and previous codicils, even though she did intend, if spared, to have it witnessed and written out fair; and if her intention to dispose of her own property was complete, it cannot be successfully contended that her intention to dispose of the property the subject of the power was only inchoate. The question then arises, whether the powers are well exercised in favour of the charities, notwithstanding the requisitions of the powers have not been complied with. Upon this point I may observe, that the doctrine applicable to this question ought to be considered as well established by judicial decision, namely, that a power well exercised in other respects will, in favour of charities, be deemed to have been effectively exercised, notwithstanding the formalities required by the deed creating the power have not been complied with. The decisions upon this point are too familiar to render it necessary to cite them by name. With regard to the attestation being required by the instrument creating the power, there is no valid objection to dispensing with attestation, on the ground

of its contravening the intention of the donor of the power. The attestation is required merely for the purpose of preventing fraud; and in the case of a gift to a charity, there is much less danger than where an individual is to take a benefit by the execution of the power, and in fact, no danger at all.

The only other objection to the decree is, that it leaves the charities to take their legacies exclusively out of the funds derived under the will of Thomas Innes, and that it ought to provide that the legacies should be taken out of those funds, and the 1,000*l.* consols over which the testatrix had a power of appointment, proportionably. But the parties interested in the latter fund are not before the Court, and the Court has no jurisdiction over that fund in this suit; and, therefore, I can make no order as to that upon this appeal, but the charities must be left to take their legacies out of the fund in court; and I may observe that the principle of marshalling has no application to the case before me.

For these reasons, the decision must be affirmed, and the appeal dismissed, with costs.

KINDERSLEY, V.C. }
Nov. 15, 21. } BOURNE v. BUCKTON.

Thellusson Act—Accumulations—“Portions.”

A testator gave the residue of his personal estate to trustees, in trust, to invest and accumulate the income from time to time during the life of his niece, and after her death to transfer the securities and accumulations to her children in equal shares, the shares of male children to be vested at twenty-one, and those of females at twenty-one or marriage. Then followed other provisions with regard to what the testator sometimes called the “portions” and sometimes the “shares” of such children, as to maintenance and education, and if the trusts for the benefit of the children of his niece should fail, there were similar trusts for the benefit of the children and issue of other parties, and failing those trusts, for his own next-of-kin. The testator’s niece was still living, and had survived the period of twenty-one years from the death of the testator. Held, that this pro-

(4) 4 Myl. & Cr. 37; a. c. 8 Law J. Rep. (N.S.) Chanc. 7.

(5) 8 Sim. 561.

vision was not one for raising portions within the meaning of the 2nd section of the Thellusson Act: that from the expiration of twenty-one years from the testator's death, the trust for accumulation was void; and that from that time till the death of the niece, the legal personal representative of the testator was entitled to the accumulations.

This case came on upon the petition of the legal personal representative of a testator named William Stains, and it prayed that the trusts for accumulation contained in the will of the testator, as to his residuary personal estate during the life of his niece, might be declared void under the Thellusson Act after the expiration of twenty-one years from the testator's death; and that the petitioner might be declared entitled to such accumulations during the life of the testator's niece.

The will of the testator, W. Stains, was the subject of discussion on a previous occasion, before the Vice Chancellor of England, upon a petition that the trusts for accumulating the income of his residuary real estate might be declared void—*Halford v. Stains* (1).

The testator, after making divers pecuniary and specific bequests, bequeathed all the rest of his personal estate unto his friends John Buckton and Thomas Bourne, their executors, administrators and assigns, upon trust, with all convenient speed after his decease, to sell all parts thereof as should not consist of stocks, funds, monies, mortgages and securities for money, and get in all such parts thereof as should consist of monies or securities for money, and at their or his discretion to lay out and invest the same monies to arise and be produced by such sales, and to be got in as aforesaid, in the purchase of freehold hereditaments, in the county of Kent, which the said testator directed to be forthwith settled to the same uses, and upon the same trusts as were thereafter by him declared concerning such parts of the said net monies as should not be laid out in such purchases as aforesaid, or as near thereto as the deaths of parties and other contingencies would admit of; and upon further trust, as to such parts of his

said net residue as should not be laid out in such purchases as aforesaid, and also in the mean time, and until such purchases should be made as aforesaid, as to the whole of the said net monies, to lay out the same in the purchase of stock in some or one of the public funds, or upon other government or real securities, and alter, vary and transpose the same stocks, funds, and securities from time to time, and receive the annual proceeds of the said stocks, funds, and securities, and again lay out the same in manner aforesaid, so that the same and all the resulting income and produce thereof might accumulate in the way of compound interest for and during the term of the natural life of his niece Elizabeth Stains, and from and immediately after the decease of the said Elizabeth Stains, then, upon trust, that his said trustees or trustee for the time being should assign or transfer, or make over all and every the said stocks, funds, securities and accumulations unto the child, if only one, and if more than one, between and amongst all and every the children (but exclusive of an elder or only son, such only son not being an only child) of the said Elizabeth Stains, equally to be divided between them if more than one, share and share alike, as tenants in common, and to be vested in such of them the same children as should be a son or sons, when and as he or they should attain his or their age or respective ages of twenty-one years, and in such of the same children as should be a daughter or daughters when and as she or they respectively should attain the like age or be married, which should first happen, and to be transferable and transferred as soon after the said age or days should be attained, and also after the decease of his said niece Elizabeth Stains, as conveniently might be.

And the testator directed his trustees, after the decease of the said Elizabeth Stains, to apply the income of the portion of each of the said children and issue being minors for their maintenance, and to apply one-half of their expectant shares for their advancement, and such sums as should be so advanced to be considered as part of his or her said portion or share, and to be deducted from such portion; and that so much of the income of the portion or share

(1) 16 Sim. 488.

of each of the children as should not be applied for their maintenance and advancement should be added to and accumulated together with the principal of such portion or share, and should be subject to the trusts and limitations therein specified as to the principal of the same portion or share until the principal should become payable. The will contained similar trusts for the benefit of the children of Edwin Stains, and afterwards of John Palmer, in case the preceding trusts should fail; and the last trust was in favour of the testator's own next-of-kin, according to the Statute of Distributions.

The testator died in the year 1827, leaving his brother James his sole next-of-kin. Upon the death of James in 1828, the petitioner became his personal representative. Elizabeth Stains was still living, and had survived the period of twenty-one years from the death of the testator.

Mr. Rolt and *Mr. Fooks* appeared in support of the petition, and

Mr. Stuart and *Mr. Goodeve*, *Mr. Bethell*, *Mr. Erskine* and *Mr. Jessel* opposed for different parties.

The following cases were cited—

Halford v. Stains, 16 Sim. 488.

Shaw v. Rhodes, 1 Myl. & Cr. 135.

Morgan v. Morgan, 20 Law J. Rep. (N.S.) Chanc. 109, 441.

Elborne v. Goode, 14 Sim. 165; s. c. 13 Law J. Rep. (N.S.) Chanc. 394.

Ellis v. Maxwell, 3 Beav. 587; s. c. 10 Law J. Rep. (N.S.) Chanc. 266.

Beech v. Lord St. Vincent, 19 Law J. Rep. (N.S.) Chanc. 130.

The first and second sections of the *Thellusson Act*, 40 Geo. 3. c. 98. were also referred to (2).

Judgment reserved.

(2) 40 Geo. 3. c. 98. s. 1. enacts, "That no person or persons shall after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated, for any longer term than the life or lives of any such grantor or grantors, settlor or settlers, or the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator, or during the minority or re-

Nov. 21.—*KINDERSLEY*, V.C.—In this case the question raised is, whether the bequest or provision for accumulation contained in the will of the testator comes within the 2nd section of the 40 Geo. 3. c. 98, commonly called the *Thellusson Act*; for it is not disputed that if it does not come within the provisions of the 2nd section of the act, the direction to accumulate is void under the provisions of the 1st section. The only question, therefore, is, whether it comes within the provisions of the 2nd section, as being, according to the terms of that section, a provision for raising portions for the child or children of any person taking an interest under the devise. The question with regard to the real estate has been already disposed of by the decision of the late Vice Chancellor of England, in the case of *Halford v. Stains*.

In order to see whether the bequest of the personal estate, which is all that I have to do with, is or is not within the provisions of the 2nd section of the *Thellusson Act*, it is necessary to see what the provisions of the will are. The will runs to very great length, but it is very conveniently abridged and very accurately stated in *Mr. Simons's* report of the case of *Halford v. Stains*,

spective minorities of any person or persons who shall be living or *in ventre sa mere* at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would, for the time being if of full age, be entitled unto the rents, issues and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such directions shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated, shall so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Sect. 2. enacts, "That nothing in this act contained, shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this act had not passed."

therefore for convenience I shall state the provisions of the will from the report of that case. The testator, William Stains, was possessed of real and personal estate, and he first makes a devise of his realty and then of his personalty. The devise of the realty is thus: the real estate is devised to trustees during the life of the testator's niece Elizabeth Stains, upon trust to make certain payments out of the rents and profits, not material to be considered, except that among those annual payments there is this direction,—that the trustees should pay an annuity to Elizabeth Stains in case she should marry a certain individual mentioned in the will, of the name of Smith, which event never happened. Then, subject to those payments, the rents and profits are to be laid out in the purchase of other real estates, which real estates, when purchased, are to be settled to the same uses as those to which he devises his own real estate in the subsequent part of his will. But he goes on to say, that as to the rents and profits which shall not actually be laid out in the purchase of real estate, they shall be invested in government securities and the income accumulated during the life of Elizabeth Stains, and that the accumulations of so much as should not be laid out, instead of going in the same manner as the real estate would have gone, if it had been laid out in real estates, is to go in the same manner in which he bequeaths, subsequently, his personal estate. Having given that direction for the accumulation of the rents and profits of the real estate during the life of the niece Elizabeth Stains, he devises his real estate, at her death, to her first and other sons in tail male, with remainder to Edwin Stains for his life, with remainder to his first and other sons in tail male, with remainder to the use of all the children of John Palmer as tenants in common in tail, with remainder to the testator's right heirs. That disposes entirely of his real estate, and disposes of all those real estates which should be purchased by means of the rents and profits of that real estate, accruing during the life of Elizabeth Stains; and it also directs that as to so much of those rents and profits which should not be laid out in real estate, then the rents and profits should accumulate in real or government

securities, and should go as he bequeaths his residuary personal estate.

Then, we come to the bequest of the personal estate; and it is only with respect to this bequest that the question now arises. This petition affects only the personal estate. As I have said, the question as to the real estate was disposed of by the case of *Halford v. Stains*. Now, the bequest of the personal estate is this: he gives all the residue of his personal estate to trustees, on trust to realize and to lay out the money to arise by the realization of the personalty in the purchase of real estates, and those real estates are not to go according to the real estates which are to be bought with the rents and profits of his own real estate, but are to be conveyed to the same uses and upon the same trusts as he afterwards directs with respect to the monies which shall not be laid out in real estates. As to so much as the trustees should think fit, or should happen not to lay out in the purchase of real estates, the income of the personal estate is to be from time to time invested and accumulated during the life of the niece; and after the death of the niece the trust is, to transfer the securities and accumulations to her child, if only one, and if more than one, to her children, exclusive of an elder or an only son, such only son not being an only child, equally as tenants in common, and to be vested in male children at twenty-one and female children at twenty-one or marriage. Then, there are provisions that in case any of the male children should attain twenty-one, or females attain twenty-one or marry, and die before their mother, leaving issue, then the issue are to stand in the place of the parent, who would have taken in that event the share, if he or she survived the mother Elizabeth Stains; and then there are other provisions with regard to what are sometimes called the "portions" of these children of Elizabeth Stains, and sometimes what are called the "shares" of the children of Elizabeth Stains, as to maintenance and education and advancement if any of them should be under twenty-one at her death. Then, if the trust for the benefit of the younger children of Elizabeth Stains should fail, there are similar trusts for the benefit of the children and issue of Edwin Stains; and failing that, similar trusts for

the benefit of the issue of Palmer, and failing all those trusts, then it is to be held in trust for his own next-of-kin, according to the Statute of Distributions. Now, it is to be observed, that with respect to the personal estate, Elizabeth Stains takes no benefit of that estate whatever. Edwin Stains takes no benefit of the personal estate. John Palmer, whose children are the last provided for, takes no benefit under the bequest of the personal estate. Then, it appears that Elizabeth Stains is still living, and has survived the period of twenty-one years from the death of the testator. The question therefore, is, whether, it being admitted that the trust for accumulation beyond the period of twenty-one years would be void under the Thellusson Act, if it does not come within the meaning of the 2nd section of the act, the question is, whether this provision is such a portion for the child or children of a person taking a benefit under the devise, for that is the language of the 2nd section, "under such devise," as to prevent it coming within the prohibition of the first section.

Now, there are two questions raised here. The first question is, are these portions at all within the meaning of the 2nd section? And the next question is, even supposing that they are portions within the meaning of the term "portions" as used in that 2nd section, are they portions for the children of any person taking any interest under such devise? I am using the words of the section. Now, with regard to the real estate, as to which the late Vice Chancellor of England decided in the case of *Halford v. Stains*, his Honour decided that the provision was not within the 2nd section; for although, as to real estate, Elizabeth Stains would in a certain event take an annuity, that is, have a contingent interest on her marrying a certain person; and although Edwin Stains, whose children were beneficially interested, did take a life interest in remainder in the real estate, yet His Honour decided that it was not within the provisions of the 2nd section,—that is to say, that they were not "portions." But the reasons he gave were these: first, that the meaning of the 2nd section of the act was, that it was to apply to the raising of

portions created by some other instrument, either cotemporary with the will or instrument or prior to it; and the second reason he gave was, that the testator himself calls these "shares," and that, therefore, they could not be considered as coming within the term "portions." Now, I am bound to say, with all deference and respect for the opinion of that learned Judge, that I cannot concur in the reasons assigned for the judgments either in the one or in the other. I am bound to say that; for it is better to express my opinion fairly, than to attempt to find out distinctions which really have no foundation, and so mislead for the future. I do not conceive that the intention of the 2nd section was, that it should apply only to portions created by another instrument. On the contrary, although I am persuaded it was not meant to exclude portions created by another instrument, I believe the portions meant, in the contemplation of the legislature, were portions created by the very instrument in question. With respect to the other reason, that they are called "shares," one observation arises, that, looking through the whole will, the testator as often calls them "portions" as "shares." Sometimes he calls them shares; sometimes he calls them portions, and sometimes he uses the term "portions or shares." And I must say that I think the general meaning of the term "portion" is the same as a part or share. However, though I do not concur in the reasons for the decision, better reasons I conceive may be assigned why that decision was perfectly correct, and I am particularly desirous, while I think it right to express my dissent from the reasons of the Vice Chancellor so far as they are expressed, to state my entire assent to the propriety of the decision itself.

There is some difference in the case as applied to the personalty and applied to the realty; but I will consider the bequest of the personal estate as if there had been no decision at all about it with respect to the question, whether the provision of the will comes within the meaning of the legislature in using the term "portions" in the 2nd section. It appears to me that a provision of this sort can in no proper sense be called a provision for raising portions. Observe what it is; it is

not a direction out of rents and profits, or out of the income of the estate, or by felling timber on the estate, or by any of the ordinary modes, to raise a certain sum for the benefit of younger children or children generally, or to raise a sum of money for each child, but it is a direction that the whole residuary personal estate, whatever it may amount to, is to accumulate during the life of Elizabeth Stains for the purpose, not of raising portions, but of increasing the aggregate of the fund which he would have to dispose of at the death of Elizabeth Stains, and then giving the whole of this aggregate accumulated fund among the children of Elizabeth Stains, and then, failing those, among the children of John Palmer. Now it appears to me that is really not the meaning of the term "portions." It is very true with respect to this act of parliament, which has often been made the subject of commentary by different Judges, that it is extremely difficult to lay down *à priori* a definition of the term "portions," which necessarily includes all cases that ought to be included and which excludes all those that ought to be excluded: but when a particular case comes before me, I am bound to say, as in this case, that it does or that it does not come within my notion of the term "portions for children."

Being clearly of opinion independently of any authority that this is not a raising of portions within the meaning of that term, as used in the 2nd section of the Thellusson Act, I have looked to see whether I can find any corroboration of that opinion in any of the decided cases. When the question was argued I had a vague recollection that there had been a case at the Rolls in which the question had arisen, and had received the consideration of the late Master of the Rolls; and I asked myself whether there were not other cases beyond those cited. I have found the case that I had in my mind; it is the case of *Eyre v. Marsden* (3), where the question arose, and where Lord Langdale was called upon to adjudicate upon a provision for accumulation very similar to this, similar in point of principle, and in

which he has expressed his opinion that a provision of this sort for accumulating the whole income of the entire personal estate for a certain period, excepting the twenty-one years, or the period named by the Thellusson Act, and then disposing of the whole aggregate fund, is not within the meaning of the term "portions." I will only just cite so much of that case as is necessary to shew what the provision made by the will was. I may take it from the marginal note, because it is quite sufficiently extensive for the purpose. "A testator gave certain annuities out of his residuary estate to his three children." I should observe he had three children, and he had had another child who had died leaving issue. "He gave certain annuities out of his residuary estate to his three children, and requested the surplus of the annual income to be applied in accumulation of the capital of his property for the benefit of his grandchildren, and which was to be divided between them after the death of the survivor of the testator's three children. Thirty years elapsed between the death of the testator and of the survivor of his children, and it was held that the direction for accumulation beyond twenty-one years from the testator's death was void under the 1st section of the Thellusson Act, and that the case did not come within the exception of the 2nd section." That states enough to shew that there were annuities given out of the general estate to the testator's three children, who were living at the date of his will, and who did survive him; but he had had another child who had died leaving issue in his lifetime, before the date of his will, and the provision which he makes as to the parties to whom the accumulated fund should go at the death of the survivor of the three children living, were all his grandchildren, who, of course, included the children living of the deceased children. Now, I only refer to this case for the purpose of the passage in the judgment, in which the Master of the Rolls refers to the question whether such a gift came within the meaning of the term "portions" in page 573. It will be observed, that the Master of the Rolls decided that it did not come within the 2nd section for two different reasons, one of them not applica-

(3) 2 Keen, 564; a. c. 7 Law J. Rep. (N.s.) Chanc. 220.

ble to this case, but the other applicable. One was that the grandchildren for whom provision was made were partly the children of persons who did take a benefit under the will, and partly the children of a person who took no benefit, namely, a deceased child; and the other reason was that which applies to the present case. He says, "as two of the grandchildren for whose benefit the accumulation is directed, were not the children of any person taking an interest under the will," (that is one reason,) "and as the accumulation which is directed does not appear to me to be a provision for raising portions, but a provision for making additions to the capital for the purpose of making one gift of an aggregate fund" (that reason clearly applying to this case), "I think that this case is not within the proviso of the act, and that the direction to accumulate for more than twenty-one years is void." Therefore, I am perfectly satisfied, if the present case had been before Lord Langdale, he would, for the same reason on which I decide, have decided that these were not portions within the meaning of the act, to give the whole residuary personal estate to accumulate, as it might be, during the life or lives of fifty persons, and the survivor of those fifty, and then give the whole aggregate fund to the children of persons to whom you may have given a small benefit by the will, or a person who takes no benefit by the will; that it never can come within the term "portions" at all; they are not portions. The purpose is not to raise portions for children, but the purpose is to increase and swell up the aggregate of the personal estate, in order to give the aggregate fund to the person or persons who may be the children of another person or not; that appears to me material to the question whether it comes within the term raising "portions." There is also a little allusion to this point in the judgment given by Mr. Justice Bosanquet in the case of *Shaw v. Rhodes* (4). He just touches on the point, and indicates, as it appears to me, that his opinion also would be to the same effect. It is not so direct as the case of *Eyre v. Marsden*. Mr. Justice Bosanquet was asked by the Lord Chancellor, having been one of the

Lords Commissioners before whom the case had been, to come and assist him, the Chancellor, with his opinion, and he gives this judgment. He refers to the contest which had been raised, whether that case fell within the decision respecting the provision for raising portions for persons taking an interest under the devise, and he states two reasons why it does not come within that. But, first of all, some of the persons for whom the ultimate benefit was given were illegitimate children; it was not for those children whom the law recognizes as children taking a benefit under the will. Then he goes on to assign another reason, and he says, "Independently of this answer, I do not think that the case falls within the meaning of the exception. Where the whole rents and profits are given, in the first place, to persons during the lives of their parents,"—(he is referring to the particular provisions in *Shaw v. Rhodes* which are very peculiar)—"with the exception of small annuities only, to be paid thereout to the parents themselves for their own lives, and a gift to the same persons after the death of their parents is superadded, to be paid out of the subsequent rents and profits, I cannot think that the superadded gift is to be considered within the meaning of the statute in the nature of a portion to the children of persons taking an interest under the devise." The circumstances of *Shaw v. Rhodes* are so peculiar that it makes that observation less distinctly applicable to the present case; but I think it shews that Mr. Justice Bosanquet considered that it was not merely because it was a gift to the children of persons to be divided among them, that therefore it was a provision for raising portions among those children.

Mr. Malins (amicus Curiae) here referred to a case of *Swabey v. Amor* (5), in which the same point was argued before the Vice Chancellor Knight Bruce, and he came to the same conclusion. It was a case in which the whole income was very considerable, and but 50*l.* a-year given to Mrs. Amor for her life. The Vice Chancellor Knight Bruce held that it was not within the provisions of the act.

(4) 1 Myl. & Cr. 159.

(5) Not reported.

KINDERSLEY, V.C.—I think that is a case distinctly in point fortifying the opinion I have come to. I have no doubt that will be enough to dispose of the case; but I think I ought to refer to another point which has been the subject of discussion and ingenious argument, which is this: as I have already observed, the 2nd section requires that it shall be for "raising portions for the children of any person taking any interest under such devise." Now, it is very difficult to know, looking at this 2nd section, what is exactly meant by "such devise." The word "devise" does not appear in any part of the statute. The word "devisor," or "testator," does appear. I should have observed already, that neither Mrs. Stains, whose children are first to take, nor Edwin Stains, whose children take in the second place, neither of them takes any benefit in the personal estate, but each of them does take some sort of interest in the real estate, which is a separate devise altogether.

Then, it was argued, that the words "such devise" must mean taking an interest under the will, and not under the particular gift which is here called "devise." Now, I think it right to say, that I cannot conceive that any inaccuracy of expression in the word "devise" should ever be used to signify the whole will. You never could use the language, even with the utmost latitude of inaccuracy, "the testator made his last devise and testament, and the executors proved his devise in the prerogative court;" but you may with a very common inaccuracy of expression by the term "devise" signify either the real or the personal estate. It is very common, although not very correct, to say, he "devised all the residue of his real and personal estate to trustees on trust," and so on. The more correct language would be to say, he "devised and bequeathed," that is, "devised the real" and "bequeathed the personal;" but still it appears to me that the meaning of this clause in the act as to the use of the words "such devise" is, that the parent must take an interest in the dividends, the particular gift, devise, or bequest, which is that gift or bequest which contains the provision for the accumulation. Because, if it were not so, a man might say, "I give my silver watch to A. B.

and then I give all my real and personal estate to trustees to accumulate for a period of fifty years, if A. B. shall so long live;" and then give it all to the children of the person to whom he gave the silver watch. It is called by counsel in arguing the case on the appeal from *Shaw v. Rhodes*, a fraud on the act of parliament to put such an interpretation on it. But there is also an observation by Lord Justice Knight Bruce, in the case of *Morgan v. Morgan*, in which he observes on this case—he does not speak of it very strongly, but he observes—in that case there was a gift of specific chattels to a Mrs. Gyles, and then after her death there was a direction to accumulate for the benefit of her two daughters Mary and Charlotte. Vice Chancellor Knight Bruce expressed clearly an intimation of his opinion, that the mere gift of a personal chattel will not do, for he observes they are only specific bequests that are given to Mrs. Giles, and the bequest which contains the direction to accumulate, is the bequest of the whole residuary estate. It is unnecessary to decide that second point, if I am right on the first point, that these are not portions within the 2nd section.

Being of this opinion, I must direct that from the expiration of the twenty-one years, I think there should be a declaration,—for I see no harm in a declaration on petition in such a case—that from the expiration of the twenty-one years from the death of the testator, the provision for accumulation as to the personal estate—we have nothing to do with the real—is void. And then comes the question, to whom is it to go? It was contended that it should go to the heir-at-law of the testator, by reason of the direction to lay it out in real estate; but it must be remembered that the heir-at-law can take nothing as heir but what was the testator's own real estate. No direction of the will merely to lay out the testator's personal estate in realty, will make that the testator's realty. He may give and devise it as if it had been his own, which would give it to his heir-at-law; but in the absence of any such particular direction, what was his personal estate must go to his legal personal representative, if undisposed of by will. I am of opinion, there-

fore, that the legal personal representative of the testator is entitled to the benefit, both of the income of the accumulated fund up to that time, and of the income of the personal estate itself from the expiration of the twenty-one years, up to the time when Mrs. Stains's death would put an end to the period for accumulating. Mrs. Stains is still living, and it appears by the Master's report that the testator left one brother only, James Stains, who was sole next-of-kin and heir-at-law, and the present petitioners are the legal personal representatives of that James Stains. Therefore, the petitioners will be entitled to the prayer of the petition. I think that the petition prays that the costs of all parties should come out of the fund, and if it did not pray that, it would be the right thing. Here it must come out of that portion of the fund which is left undisposed of. If there should be any inaccuracy it must be set right; but, in substance, the costs of all parties are to come out of that portion which I determine to be undisposed of, and subject to that, it would go to the legal personal representative of James Stains, who was the sole next-of-kin of the testator at his death.

PARKER, V.C. }
1851. } BURBIDGE v. COTTON.
Nov. 10, 11, 19. }

Friendly Societies—Joint-Stock Companies Registration Act—Usury.

In 1845 a society, called the *Frugal Investment Society*, was established, and a book of rules was framed and approved of by the barrister appointed under the *Friendly Societies Act*. By these rules it was declared that the society should last for one hundred months; that every member should pay 1*l.* a month in respect of each share held by him; that members might be paid their shares in advance upon the terms of paying 8*s.* a month by way of interest in respect of each share so anticipated, in addition to the subscription, and giving security for such payments. All monies which should be paid to the society, exclusively of the subscriptions, were to be divided among the members every year. The society consisted of 180 members. A. took some shares in the society, and re-

ceived the amount of them in advance, and made a mortgage of real estate to the trustees of the society, for the purpose of securing the sums payable by him under the rules. A. paid sums to the society, to an amount, however, less than the sums so payable. He afterwards filed a bill against the trustees, praying that, upon accounting for the sums advanced to him and interest, the difference, if any, between this amount and the sums paid by him might be repaid to him by the trustees, and that the mortgaged property might be reconveyed to him:—Held, that A. had, on this bill, no right to relief.

The above-mentioned loans made to A, under the rules of the society, were not usurious.

Whether the society came within the *Friendly Societies Act*, or whether it was an illegal one—quære.

In 1845 a society, called the *Frugal Investment Society*, was established. A book of the rules of the society was prepared. By the first rule it was declared that the objects of the society were to accumulate and employ the savings of its members, and therewith to assist those of them who might need immediate pecuniary advances, either to carry on their pursuits or to promote any other laudable and legal purpose. The other rules material to the questions argued in this case were as follows:—The first meeting was to be held in September 1845, and meetings were to be held once in every succeeding month. Every member was to commence at the first meeting to pay his subscription money of 1*l.* per share for each share he might hold, and was afterwards to pay the same amount of subscription money at every succeeding subscription meeting for a period of eight years and four months, by which time it was estimated that 100*l.* would have been subscribed upon each share. Every member neglecting to pay his subscription was to be subject to certain specified fines. Those persons who might join the association after the first meeting should subscribe for an additional number of shares, or should purchase forfeited shares, and should pay the full amount of the subscription for such shares from the commencement of the association, together with such further sum as the directors,

from a calculation of the current year's profits, should consider reasonable. The funds of the association were to be divided into two portions, to be respectively called "the subscription fund" and "the dividend fund." The "subscription fund" was to consist of all monies paid as subscriptions upon the shares, and the "dividend fund" of all monies arising from fees, fines, forfeitures, premiums, and all other receipts than those for subscriptions. The "dividend fund" was to be applied, first, in paying the expenses of the association, and the surplus was then to be divided among all the members, whether borrowing members or not, and was to be divided between them as soon as convenient after the annual general meeting. The members, who should have the amount of their shares at once advanced to them, were to give security to the association for all payments to become due on the advance. The premiums agreed to be given by any member wishing to anticipate his share were to be paid by him in equal monthly payments during all the remaining period of the existence of the association. Each member who should anticipate his shares should, after the receipt thereof, pay the sum of 8s. per month, as interest for each share, and should continue to pay the same interest, during the continuance of the association, in addition to his periodical subscriptions. The interest of 8s. per month upon each share advanced was to be designated "redemption money." The shares in the association were not to exceed two thousand in number, and the duration of the association was limited to the period of eight years and four months, when the property of the association was to be divided among its members.

The book of rules was submitted to Mr. Tidd Pratt, the barrister appointed under the Friendly Societies Act, 4 & 5 Will. 4. c. 40, with all the formalities required by section 4. of that act, and approved of by him.

In February 1846 Mr. Burbidge became a member of the society, and took five shares, three of them at a premium of 71*l.* and the other two at a premium of 73*l.*, and received in advance the sum of 400*l.* in respect of four of the shares. In April 1846 Mr. Burbidge mortgaged to the trus-

tees of the society some leasehold property and policies of assurance, for the purpose of securing, first, the sum of 286*l.*, being the three premiums of 71*l.* and one premium of 73*l.*; secondly, the sum of 368*l.* in respect of the four shares (these two sums to be paid by ninety-two monthly instalments); and thirdly, 32*s.* a month for ninety-two months in respect of the "redemption money" of the four shares. In July 1846 Mr. Burbidge received a further sum of 100*l.* in respect of the fifth share, and made a further charge on the mortgaged property for securing the payment of the premium of 73*l.* and the sum of 89*l.* in respect of the share (the payments of these sums to be made by eighty-nine monthly instalments), and 8*s.* per month for ninety-two months in respect of "redemption money" on the share. The total amount so secured to be paid was 998*l.* 16*s.*

Mr. Burbidge made some payments in respect of the sums due from him, and received some sums out of the "dividend fund," and died in June 1848, leaving Mrs. Burbidge, the plaintiff in this suit, his sole executrix.

The trustees of the society, after the death of Mr. Burbidge, realized from the mortgaged property a considerable sum of money, but not sufficient to answer the whole amount secured by the deeds, and claimed from Mrs. Burbidge, as executrix, a balance of 153*l.*

Mrs. Burbidge then filed a bill against the trustees, in which she prayed for an account of the advances made to Mr. Burbidge and of the sums received by the trustees; and, offering to pay the sums advanced, and interest at 5*l.* per cent. from the time of the advances, claimed to be repaid the difference between such receipts and advances, and interest, and a reconveyance of the mortgaged leasehold property.

The number of the members of the society was 180.

By section 2. of the Friendly Societies Act, 4 & 5 Will. 4. c. 40, it is enacted that it shall be lawful for any number of persons to form themselves into a society under the provisions of the said recited act (10 Geo. 4. c. 56.), for the mutual relief and maintenance of all and every the members thereof, their wives, children, relations or nominees, in sickness, infancy,

advanced age, widowhood, or any other natural state or contingency, whereof the occurrence is susceptible of calculation by way of average, or for any other purpose which is not illegal.

Mr. Russell and Mr. Southgate, for the plaintiff.

Mr. Bacon, Mr. Malins, and Mr. H. Prendergast, for the defendants, objected that the members of the society ought to have been made parties to the suit.

PARKER, V.C. said that he would hear the case before giving any opinion on the question of parties.

Mr. Russell and Mr. Southgate, for the bill, then contended, first, that the contract of *Mr. Burbidge* with the trustees was usurious; secondly, that it was a colourable evasion of the usury laws; thirdly, that *Mr. Burbidge* had never properly become a member; fourthly, that the society did not come within the provisions of the Friendly Societies Act, the objects not being comprised in section 2. of the 4 & 5 Will. 4. c. 40; fifthly, that, if it was not a friendly society, it was a joint-stock company, and, as there were 180 members, it ought to have been registered under the Joint-Stock Companies Registration Act (7 & 8 Vict. c. 110). They also referred to the following cases on building societies.

Dobinson v. Hawks, 16 Sim. 407.

Mosley v. Baker, 6 Hare, 87; s. c. 1 Hall & Twells, 301; 18 Law J. Rep. (n.s.) Chanc. 457.

The Queen v. Phillips, 8 Q.B. Rep. 745; s. c. 17 Law J. Rep. (n.s.) M.C. 83.

Parsons v. Spooner, 15 Law J. Rep. (n.s.) Chanc. 155.

Mr. Bacon, Mr. Malins and Mr. H. Prendergast, for the trustees, contended that the contract was not usurious—*Silver v. Barnes* (1), the authority of which case had been subsequently recognized by Parke, B. in *Cutbill v. Kingdom* (2). The expression used in p. 504 of the report is

(1) 6 Bing. N.C. 180; s. c. 9 Law J. Rep. (n.s.) C.P. 118.

(2) 7 Exch. Rep. 494; s. c. 17 Law J. Rep. (n.s.) Exch. 177.

as follows:—"There is no usury in benefit societies lending to their members money at more than 5*l.* per cent."

PARKER, V.C.—The case of *Silver v. Barnes* is a direct authority that an advance out of the funds of an association of this kind, made pursuant to its rules to one of its members, having, in common with other members, an interest in the fund out of which the advance was made, and in the money to be repaid by him, is not a loan of money, but a dealing with the partnership fund, and is not usurious. I am not aware that the authority of that case has ever been doubted. It has been approved of by Parke, B. in *Cutbill v. Kingdom*, and I consider that a decision of a Court of law on such a subject is binding on this Court. The plaintiff next contended, that the transaction, if not actually usurious, was a mere shift and pretence to make a loan to Burbidge at usurious interest under colour of his being a member; that he was not *bond fide* a member when the transaction took place; and that the association itself consisted of a small number of persons of considerable property, who got it up and joined it in order to be enabled to lend their money at usurious interest to persons in needy circumstances. Now, Burbidge became a member on the 10th of February 1846, and thenceforth became entitled to all the benefits, and subject to all the liabilities of a member. At the same meeting he became entitled to anticipate his shares, and engaged to pay the premiums named, but the transaction was not completed till some months afterwards. He, doubtless, became a member for no other purpose than to avail himself of the rules entitling members to an advance in anticipation of their shares; but, if the object of these rules was lawful, I see no reason why he should not do it. The only question appears to be whether he really had become a member, and this I think is clear. It appears to me, therefore, that the plaintiff is not entitled to relief on the ground of usury.

The plaintiff then contended that the society was illegal, and that, on that ground, she was entitled to relief, independently of anything usurious in the contract. The plaintiff contended that it was not a friendly

society, and that, to make it a friendly society, its objects must be among those contemplated by the act of 4 & 5 Will. 4. c. 40. s. 2, and relied on this enactment as establishing that the association was not a friendly society. She then contended that, if it were not a friendly society, it was a joint-stock company within the Joint-Stock Companies Registration Act (7 & 8 Vict. c. 110), and that, as it was not registered pursuant to that act, it could not lawfully carry on business or enter into any valid contract. I think that this part of the plaintiff's case would have required great attention if the question of the legality or illegality of the society could be determined in this suit; but I do not think that this arises, or that the Court can properly express an opinion upon it. On the supposition that the association is illegal, it may reasonably be asked how this could entitle the plaintiff to the relief she asks? Her case is this,—the testator with a number of other persons became members of a society which was unlawful, and therefore his contracts were voidable; but if so, every other member must have a similar right, and it cannot be considered in justice that one member should have an advantage over the others by retiring from the society on the terms of being restored to his original position. The plaintiff has come into the Court for relief on the ground that the society was unlawful, and she is therefore bound so to frame her suit as to enable the Court, if it interfered at all, to wind up the association in a manner consistent with the rights of all the members. This bill has no such object, and, as regards that part of the case, I think that it cannot be sustained. The bill must be dismissed, with costs.

PARKER, V.C. }
Nov. 17, 25. } BLIGH v. TREDGETT.

Next Friend—Married Woman—Costs.

The solicitor for a married woman, the plaintiff in a suit, placed the name of A. on the record as her next friend. On a motion to dismiss the bill for want of prosecution, it was stated by A. that his name had

been put on the record without his knowledge or sanction, that he had no acquaintance with the plaintiff or any of the parties to the suit, that he had no means of hearing of the suit, and that he had never heard of it until he was served with the notice of motion:—Held, that A. was nevertheless liable to pay to the defendants all the costs of the suit.

A next friend of a married woman placed on the record after the institution of the suit is liable, not only for the costs of the suit incurred after his name was so placed, but to all the costs of the suit.

In May 1849 a bill was filed by Mrs. Bligh, a married woman, by Mr. Warden, as her next friend, against the defendant in this case. In the same month Mr. Warden died. In July 1850 an order of course was obtained that the bill should be amended by the insertion of the name of Mr. J. F. Baker as next friend.

In October 1851 a notice of motion was served on the London agent of the solicitor acting for the plaintiff, for the dismissal of the bill for want of prosecution, and the payment of the costs by Mr. Baker; and on the 3rd of November an order was made accordingly.

This was a motion, by Mr. Baker, that the bill might be dismissed, with costs to be paid by the solicitor for the plaintiff, and that such part of the order as directed that he, Baker, should pay the costs, should be discharged.

Mr. Baker's case, as stated in the affidavit, was as follows:—The solicitor for Mrs. Bligh was a solicitor practising at Dover. Mr. Baker was his clerk for a few months only in the year 1849, and all connexion between them terminated in August 1849. Mr. Baker had not been aware of the existence of the suit in any way, and his name had been inserted as next friend of the plaintiff without his knowledge, privity, or concurrence. He never heard of the suit, or that his name had been inserted until the 30th of October 1851, when he received from the London agent of the solicitor the notice of the motion for the dismissal of the bill, and he had been unable to give any instructions as to appearing on the motion which had been made on the 3rd of November. The solicitor had absconded.

Mr. Karslake, for the motion, contended, first, that *Mr. Baker*, not having consented in any way that his name should be used as next friend of the plaintiff, was not liable to pay the costs; and, secondly, that, if there was any such liability, it ought to be confined to the period during which his name was on the record.

Mr. C. Hall and *Mr. Bates*, for the defendants.

The following cases were cited:—*Tarback v. Woodcock* (1), *Hood v. Phillips* (2), *Wade v. Stanley* (3), which were cases in which plaintiffs, who had given no authority to solicitors, were held liable to pay the costs of the suits; *Tabbemor v. Tabbemor* (4), which was a case in which a solicitor was held liable to pay the costs of a plaintiff, who had not given any authority, and *Ward v. Ward* (5), a case in which a solicitor was held liable to pay the costs of the next friend of an infant who had given no authority.

PARKER, V.C.—The practice of this Court is quite clear, and there is no reason why *Mr. Baker* should be relieved from his liability as between him and the defendants. The cases which have been referred to go to this length—that, although the solicitor had improperly used the name of the plaintiff, and although he was liable to indemnify the person whose name he had made use of, yet that circumstance did not interfere with the right of the defendants to look to the plaintiff for payment of costs. In the case of *Dundas v. Dutens* (6) Sir Thomas Dundas made an affidavit that his name had been inserted without his authority. The Lord Chancellor (Lord Thurlow) said “If a man will do such a thing as this in a court of justice, and bring a person’s name on the record without any authority, and if it is attended, as in this case, with a combination to bring him and Callender forward, in order to cheat the children, I ought not to permit the children or the estate or any one to receive

any damage.—*Mr. Mansfield*, for Sir Thomas Dundas, insisted that, as his name was used without his authority, he was not to pay defendants’ costs, but his name ought to be struck out, which he said would be immediately done at law, and compared it to the case of forging a name.—Lord Chancellor—I doubt whether it would be so at law, and whether I can deliver him from the costs to be taxed against the plaintiffs. I cannot deprive defendants of their right; they are entitled to this judgment. The defendants must have their remedy against the plaintiffs, and this plaintiff against him who pretended to be his agent. If a man’s name stands upon the record down to the hearing, which I can hardly conceive without his knowing it, he must pay costs if the bill is dismissed with costs. The case of forging a name is not parallel; it is different from that of a name standing upon the record. At law there would be a remedy upon the record for the costs, and the Court would act according to their discretion.” Under these circumstances, I am of opinion that I cannot relieve the next friend from the liability which the order imposed on him to pay the costs.

The other point made is that, as *Mr. Baker* was appointed next friend at a period subsequent to the institution of the suit, he was not liable for the costs incurred before the time that his name was placed on the record. There is, however, no authority to shew that it is the practice of the Court to sever such costs, and my notion is, that a party, on becoming next friend, becomes also liable to pay all the costs which had been incurred previously. I cannot, therefore, grant him any relief in this respect, and I am afraid that the next friend must pay the additional costs of bringing these defendants on this motion before the Court. The solicitor is undoubtedly liable, but as he has gone to America, an order for him to pay would be useless. The motion must be refused, with costs.

On a subsequent day *Mr. Karslake* mentioned the motion again to the Court, with regard to the limitation of the liability of the next friend to the time during which he was next friend; and cited—

(1) 6 Beav. 581.

(2) Ibid. 176.

(3) 1 J. & W. 676.

(4) 2 Keen, 679; a.c. 6 Law J. Rep. (N.S.) Chanc. 19.

(5) 6 Beav. 251; a. c. 12 Law J. Rep. (N.S.) Chanc. 332.

(6) 1 Vea. jun. 200.

Turner v. Turner, 2 Str. 708.
Lady Lawley v. Halpen, -Bunb. 310.
Morgan v. Crompton, Ibid. 332.
Davenport v. Davenport, 1 Sim. & S. 101.
Melling v. Melling, 4 Madd. 261.
Harrison v. Harrison, 5 Beav. 130 ;
 and a note to
Howard v. Prince, 14 Beav. 28.

PARKER, V.C. said that there must be a settled rule of practice in these cases. He had always been of opinion that the Court, on a change of next friends, did not apportion the costs between them. He said that it was analogous to the case where a plaintiff died, and his executors revived the suit, and that there they were responsible for all the costs. The same principle must apply here.

His Honour directed the Registrar, Mr. Munro, to look into the practice; and said that, if a different course had been adopted, the case might be mentioned again.

The case was not mentioned again.

M.R. }
 Jan. 13. } GORDON v. DALZELL.

Solicitor and Client—Profits of Business—Right of Participation—Contract—Unqualified Person—Statute 22 Geo. 2. c. 46. s. 11.—Agent.

J. F., a writer to the Signet in Edinburgh, employed *P.*, a solicitor, as his agent in London, and introduced to him business of some importance, which a client of his had in England. *P.*, by letter, promised to allow *J. F.* one half of the profits of all such business, so long as he should retain the same, directly or indirectly. Upon the discovery of this by the client, who had obtained an order for the taxation of *P.*'s bills of costs, he presented a petition, asking that the taxing Master might disallow all such share of the charges as *P.* had promised to pay to *J. F.* :—Held, that if the agreement was illegal, it could not be enforced by *J. F.* ; that the 22 Geo. 2. c. 46. s. 11. being a penal act must be construed strictly; that the business having been done, the soli-

citor was entitled to payment, and that the client could not avail himself of the letters to refuse payment, or insist upon deducting from the bills of costs what *P.* had promised to allow to *J. F.*, and that the production of the documents, relating to the bills of costs, ought to be left to the discretion of the taxing Master; and the petition was dismissed, with costs.

On the 11th of July 1837 John Gordon obtained an order to tax the bills of fees and disbursements of George Woolley Poole, as his attorney or solicitor, in this and various other causes, suits, and matters.

This petition asked that the taxing Master might, in completing the taxation, have regard to an agreement evidenced by documents of the 27th of July 1828 and the 27th of August 1829, and that all charges for attendances on, and conferences with, James John Frazer, whether expressed in the bills of costs to have been had with him or otherwise, might be disallowed, and that such part of the profits as it was stipulated that *J. J. Frazer* should receive, might be deducted from the amount to be allowed to *G. W. Poole* on such taxation, and that he might be allowed such portion of profit only as he would have been entitled to receive for his own use had *J. J. Frazer* been in lawful partnership with him upon the terms of an equal division of profits. It also asked for the production of papers relating to the bills of costs, and the reference, and to the agreement.

It appeared that *J. J. Frazer*, a writer to the Signet, was previous to 1825 employed by *J. Gordon* as his professional agent in Scotland. Mr. Frazer at that time employed Mr. Poole as his agent in England, and in 1825 he employed him to act as solicitor in any causes, suits, or matters in which *J. Gordon* was engaged in England.

J. Gordon subsequently sanctioned Mr. Poole's acting as his solicitor, but he was not aware that Frazer was either directly or indirectly concerned or interested in the practice or profits of *G. W. Poole* as an attorney and solicitor, or otherwise, except that Poole was the agent of *J. J. Frazer* in appeals from the Court of Scotland to the House of Lords, and as such

might be entitled, according to practice, to some division of the profits of such business.

On the 22nd of July 1829, John Gordon ceased to employ J. J. Frazer, except in matters connected with the defendant, Robert Dalzell, but G. W. Poole continued to act as the solicitor of J. Gordon, and correspond with Frazer as though he was the agent of J. Gordon, until about March 1830.

About 1832, a litigation in Scotland between J. Gordon and J. J. Frazer relative to the accounts and transactions was referred to judicial arbiters, and at that time J. Gordon suspected that J. J. Frazer had secured to himself a remuneration out of the profits of the bills of costs in respect of all business done in England; but, in answer to an inquiry by Mr. James Bennett, who had acted as agent for J. Gordon, Mr. Poole stated that Mr. Frazer never had any connexion in business with him in any other respect than as his agent. That in matters of appeal to the House of Lords, in which the fees were ample, he had sometimes made him small allowances; that it was the practice with nine-tenths of the agents so to do, and was done between English agents, and that it was recognized by the Courts, but that Mr. Frazer, who was neither an attorney nor solicitor of any of the courts in England, was not, and never was, a partner in his business.

While before the judicial arbiters in Scotland, objections were made to a claim for large sums of money paid by Mr. Frazer to G. W. Poole on account of his bills of costs against John Gordon; and on the 20th of March 1833 Mr. Poole wrote to the judicial arbiter:—"My employment in the subject-matter of the bills was that of an independent solicitor, retained unconditionally, and without reservation of any latent controul or indirect pecuniary participation in the profits of my professional labours by any one. After Mr. Frazer ceased to act as J. Gordon's agent, I had no communication with him relative to J. Gordon's business."

In consequence of these and other letters of Mr. Poole to the same effect, J. Gordon abandoned the objections before the judi-

cial arbiters, and did not assert them in the petitions upon which the order for taxation, &c. was made.

In 1837, J. Gordon ceased to employ Mr. Poole as his solicitor, and in June 1839 J. J. Frazer died, and in 1843 an inspection of the following letters from Mr. Poole to Mr. Frazer was obtained:—

"London, 27th of July, 1828.

"Sir,—In consideration of your having obtained for me the business of the Johnstone family (which was business in which J. Gordon and Masterton Ure were trustees) I oblige myself to pay you one-half of the free profits arising therefrom, and that so long as I shall retain said business, either directly or indirectly.—I am, Sir, your obedient servant, G. W. Poole."

And on the back of the same letter was written as follows:—

"Edinburgh, 27th of August, 1829.

"Sir,—The within written contract of copartnery I agree shall refer to all business in which I am at present, or shall in future be, either directly or indirectly, employed by you, and through your means and interest, and I oblige myself to pay to you the one-half of the free profits thereof, so long as I shall retain the same, either directly or indirectly.—I am, Sir, your obedient servant, G. W. Poole."

In 1851, under a commission to examine witnesses at Edinburgh in a suit between J. Gordon and G. W. Poole, upon an inspection of other documents deposited under processes or actions depending in the Scotch courts between J. Gordon and G. W. Poole, other letters and also accounts were discovered, which afforded evidence that the agreement between G. W. Poole and J. J. Frazer had been concluded and acted upon, and that payments had been made to Frazer in respect of them.

Upon obtaining this evidence, J. Gordon presented this petition, and one question raised was, whether any agreement could be made to allow a person not qualified to practice in England as an attorney or solicitor any part of the profits to arise from the business done.

Mr. Roupell, Mr. Willcock, and Mr. Horsey, in support of the application.—The letters which had been discovered

afforded clear evidence of an agreement between Messrs. Poole and Frazer that the latter, who was not qualified to practise as a solicitor, was to participate in the profits of a solicitor's business, and that, in the character of a partner: such an agreement was contrary to the policy of the law, and also of the provisions of the 22 Geo. 2. c. 46. s. 11. (1). It would also have the effect of multiplying the charges upon the client, as it would operate as an inducement to increase the number of attendances upon Mr. Frazer, as well as the number of letters between them; the policy of the law was altogether defeated, as the party trusted to execute a particular business might not be the party who did it, and it might be left to some clerk, or other unqualified person, who had no right to participate in the profits, and even the attention of the principal might be taken away by a diminution of his profits; the agreement, therefore, was illegal: and as Frazer was the agent of J. Gordon, and had no right

to make a contract for his own pecuniary advantage, especially at the expense of his principal, it must be considered that it was an agreement made for the benefit of J. Gordon, and that Mr. Poole ought to be disallowed so much of the charges as he had agreed to allow to Mr. Frazer—*Coates v. Hawkyard* (2), *Sumner v. Ridgway* (3), *Parker v. Harcourt* (4), *Wyburd v. Stanton* (5).

Mr. R. Palmer, for Mr. Poole, was not heard.

The MASTER OF THE ROLLS.—This is an application to disallow, on the taxation of a bill of costs between Mr. Poole and John Gordon, all the charges which, under an agreement, Mr. Frazer was to have the benefit of. In the year 1829, an agreement was entered into between Mr. Frazer and Mr. Poole, by which Mr. Poole was to pay to Mr. Frazer one-half of such profits as he should make from the business which John Gordon should give to him. In 1829 Mr. Frazer ceased to be the agent of John Gordon, who, however, employed Mr. Poole as his solicitor down to the year 1837, and it is in respect of any share which Mr. Frazer might have been entitled to, or might have received, under that agreement, that Mr. Gordon contends that Mr. Poole is not entitled to receive any allowance on taxation of his bill. Either the agreement made between Mr. Frazer and Mr. Poole was legal or it was illegal. If it was legal, no question can arise upon the subject, because Mr. Frazer undoubtedly did not contract on the part of his principal, but for himself, and Mr. Gordon cannot be entitled to any benefit from a legal agreement to which he is no party. But, supposing it to be an illegal contract, the argument that Mr. Gordon was defrauded cannot be sustained, because Mr. Poole could charge no more than he was entitled to, and the items were subject to the moderation of the taxing Master, and Mr. Gordon would only have to pay what, assuming there was no contract between them, the taxing Master should find to be due.

(1) 22 Geo. 2. c. 46. s. 11. "Whereas divers persons who are not examined, sworn, or admitted to act as attorneys or solicitors in any court of law or equity, do, in conjunction with, or by the assistance or connivance of certain sworn attorneys and solicitors, and by various subtle contrivances, intrude themselves into, and act and practise in the office and business of attorneys and solicitors to the great prejudice and loss of many of his Majesty's subjects, and the scandal of the profession of the law: Be it therefore enacted, that from and after the 29th day of September, which shall be in the year of our Lord 1749, if any sworn attorney or solicitor shall act as agent for any person or persons not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be in any ways made use of upon the account, or for the profit of any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act or practise in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to the Court from whence any such process did issue, and proof made thereof upon oath to the satisfaction of the Court, that such sworn attorney or solicitor hath offended therein as aforesaid, then, and in such case, every such attorney or solicitor so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor, and in that case and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said Court to commit such unqualified person so acting or practising as aforesaid to the prison of the said Court for any time not exceeding one year."

(2) 1 Russ. & Myl. 746.

(3) Ibid. 748.

(4) 5 Esp. 249.

(5) 4 Ibid. 179.

The 22 Geo. 2. c. 46. s. 11. was then referred to. This is a highly penal statute, which must be construed strictly. Mr. Poole did not act as the agent for any person not duly qualified; he was the solicitor of Mr. Gordon, and was authorized to act for him. Neither did Mr. Poole permit or suffer his name to be used upon the account or for the profit of any unqualified person, or send any process to such person to enable him to act or practise as an attorney or solicitor knowing him not to be duly qualified: had he done this, and had complaint been made, he would have been liable to be struck off the rolls. The meaning of the act was that if a solicitor does not act himself, but allowed a person not duly qualified to act as solicitor, then he was liable to be struck off the rolls; and had Mr. Poole lent his name to Mr. Frazer, and allowed him to act as an attorney or solicitor in his name, he would have been liable to the penalty under the 22 Geo. 2. c. 46. s. 11; but there was nothing in this clause which said that an attorney acting as such and being responsible for his business, and liable in case of misconduct in that business, may not give a charge on the profits, or even a proportion of the profits to another person. I am very far from saying that the contract with Mr. Frazer was legal, but assuming that this was an illegal contract and came within the clause, what would be the penalty? Is the client to get the benefit of it? Is the client to get the benefit against the person so acting, that he is not to pay his bill of costs? The penalty is, that the solicitor shall be struck off the rolls, not that he shall lose the benefit of his profits. Upon what ground or consideration, or upon what legal principle or authority is it assumed that this case is obnoxious to this clause, and that the client is to have the benefit of it? The cases of *Sumner v. Ridgway* and *Coates v. Hawkyard* do not apply. In order to compel a man acting as a solicitor to take out his certificate he was, if he acted without it, deprived of his costs; and had Mr. Poole not taken out his certificate he could not, as against Mr. Gordon, have charged more than the money out of pocket. But, assuming the contract to be illegal, what is there to shew that Mr. Gordon is entitled to the benefit of it?

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It may be illegal upon two grounds, upon the policy of the clause in the 22 Geo. 2. c. 46. If so, the penalty is, that the solicitor shall be struck off the rolls. It may be illegal upon the general policy of the law; the effect, then, would be simply this, that Mr. Frazer could not invoke the law against Mr. Poole, or obtain payment of the amount which the contract gives. But it would be a strange law if Mr. Gordon could get the benefit of that contract, when the parties to it could not get the benefit of it. And in this petition Mr. Gordon seeks to get the benefit of the contract between Mr. Frazer and Mr. Poole, the latter being his solicitor, and the former the agent of that solicitor. If the contract had been entered into by Mr. Gordon he might, undoubtedly, have got the benefit of it. But this contract is not of that description; and I do not mean by the slightest observation to say that it is a contract which can be supported or made a legal contract, but it is not on that ground that Mr. Gordon is entitled to the benefit of it. Suppose a solicitor, in reduced circumstances, made an arrangement with his creditors by which he said, "I will pay a portion of my profits to you, if you will allow me to carry on my business, and will not make the matter public and not bring actions against me." Could any one pretend that the effect of that would be, that all the clients of that attorney would be entitled to deduct from their bills of costs the proportion which he undertook to pay to his various creditors? It might be said that the contract made with the creditors was not a legal one, and that the only way to make it legal would be to make it a fixed sum; but it would be a strange doctrine to say, that all the clients would be entitled to deduct from their bills of costs the proportion which he paid to his creditors. This petition cannot, in my opinion, be supported, and Mr. Gordon cannot get the benefit of it by any proceeding of this description. Whether he can by any other means I do not say, but certainly I do not encourage any further attempt. It is then said, that there are no documents shewing the nature of the business done; but no petition is required for that, as it rests in the discretion of the taxing Master, who has full power to order

the production of such documents as he shall deem necessary. My opinion, therefore, is, that the petition must be dismissed, with costs.

PARKER, V.C. }
Dec. 3, 8. } JOHNSON v. BALL.

Will—Memorandum—Trust.

A testator, by his will, bequeathed a policy of assurance on his own life to A. and B. upon the uses of a letter signed by them and himself. At the date of the will there was no such letter. Subsequently the testator addressed a note to his executors and signed a memorandum, by which he stated his wishes as to the disposition of the monies to be received in respect of the policy. The testator kept the policy in his possession until his death:—Held, that no trust was created by the memorandum, and that the policy formed a part of the residue.

G. R. Lamb, being entitled to a policy of assurance on his own life, made his will, dated the 21st of February 1844, and thereby bequeathed the policy to J. Ball and T. Manners, in the following terms: "To hold the same upon the uses appointed by a letter signed by them and myself;" and appointed J. Blackett, J. Hadland and W. Bell his executors.

At the date of the will no letter or other document relating to the policy was in existence.

On the 4th of August 1845 the testator signed a paper, which was in the following terms:—

"To J. Blackett, J. Hadland and W. Bell, Esqs.

"My Dear Sirs,—I made my last will and testament in 1844, wherein, amongst other things, I left my policy of life assurance, being No. 25,098, unto John Ball, of &c., and Thomas Manners, of &c., to be delivered up to them for certain purposes which they have agreed to carry out.

"Your obedient servant,

"G. R. Lamb."

Mr. Ball having then requested to know what the trusts of the policy were to be, the testator dictated the following letter to him, and afterwards signed it.

"I wish my policy of insurance left to

John Ball, Thomas Manners, and Henry Ball, to be divided as follows: I give to Mrs. Catherine Johnson the interest accruing from the sum total during the term of her natural life, and, on her death, I will that it be divided as follows"—[The letter then proceeded to distribute the amount among the five children therein named of Mrs. Johnson].

"Signed the 4th of August 1845, G. R. Lamb, 75, Queen Street, Cheapside."

The testator kept the policy in his possession until his death, and died in June 1850.

The bill in this case was filed by Catherine Johnson, who claimed a benefit under the letter of the 4th of August 1845, against the executors and other parties interested, for the purpose of having a declaration as to the rights of the parties to the policy.

Mr. Bacon and Mr. Speed, for the plaintiff, contended that by the will and the letter a valid trust had been declared, and cited—

Jones v. Nabbs, Gilb. Eq. Rep. 146.

Crook v. Brooking, 2 Vern. 50.

Pring v. Pring, 2 Ibid. 99.

Metham v. the Duke of Devonshire, 1 P.

Wms. 529.

The Earl of Inchiquin v. French, 1 Cox, 1.

Boson v. Statham, 1 Eden, 508.

Smith v. Attersoll, 1 Russ. 266.

Mr. Daniel, for the executors, contended that a valid trust had not been declared.

Mr. Rogers, Mr. Shebbeare and Mr. Bates, for other parties.

Mr. Bacon replied.

PARKER, V.C.—The testator gave the policy of assurance in question to Ball and Manners, to hold the same upon the uses appointed by a letter signed by them and himself. It was not suggested that any such letter existed at the time when the will was made. The document which was relied on by the plaintiff was signed by the testator some time after. Even supposing that the will referred to a letter to be afterwards signed, it would be impossible to give effect to any such letter as a declaration of trust. To do so would be to give effect, as a *codicil*, to a paper subsequent in date

to the will, and not properly attested. A testator cannot by will prospectively create for himself a power to dispose of property by an instrument not properly attested. The cases under the Statute of Frauds, *The Countess de Zichy Ferraris v. the Marquis of Hertford* (1) and *Briggs v. Penny* (2), are not applicable to the present case. It was argued that the policy was bequeathed to trustees, and that, if the trustees admitted the trust, the Court would execute it. The cases, however, in which the Court has established a trust on the admission or confession of the trustees are not applicable to the present case. The letter of the testator cannot operate as a gift or settlement by act *inter vivos*. It was merely in furtherance of a particular disposition; and if the will had been revoked, the letter must have dropped with it. No doubt the testator intended to make a provision for the plaintiff and her children; and it is with regret that the Court feels compelled to declare that the testator has failed in carrying that intention into effect. The executors, therefore, must hold the policy as part of the residue.

PARKER, V.C. }
Jan. 22. } PORTER v. WATTS.

Trustee—Discharge from Trusteeship—Costs.

A trustee desiring to be discharged from his trust, without any changes as to the position of the trust property, or the persons with whom he was associated, and seeking the aid of the Court for that purpose, will not be allowed any costs, but will not be compelled to pay any.

Mr. Filchett, being entitled to a mortgage debt charged on real estate belonging to Mr. Burrell, by a deed of settlement, dated in 1846, conveyed the debt and the mortgaged property to Mr. Porter and two other trustees, upon trust for himself (the settlor) for life, with remainder to the children of Mr. Burrell, the mortgagor. The settlement contained a power for the trus-

tees, with the consent of the settlor, during his life, and, after his death, at their discretion, to vary the securities.

In 1851 the settlor died.

This was a claim filed by Mr. Porter, the object of which was, that he might be discharged from the trust, and that a new trustee might be appointed in his place. In his affidavit in support of the claim, Mr. Porter stated that the security was scanty, and that the mortgagor had cut down timber.

Mr. Lewis, for the claim, cited *Greenwood v. Wakeford* (1), in which the Master of the Rolls said, "If the trustee finds the trust estate involved in intricate and complicated questions, which were not and could not have been in contemplation at the time when the trust was undertaken, he has, in consequence of that change of circumstances, a right to come to the Court to be relieved." As long as the settlor was alive, the trustees were free from liability as to keeping the security, as it could only be changed by his direction. Now, however, they may be liable if they do not actively interfere; and, considering the circumstances in which the property stands, the father being the mortgagor, and the children being entitled to the mortgage debt, there is a great difficulty in knowing how to act. There is a difficulty then from which the trustees ought to be released. The rule that a trustee retiring without a reason shall not have his costs is laid down in *Howard v. Rhodes* (2). This, however, is not the case here.

Mr. Chandless and *Mr. Briggs*, for the two other trustees, said they were willing to stay if Mr. Porter stayed, but that, if he retired, they wished to retire.

Mr. Prior, for the children of Mr. Burrell.

PARKER, V.C.—I think that the trustee has a right to his discharge. Here is a settlement in 1846, and nothing has since taken place either as to the position of the property, or the persons with whom Mr. Porter was associated. There is no change of circumstances. The trustee comes here

(1) 1 Beav. 576; a. c. 8 Law J. Rep. (N.S.) Chanc. 333.

(2) 1 Keen, 581; a. c. 6 Law J. Rep. (N.S.) Chanc. 196.

(1) 8 Curt. 468.

(2) 13 Jurist, 905.

for his own benefit. I will not make him pay any costs, but I will not allow him to receive any. The order will be to refer it to the Master to appoint new trustees. The costs of the two other trustees to be paid out of the estate. No order as to Mr. Porter's costs. Mr. Porter, however, it must be observed, will not cease to be a trustee until a new one is appointed in his place.

PARKER, V.C. *In the matter of THE DIRECT EXETER, PLYMOUTH AND DEVONPORT RAILWAY COMPANY, ex parte TANNER.*
Jan. 22, 23, 26.

Company—Winding-up Act—Contributory—Provisional Committee—Committee of Management.

A. was a member of the provisional committee of a projected railway company, and, as such, attended a meeting of the provisional committee, and concurred in the appointment of a number of gentlemen as a committee of management. This committee of management, immediately on their appointment, undertook the exclusive conduct of the affairs of the company, and gave orders to engineers to make surveys, &c., in the name of the company, and incurred considerable expenses in respect of the undertaking, but, after some time, abandoned the concern. The provisional committee, after such abandonment, held a meeting, at which, under the impression that they were personally liable, they came to certain resolutions as to contributions among themselves in respect to the expenses incurred. A. attended this meeting, and took an active part in carrying out the resolutions:—Held, that A. was not liable as a contributory.

The circumstances relating to the projection and abandonment of the above-mentioned company will be found in *Besley's case* (before Lord Cottenham), 2 Hall & Twells, 375; 2 Mac. & Gor. 176; s. c. 19 Law J. Rep. (N.S.) Chanc. 362; (before Lord Truro), 3 Mac. & Gor. 287; and *Roberts's case*, 2 Hall & Twells, 391; 2 Mac. & Gor. 192; s. c. 19 Law J. Rep. (N.S.) Chanc. 368.

Captain Tanner was a member of the provisional committee, and attended a meeting of that committee on the 7th of October, which was called for the purpose of appointing a committee of management, secretary, and officers, and concurred in a resolution that certain gentlemen who were named should be the committee of management.

Immediately after their appointment the committee of management took upon themselves the entire direction of the scheme, issued prospectuses, received applications for shares, employed engineers to make plans, surveys, &c. in the name of the company, and opened an account with a bank at Exeter in the name of the company.

The committee of management finding that it was impossible to carry out the project, prepared a report which is stated in the books of the provisional committee and referred to in the account of the meeting next mentioned.

On the 31st of December 1845 a meeting was called of the provisional committee. The account of this meeting was contained in the books of the provisional committee, and the entry was entitled, "At a meeting of the provisional committee held this 31st of December 1845." The entry then went on to state that, "at this meeting a report of the managing committee was read, which stated that the allottees had failed to pay their deposits, that debts had been contracted beyond the funds at the disposal of the committee, that the scheme was abandoned, that the opinion of counsel had been taken to the effect that the provisional committee were liable collectively and individually for all the debts of the company, and the allottees were liable to the committee for the amount of their deposits." The entry then further stated that the report was received, approved, and adopted, and that the meeting resolved—"That it appearing from counsel's opinion that the whole of the provisional committee were collectively and individually liable for the debts of the company, and the committee, having agreed to pay 3s. per share on 200 shares each, the provisional committee do pay the like amount per share on 100 shares each to meet the liabilities of the company; that a com-

mittee of four persons be appointed to co-operate with the managing committee to prepare the accounts for inspection at the next meeting."

Capt. Tanner attended this meeting and concurred in the resolution, and was appointed one of the four persons referred to in the resolution, which persons were called the "Finance committee," and took an active part in obtaining contributions and in endeavouring to wind up the affairs of the company.

The Master having placed Capt. Tanner's name on the list of contributories, this was a motion to exclude it from the list.

Mr. Malins and *Mr. Karlake*, for the motion.

Mr. Daniel and *Mr. Roxburgh*, for the official manager.

Mr. Malins replied.

The following cases were cited—

Besley's case, *Supra*.

Roberts's case, *Supra*.

Ex parte Cottle, 2 Hall & Twells, 382;
2 Mac. & Gor. 185; s. c. 19 Law J.
Rep. (N.S.) Chanc. 366; 2 House
of Lords Cas. 647.

Hole's case, 3 De Gex & Sm. 241.

Half's case, 3 Ibid. 214; s. c. 19 Law
J. Rep. (N.S.) Chanc. 386.

Carrick's case, 1 Sim. N.S. 505.

PARKER, V.C.—In support of this application, the object of which is to remove Capt. Tanner's name from the list of contributories, it is insisted that the question as to his liability is concluded by decisions already made in the matter of the company, and *Roberts's case* and *Besley's case* are especially relied on. In the course of the argument I stated that these decisions did not appear to me to be conclusive on the question now raised, the essential difference between the present case and all the others being, that Capt. Tanner was a party to the resolution of the 7th of October 1845, appointing the committee of management. This circumstance did not exist in the case of *Roberts*. It is true that *Roberts* was at the meeting, but he left it before the resolution was passed, and the Lords Commissioners expressly rest their judgment in the case on the circumstance that he

did not concur in the resolution. They say, in their judgment, "Now, here it appears that before any resolution was finally come to, Mr. Roberts had left the meeting, and so the resolutions passed certainly were not his acts. Indeed, if he had concurred, all that he would have concurred in would have been in appointing the persons named in that behalf to be the committee of management; and, as was pointed out in the judgment in the *Exchequer* (1), to which we have referred in the preceding case, it by no means necessarily follows from thence, that the parties appointing the committee of management gave them authority to make contracts. It is not, however, necessary to discuss this; for it is certain, on the evidence before us, that *Roberts* did not concur in the resolution by which the committee of management was appointed." In referring to *Besley's case* again, it appears that *Besley* had nothing to do with the meeting, and the Lord Chancellor rests his judgment on the fact that he did not attend this meeting or any meeting before the 31st of December 1845. This is repeatedly stated in his Lordship's judgment, especially where he says, in p. 306 of that report, "I cannot help thinking that the facts of the case were not accurately and correctly presented to the mind of Lord Cottenham. According to the report of his judgment it would seem as if it had been represented to him that Mr. *Besley* had attended meetings of the provisional committee before the provisional committee appointed the managing committee, which might have made, though I do not say that it would have made, some difference; and it might have been urged that, by appointing a managing committee to prosecute the scheme and incur all the expenses incidental to it, he became liable to contribute to the payment of such expenses. But this was not the fact: Mr. *Besley* never did attend any meeting of any committee till all the expenses had been incurred, and in the mean time he had desired his name to be withdrawn; which desire the committee expressed their intention to comply with."

(1) *Reynell v. Lewis* and *Wyld v. Hopkins*, 15 Mees. & W. 517; s. c. 16 Law J. Rep. (N.S.) Exch. 25.

The question before me is as to Capt. Tanner's liability to contribute to the expenses incurred by the committee of management, in whose appointment he must be taken to have concurred; and I consider that this question must depend entirely on the relation in which the committee of management stood to the provisional committee, or, at least, to those members of that committee who concurred in that appointment. If the committee of management is to be regarded as a sub-committee of the provisional committee, deriving authority from them and acting for them, the members of the provisional committee who appointed the committee of management may well be liable upon contracts of that committee, or to contribute towards expenses incurred by them; but the case would be very different if the committee of management is to be regarded as a body of persons acting in the formation of the projected company, for themselves, and independently of the provisional committee. This distinction is adverted to by the Court of Exchequer in *Reynell v. Lewis and Wyld v. Hopkins*. In one of these cases the defendant had allowed his name to be placed in a public prospectus as a member of the provisional committee; the same prospectus described other persons as the acting committee, and the Lord Chief Baron, in delivering the judgment of the Court, at page 530 (after speaking of the provisional committee-man making himself responsible for his own acts), says, "There are other cases in which the question does not assume so simple a form, and where there is evidence that the defendant has not only consented to be a provisional committee-man, but has authorized his name to be inserted in a prospectus, not generally, but a particular prospectus, in which, in some cases, certain persons are described as the acting committee, in others, solicitors are named, or engineers, or a secretary. If such prospectus has been so publicly circulated with the defendant's consent that the jury would presume that the plaintiff knew of it, or if the plaintiff has had it shewn to him at or before the time of making the contract, and has in either case acted upon it in making the contract, the question is, what

inference ought a reasonable man to draw from the contents of that paper? This must, of course, depend upon the terms of each particular prospectus. If the prospectus state merely the names of the provisional committee and nothing more, and no light be derived from the context, that circumstance does not alter the liability of the defendant. If not responsible, as being one of that committee in fact, he cannot become so by the representation of the fact. If it states the names of the acting committee also, where that has been appointed, is the meaning that the acting committee is to take the whole management, to the exclusion of the provisional committee, their provisional character having ceased; in which case the provisional committee would not be liable: or does it mean that the provisional committee-men have appointed the acting committee, or the majority of it, on their behalf, and as their agents; in which case they would be liable for the contracts of the acting committee, or the majority, made as such agents?"

Now, in the present case, I think that the committee of management was a body of persons acting for themselves, independently of the provisional committee, and not acting as agents for and on behalf of the provisional committee. At the outset of the project the provisional committee, as usual in these cases, was formed, consisting of persons who were desirous of promoting the scheme, and who agreed to act for that purpose provisionally, that is to say, until some other arrangement should be made. When matters were more advanced, a sufficient number of persons were found willing to undertake to do what was necessary to form the projected company, and to make an application to parliament for an act; and these persons, at a meeting of the provisional committee, held on the 7th of October 1845, were formed into the committee of management. When the undertaking had advanced thus far, the provisional arrangements and the duties of the provisional committee appear to me to have ceased. The committee of management was the committee of management of the independent company, and not of the affairs of the provisional committee, and the contracts they entered into were on behalf of the company they had undertaken

to form, and not on behalf of the provisional committee. For instance, the engineers employed to make and deposit the plans, surveys, and sections were engaged in the name of the company, and the account opened with the Exeter bank was in the name of the company. I consider that the committee of management charged themselves with these duties on their own responsibility, and were in no sense the agents of the provisional committee; and, looking at the decisions on this subject, I see no ground on which the committee of management would be entitled at law or in equity to call on the provisional committee to contribute towards the expenses incurred. By the end of December 1845 the committee of management found it impracticable to establish the intended company, and the project was abandoned. Monies, however, had been expended, and debts incurred by the committee, and they made a report, in which, after giving the account of what they had done, and of the position of the undertaking, they stated that they had been advised by counsel that the provisional committee were collectively and individually responsible for the debts of the company, and a meeting of provisional committee-men was called for the 31st of December, to receive this report, and to take into consideration the liabilities, and decide on the best means of settling the claims on the company. The provisional committee have taken no part whatever in the proceedings of the committee of management; they appear to have ceased to act from the 7th of October, and, as I conceive, they were in no way liable in respect of the debts incurred. Capt. Tanner attended the meeting of the 31st of December, as a member of the provisional committee, but, if I am right in the opinion I have expressed as to his position, he was at that time under no liability, either to the creditors or by way of contribution to the committee of management. I consider he attended the meeting under the same circumstances as Besley did; and if this be so, the Lord Chancellor's judgment in *Besley's case* establishes that he did not become liable as a contributory by concurring in the resolutions that passed at the meeting. Subsequently to this time, Capt. Tanner took an active part in wind-

ing up the affairs of the company; he attended several meetings of the provisional committee for the purpose of adjusting claims on the company, and obtaining contributions from other persons supposed to be liable, and he acted on a finance committee appointed to investigate the accounts of the projected company, and to prepare a balance-sheet. But, if he was not originally liable as a contributory, I do not think that his subsequent conduct could make him liable. The Lord Chancellor's observations in *Besley's case* appear to be conclusive on this part of the case. His Lordship says, at page 309 of 3 *Mac. & G.* "Such is the state of facts before the concern was abandoned; and if up to that time no liability to the creditors attached to Mr. Besley, nor any liability to contribute to indemnify the committee, his liability, if any, must result from his conduct subsequent to the abandonment of the concern; and here I must repeat that, if the evidence did not disclose what the conduct of Mr. Besley had been before the debts were contracted, his subsequent conduct might lead to an inference, in the absence of evidence to the contrary, that he had so conducted himself as to be liable; but, with the knowledge the Court has, that no such conduct had been pursued, the subsequent facts can create a liability only from their legal effect. If Mr. Besley was liable neither to the creditors nor to the committee before the concern was abandoned, upon what consideration was he bound either to pay the debts or to contribute to indemnify the committee, or how will partial payments, even if made under a supposed liability which did not exist, create a liability to make further payments?"

For these reasons, I am of opinion that Capt. Tanner is entitled to have his name removed from the list of contributories.

TURNER, V.C. }
Nov. 21. } THICKNESSE v. ACTON.

Attachment—Feme Covert.

An attachment for want of answer is issuable against a feme covert who has obtained.

an order to answer separately from her husband.

This was a motion for an attachment against a married woman, one of the defendants, who had appeared separately to the plaintiff's bill, and had obtained an order to answer separately from her husband, but who had not put in her answer to the bill.

Mr. Kinglake, for the motion, said, that such an order as was now sought had been made by the late Master of the Rolls in the case of *Mrs. Lydia Taylor*.

TURNER, V.C. said he did not know what other process could be adopted; and, therefore, made the order.

Order accordingly.

PARKER, V.C. 1851. Nov. 14, 19. LORDS JUSTICES, 1852. Jan. 16.	}	CARTER v. TAGGART.
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Baron and Feme—Equity for a Settlement—Assignment by the Husband of Wife's Interest—Form of Settlement.

A, the husband of B, to whom a share of the residue of a testator's estate had been bequeathed, assigned it to C. for valuable consideration. A sum of stock representing this share was carried to the account of B. in a suit. The proper terms of a settlement of the part allowed to B, by way of equity of settlement, were held to be to B. for life, with remainder to her children as she should appoint, with remainder to the children in default of appointment, and, in default of children, if B. should survive A, to B. absolutely; but, if A. should survive B, to C.

The Court has the power of directing that, in the last event, the fund shall be at the disposal of the wife by will; and that in default of such disposition, it shall go to the next-of-kin of B; but a special case must be made for such a settlement, and the circumstance that B. had needy relatives was held not sufficient to justify it.

A testator bequeathed to *Mrs. Rigg*, the wife of *Mr. Rigg*, a share of the residue of his personal estate. A sum of stock was, in respect of this share, carried over in this cause to her separate account. *Mr. Rigg* had assigned all his interest in this share to *Mr. Hackblock* for valuable consideration. The usual reference was made to the Master to state what part of this sum should be settled for the benefit of *Mrs. Rigg*, and what ought to be the terms of the settlement.

The Master, by his report, stated the sum which he thought ought to be settled, and also that this sum ought to be transferred to trustees upon trust for *Mrs. Rigg* for her life, with remainder upon the trusts therein mentioned for the benefit of her children, and, in default of children who should attain a vested interest, upon the trusts following (that is to say), "If the said A. M. Rigg should survive her husband, upon trust for the said A. M. Rigg, her executors, administrators, and assigns; but, if the said A. M. Rigg should happen to die in the lifetime of her husband, then upon such trusts as she, notwithstanding coverture, should by deed or will direct or appoint; and, in default of such direction and appointment, upon trust for such person or persons as, under or by virtue of the statutes for the distribution of the effects of intestates, would at the time of her decease, have been entitled to her personal estate as her next-of-kin, in case she had died intestate and without having been married."

Mrs. Rigg presented a petition for the confirmation of the Master's report, and *Mr. Hackblock* also presented a petition, by which he objected to the Master's report as to the settlement of this fund in default of children, and insisted, that, in that event, a transfer of the settled funds ought to be directed to be made to him.

These petitions now came on to be heard.

Mr. Wigram and *Mr. Toller*, for *Mrs. Rigg*.

Mr. Swanston and *Mr. Eddis*, for *Mr. Hackblock*, cited—

Jacobs v. Amyatt, 1 Madd. 376 n. and *Lloyds v. Williams*, Ibid. 450.

PARKER, V.C. (after stating the case).—The question in this case is as to the destination of the fund if Mrs. Rigg should die without issue in the lifetime of her husband. The Master has proposed that, in such event, the fund should be held upon such trusts as she should by deed or will appoint, and, in default of appointment, for her next-of-kin. To this, a purchaser for value from her husband excepted, and proposed, either that the settlement should contain no provision in that event, or that it should be declared that the trustees should hold the stock in trust for him. I believe that the custom of the Court has been to settle the fund of a married woman in the form which the Master has proposed in the present case. On principle this is correct. The right to a settlement does not arise merely from the obligation of the husband to support his wife and children; it rests also on this—that the husband's legal right is inconsistent with the wife's equitable right. There is, then, no reason for confining the wife's interest under the settlement to a life interest. The Master, it appears, has proposed to give the wife a power of appointment by deed or will. I think that this power should be confined to a testamentary appointment.

The case came before the Lords Justices, by way of appeal.

It appeared that a brother and sister of Mrs. Rigg were in needy circumstances.

Mr. Wigram and Mr. Toller, for Mrs. Rigg.

Mr. Swanston and Mr. Eddis, for Mr. Hackblock.

The LORDS JUSTICES said that they were of opinion that the provision in the settlement giving the capital to the lady, in the event of there being no issue and her surviving her husband, was right. They thought, however, that, in the event of the husband surviving, there was not and ought not to be any established rule that the property should, as a matter of course, be subject to the disposition of the wife by her will, and that in default of appointment it should go to her next-of-kin. Circumstances might exist in a particular case which would

render one or both of such provisions proper, and they would not suggest that it was not in the power of the Court so to frame a settlement, but they thought that a special case must be made out for it. They thought that, in the circumstances of this case, there ought not to be in the event of the lady dying leaving her husband surviving, any power enabling her to appoint to persons not being her children. No case was made out for those who were strangers or collaterals. This lady had a brother and sister in needy circumstances, but that was not sufficient to warrant the terms of the settlement. The settlement must be varied by a direction that, in the events of the wife dying in the lifetime of her husband and failure of issue, the settled fund should be held in trust for the purchaser from the husband.

KINDERSLEY, V.C. } In re HAM'S TRUST.
Nov. 12, 14.

Lapsed Legacy—Relations—Period of Division—Costs.

*A testator by his will recited that on his marriage he had entered into a bond to leave his wife the sum of 800*l.* on his death, and that he intended shortly to distribute a sum of 6,000*l.* in his lifetime amongst her relations, in lieu of any claims under the bond. The testator then directed that, in case of his death before carrying his intention into effect, the said sum of 6,000*l.* should be divided between and amongst the said relations of his wife in such manner, shares, and proportions as would have been the case if his wife had died possessed of the said sum a spinster and intestate. The testator's wife had died before the date of his will, and had left sixteen next-of-kin, five of whom died before the testator:—Held, that the eleven surviving next-of-kin took each one-sixteenth of the 6,000*l.*, and that the shares which the other five would have taken had they lived lapsed, and went to the testator's residuary legatees.*

Held also, that the lapsed shares, being the only residuary property over which the Court had power, should bear the costs of the petition for determining the question raised upon the construction of the will.

It appeared upon this petition that John Ham, previously to his marriage with Eleanor Biles, executed a bond to J. R. Warne, on the 17th of September 1799, in the penalty of 1,600*l.*, the condition of which bond was, that if the heirs, executors, and administrators of J. Ham should pay the sum of 800*l.* to J. R. Warne, his heirs, executors, administrators or assigns, within six calendar months after the decease of the said J. Ham, upon the trusts after declared, then the said bond should be void. The trusts were for the said Eleanor Biles, if she should be then living, and for her to receive the interest for her life; and in case of her death, then in trust to pay the said 800*l.*, and the growing interest thereof, to and amongst such child or children of Eleanor Biles by the said J. Ham, in such manner and proportion as the survivor of them should by his or her will give, direct or appoint; and in default of such gift, direction or appointment, to and amongst such child or children equally; and in case of no such child, then in trust to pay the 800*l.*, and the growing interest thereof, unto such person or persons as Eleanor Biles should by her will give, direct or appoint, and in default of such gift, direction, or appointment to her executors or administrators.

The marriage took place, and Eleanor Biles, afterwards Eleanor Ham, died intestate and without issue, in July 1844, and without having made any appointment of the 800*l.* J. Ham then took out letters of administration to his wife, and on the 13th of September 1844 the said J. Ham made his will, with a codicil annexed. The codicil was in the following words:—“Memorandum.—Whereas, on my marriage with my late wife, Eleanor Biles, I entered into a bond to leave her the sum of 800*l.* on my death, as in the said bond is mentioned, and I intend shortly to sell out 6,000*l.* stock, part of the sum of 20,000*l.* stock now standing in my name in the 3½ per cent. annuities, and to distribute the same in my lifetime amongst her relations, in lieu of any claims for the said sum of 800*l.* under the said bond. Now, I do hereby will and direct that, in case of my death before carrying such my intention into effect, the said sum of 6,000*l.* stock shall

not be considered as part of my residuary estate, but shall be divided between and amongst the said relations of my said late wife, in such manner shares, and proportions as would have been the case in case my said late wife had died possessed of the said sum of 6,000*l.* stock, a spinster and intestate.”

The testator, J. Ham, died in February 1849, without having carried the above intention into effect, but his executors sold out of the funds the sum of 6,000*l.*, which they paid into court under the Trustees Relief Act. A petition was then presented praying that the next-of-kin of Eleanor Ham might be declared entitled to the said sum of 6,000*l.* A reference was thereupon directed to the Master to ascertain who were the next-of-kin of Eleanor Ham. The Master reported that there were sixteen nephews and nieces, who were the only next-of-kin of Eleanor Ham living at her death, and that there were eleven of these persons living at the death of the testator J. Ham.

A petition was now presented, praying that the eleven next-of-kin of Eleanor Ham who were living at the death of the testator might be declared to be the parties entitled to the fund in court, and that the money might be equally divided between them. The petition was opposed by the representatives of the five other persons who were amongst the next-of-kin living at the death of Eleanor Ham and claimed each a share in the 6,000*l.* The petition was also opposed by the residuary legatees of the testator, on the ground that the gift was altogether void for uncertainty, and as having been made by the testator upon a mistaken belief of some liability under the bond which did not exist.

Mr. Walker, Mr. Malins, Mr. Sandys, Mr. Grove, and Mr. Wolstenholme appeared for the different next-of-kin who were living at the decease of the testator, and cited—

Martin v. Wilson, 3 Bro. C.C. 324.

Viner v. Francis, 2 Cox, 190.

Shuttleworth v. Greaves, 4 Myl. & Cr. 35; s.c. 8 Law J. Rep. (N.S.) Chanc. 7.

Gaskell v. Holmes, 3 Hare, 438.

Lee v. Pain, 4 Hare, 201; s. c. 14 Law J. Rep. (N.S.) Chanc. 346.

Doe v. Sheffield, 13 East, 526.

Mr. Bethell and *Mr. Giffard* appeared for the representatives of the next-of-kin of *Mrs. Ham* who had died after her death and before the death of the testator *J. Ham*, and contended that they were entitled to share in the fund equally with the other next-of-kin.

Mr. Kenyon Parker and *Mr. Milne* appeared for the residuary legatees under the will of the testator, and—

Mr. Attwood for the executors of the testator.

KINDERSLEY, V.C.—The first question is, whether the gift is to fail altogether as having been made on a mistaken supposition of liability to debt; whether there was such a mistake as to make the gift void on that ground. The testator, in the codicil in question, refers to what he calls the claim for 800*l.* on bond; and no doubt that language might be considered to shew that he thought he was liable to some legal claim on the part of his wife's relations. But it is clear to me, also, that it may refer to claims on the part of the relations of a very different nature from claims constituting a legal liability. My own impression is, that he did consider that as by the terms of the bond 800*l.* was limited, so that in the event of there being no issue, which happened, it was to go to his wife absolutely, that if she had happened to survive him, and had then died intestate, her relations would have been entitled to the 800*l.*; and even if she survived him and had made a will, her relations would probably have derived some benefit from the testamentary disposition. When, therefore, he speaks of that claim, he may have considered that they had some sort of moral claim to his consideration, as they might be disappointed in finding that by the death of the wife, having made no appointment, he had, as administrator, become entitled to this absolutely. I think if he had intended only to satisfy what he considered a legal liability he would not have given 6,000*l.* stock, the bond being for no more than 800*l.* That he did consider that his wife was entitled to this is clear from the language

he uses in the codicil. In my opinion there is no ground for contending that, by reason of a mistaken supposition of his being under legal liability, the bequest is void.

The next question is, whether it is not void on the ground of uncertainty of description of the persons to take. In the first part of the codicil, where he refers to what his intentions are,—he says—"I intend shortly to sell out 6,000*l.* stock, part of the 20,000*l.*," and to distribute the same in his lifetime amongst her relations, in lieu of any claims. No doubt, if he had done that in his lifetime, he might have given to any relations, and he might have excluded any he pleased; and there is no description of the class of persons, whom he intended when he speaks of "her relations," but what he is there speaking of is what he intended to do by some act in his life; he then directs what is to be done in case he does not do this in his lifetime. He directs the money to be divided between "the said relations of my said late wife." Now, a gift to relations is not void for uncertainty, but has generally been held to mean next-of-kin. There may be something else in the will which may make it void for uncertainty, but it is not void of itself.

Being, then, of opinion that it is neither void on the ground of mistaken supposition of debt, nor on the ground of uncertainty, the next ground is, that the share, at all events, of those who died between the death of the wife and the death of the testator have lapsed to the residuary legatees. That question I will consider presently. There were sixteen persons next-of-kin of the wife at the time of her death in July 1844, and at the death of the testator eleven only were living, five having died. Now, the first point I shall consider is, what the testator meant by the words, "in such manner, shares, and proportions as would have been the case in case my said late wife had died possessed of the said sum of 6,000*l.*, a spinster and intestate." I am urged to construe these words as if the testator had supposed his wife would live just to the period at which the testator himself died, and she had then died a spinster and intestate. I cannot accede to that view; the testator in his

codicil refers to the fact that she was dead, calling her his late wife. Knowing that she had died in the preceding month of July, he, inditing the will in September, refers to the fact, and says, "in case my said late wife had died." It appears to me that he clearly meant not to suppose the case of her not being then dead, but to put it on the same footing as if, at the time of her death, she had been possessed of this sum, and had died a spinster and intestate. I think he refers to no other period than that at which she did die, *i. e.* July 1844. The next point is this: it is said, "Supposing that to be so, still, according to the decided cases, if a gift is to a class of persons, and some of that class of persons die in the interval between the date of the will and the death of the testator, those members of the class who survive shall take the whole." The rule, however, is really this; where the testator gives a legacy or residue to persons whom he designates in such a way as to represent them as a class, for instance, to the children of A, there the period of distribution of the gift is the death of the testator, and the persons who constitute the class at that period shall be considered the persons intended, unless a contrary intention appears from any other clause. Therefore, it appears to me, that you must look at the whole scope of the will for the purpose of seeing whether the testator has indicated any intention to refer to persons constituting a class at the period of distribution. Now, if this had been a special gift to the wife's relations, the case stated would have justified the construction of a gift to the relations of the wife living at the death of the testator; but we have here something which points out very sufficiently what the testator intended as to the persons constituting the class of his wife's relations: for he says, "the 6,000*l.* shall be divided between and amongst the said relations of my said wife, in such manner, shares, and proportions as if she had died possessed of the said sum, a spinster and intestate." Now, what does he mean? He means, it is to go to those persons who as being relations, *i. e.* next-of-kin, would at her death have been entitled to her personal estate by law, in case she had died a spinster and intestate; and he has shewn what

he meant by the term "relations," *i. e.* the persons who are to take under the Statute of Distributions. It appears that the wife at the time of her death left sixteen relations, nephews and nieces, who exactly answer the description of relations, who would have divided this amongst them in case the wife had so died. Now, if those who survived are to take the whole fund among them, they do not take either in the manner, shares, or proportions in which the testator says they are to take; and I should set aside the words of his direction if I were to say that he had declared they were to take. I am of opinion, therefore, that the persons to whom the testator has given the 6,000*l.* under this description are the sixteen persons who were next-of-kin of the wife living at her death. Now, the fund is given to them in the same manner, shares, and proportions as would have been the case in case she had died a spinster and intestate. Then, what would have been the manner? It would have been as tenants in common. It is, therefore, a gift to these persons as tenants in common; and the plain ordinary effect of a gift in common to persons, some of whom pre-decease the testator, is a lapse of those shares. But it has been contended that the legal personal representatives of those who died in the lifetime of the testator are to take, *i. e.* that you are to read the codicil thus: it is to go now to the same persons as if he had died possessed of this specific sum, and intestate in 1844, and as if they had not died or parted with it; *i. e.* I am to try and find out, as to each of those persons who had taken a share of the 6,000*l.*, what had become of his share of the 6,000*l.* It is clear that the testator could have had no such meaning as that. It is a gift to those persons as tenants in common; and if any have died in the lifetime of the testator their shares have lapsed, and go to the residuary legatees. I am, therefore, of opinion that the 6,000*l.* is divisible into sixteen shares, and the surviving next-of-kin will take each one share. As to the five shares undisposed of, they will go to the residuary legatees.

A discussion then arose as to the costs of the petition, whether they were to be borne by the fund in court, or whether

they were to be paid out of the testator's residuary estate.

The following cases were cited as to the costs—

In re Ross's Trust, 20 Law J. Rep. (N.S.) Chanc. 293.

In re Bartholomew's Trust, 16 Sim. 585; s.c. 19 Law J. Rep. (N.S.) Chanc. 237.

In re Croyden's Trust, 19 Law J. Rep. (N.S.) Chanc. 172.

In re Sharpe's Trust, 15 Sim. 470.

KINDERSLEY, V.C.—My opinion upon the point is clear, that I have no jurisdiction over anything else than the fund paid into court; and if the whole fund were a particular legacy, I should be obliged to direct the costs of all parties to be paid out of the legacy, and the legacy would lose that benefit. I can have no jurisdiction to order payment out of the residue, which is not before me. The trustees might say they did not admit a residue; and I could not try the question whether they had any or not. But it is clear that I have jurisdiction over this fund, and I find that part of it is residue; therefore I think the costs of the discussion as to the construction of the will should be paid for by the residue, as far as I have to deal with that fund. Now, having determined that five-sixteenths are residue, and having complete jurisdiction over the whole fund, it appears to me that I shall be acting in conformity with the rule laid down by the cases, and in exact accordance with the general principles of the Court, in directing the costs of all parties to be paid out of the five-sixteenths. I admit that it is a hardship upon the residuary legatees, but so it would have been if there had been a suit to administer the whole estate.

LORDS JUSTICES. }
1851. } *Ex parte MOUNT in re*
Nov. 19, 22. } BURTON.

Lunacy—Security given by the Committee of the Estate.

The heir-at-law of a lunatic, who with one other person was the next-of-kin of

the lunatic, was appointed committee of his person. Another party being proposed, was approved of by the Master in Lunacy as committee of the estate. The committee of the person proposed himself as one surety for the committee of the estate. The Attorney General was willing to accept this security, but declined to do so without the sanction of the Court. An order was made that, upon the allowance to the lunatic being paid direct to the committee of the person, instead of passing intermediately through the hands of the committee of the estate, the committee of the person be accepted as one of the sureties for the committee of the estate, the general rule, however, to remain unaltered.

Mr. Malins and Mr. Speed appeared in support of a petition of the heir-at-law, and one of the two next-of-kin of the lunatic, and who had been appointed committee of his person, praying that he might be accepted as one of the sureties for a gentleman who had been approved of by the Master in Lunacy as committee of the estate. The petitioner had proposed himself as such surety, and the Attorney General had signified his willingness to accept him; but it was stated by the officers in Lunacy that a general rule prevailed that such a course could not be adopted. This rule appeared to be sanctioned by a passage in *Mr. Elmer's Practice of Lunacy*, 25, but no authorities were cited in support of the position. The Attorney General had intimated his opinion as to the safety of the appointment, and his willingness to sanction it, if the allowance of the lunatic were paid to the committee of the person for the support of the lunatic; but the Attorney General had also intimated that the point had better be mentioned to the Court. The passage in *Mr. Elmer's treatise* is as follows:—
“The committee of the person does not give security, and will not be accepted as security for the committee of the estate.”
The sufficiency of the committee of the person, the petitioner, *Mr. William Foote Mount*, was unquestionable, and that he was most likely to see to the due performance of any trust regarding him or his property was plain from the facts which appeared on the report of the Master in Lunacy that, from the death of the lunatic's

father, in 1828, until 1843, Mr. Mount acted as such committee, and only resigned from ill-health; that he visited the lunatic monthly, and sometimes stopped at the asylum with him two or three days at a time; that on his restoration to health, Mr. Mount was re-appointed committee of the lunatic's person; that he had been assiduous in his care and attention towards the lunatic, and that the income of the lunatic had been augmented by his exertions and management.

Mr. Roche appeared also in support of the petition, on behalf of the other next-of-kin of the lunatic.

LORD JUSTICE LORD CRANWORTH.—If there be any general rule on this subject, it had better be followed. By the authority under which we are now sitting, we clearly have jurisdiction, sitting alone or sitting with the Lord Chancellor, and of course the jurisdiction of the Lord Chancellor is left untouched. I am, however, of opinion, that if the object proposed by this petition be in effect to set aside any general rule which is said, with or without authority cited for it, to prevail, we ought not to take any step without having the benefit of the Lord Chancellor's opinion.

LORD JUSTICE KNIGHT BRUCE.—Without intimating any opinion as to the exercise of the discretion of the Attorney General, we are both of opinion that we ought not to interfere with that discretion. The Attorney General has intimated his approval of the petitioner as the surety, and the case is left with that officer. The Court declines to interfere.

Nov. 22.—*Mr. Malins* again mentioned the matter, saying that the Attorney General preferred that the Court should say whether the security was to be accepted.

LORD JUSTICE KNIGHT BRUCE.—It is a very good general rule, that the committee of the person shall not be surety for the committee of the estate. But under the particular circumstances of this case, I see no objection to that rule being relaxed; and for myself, I am disposed to relax it. —[Counsel having, for the satisfaction of Lord Cranworth, again stated the facts, his Lordship concurred, and the judgment was

continued.]—If the allowance be paid direct to the committee of the person, instead of to the committee of the estate, to be applied by the committee of the person for the care and support of the lunatic, we are disposed to permit the committee of the person to be accepted as one of the sureties for the committee of the estate. We beg it, however, to be most distinctly understood, that we consider this a departure from a general rule, and that we sanction this departure only in the particular circumstances of this case.

KINDERSLEY, V.C. { *In re* THE INDEPENDENT ASSURANCE COMPANY, *ex parte* TERRELL.
Nov. 13.

Company—Winding-up Acts—Solicitor's Bill—Costs incurred before complete Registration.

Upon the Winding-up of a company, which had been completely registered, the solicitor carried in before the Master his bill for the whole expenses incurred, both those preliminary to the complete registration of the company and those incurred subsequently to that period. The Master allowed the whole bill as a claim and not as a debt, with liberty to the solicitor to bring an action:—Held, upon motion to discharge the Master's order, that the members of a completely registered company were not liable for preliminary expenses, unless they had expressly or impliedly rendered themselves liable; that the bill in this case was so framed that it was impossible to distinguish the preliminary from the subsequent expenses, and the Master had, therefore, come to a right conclusion in allowing the whole bill as a claim only.

This was a motion on behalf of Mr. Terrell, the solicitor to the above company, that the order of the Master upon winding up the affairs of the company, whereby he had allowed Mr. Terrell's bill as a claim only, and not as a debt, might be discharged. It appeared that the company was provisionally registered on the 13th of February 1847; that a prospectus of the company was issued, in which Mr. Terrell's name appeared as solicitor; that a meeting

of the directors was held on the 15th of May 1847, at which Mr. Terrell was appointed solicitor to the company, and the following resolution was agreed to:—"That no director should be personally responsible for the salary of any of the officers of the company, and that no officer or officers of the company should obtain payment for his services until a sufficient sum should be obtained by the funds of the company for that purpose; nevertheless, the first fund which should be formed by the payment of the deposits on shares, to be taken by the directors and others, should be appropriated to the payment of the expenses of the formation of the company." The deed of settlement was dated the 24th of August 1848, and on the 19th of October 1848 the company was completely registered. At a subsequent meeting of the directors it was resolved, amongst other things "That the sum of 60*l.* be paid to Mr. Terrell, on account of stamps required for the deed of settlement, prior to complete registration." The appointment of Mr. Terrell as solicitor was confirmed after the complete registration. An order for winding up the company was obtained in February 1850, and Mr. Terrell then brought in his bill before the Master for business done for the company from the period at which it was first projected, including the time previous to the 24th of August 1848, the date of the settlement, and also the subsequent time. The Master allowed the bill as a claim only, and not as a debt against the company, on the ground that he was unable to distinguish what portion of the expenses was incurred before the actual formation of the company, and what portion was incurred subsequently. The Master gave Mr. Terrell liberty to bring such action as he might be advised.

Mr. Malins and *Mr. W. H. Terrell*, in support of the motion to discharge the Master's order, contended that the whole of the bill ought to have been allowed as a debt. There could be no doubt but that under any circumstances the expenses after the deed of settlement was dated constituted a debt due from the company. The Master had not even allowed this portion

of the bill as a debt; but as Mr. Terrell's appointment had been confirmed after the company was completely registered, the whole bill became a debt due from the company, and ought not to have been allowed as a claim only.

The following cases were cited as to the individual liability of the directors:—

Ex parte Cope, 1 Sim. N.S. 54; s. c. 20 Law J. Rep. (N.S.) Chanc. 28; and

Ex parte Pritchard, before K. Bruce, V.C. (not reported.)

Mr. Bethell and *Mr. Roxburgh* opposed the motion on behalf of the official manager, and cited *Ex parte Lloyd* (1).

Mr. Malins was heard in reply.

KINDERSLEY, V.C.—It appears to me impossible to distinguish the items in Mr. Terrell's bill, running down, as it does, from the year 1846 to the time at which the company was formed; or to say how much of the bill was incurred prior to the 24th of August 1848, when the deed of settlement was executed, and how much was for subsequent expenses. As a general principle, I may observe, that nothing has been urged to raise a doubt in my mind why that part of the bill which was incurred subsequently to the final formation of the company should not be considered as a debt, unless the resolution of the 15th of May should have the effect of preventing Mr. Terrell from having any claim until there were sufficient funds raised. Now, that resolution does not appear to me to have any effect in preventing Mr. Terrell from being a creditor for the business done after the formation of the company. The resolution was only intended to save the directors individually from responsibility, but it could not be intended that the company were not to pay for the work done by the solicitor for the benefit of the company. My opinion, therefore, is, that Mr. Terrell is justly entitled to become a creditor to the company with respect to the business done subsequently to the 24th of August 1848. A very

(1) 1 Sim. N.S. 248.

different principle, however, may be applicable to what was done by Mr. Terrell, not as a solicitor to the company, but as solicitor to certain persons who were endeavouring to form a company. The distinction is clear; a person may incur great expenses in trying to form a company, and those persons who subsequently form the company may agree together to pay for the business done; but the members individually may never have intended to render themselves liable for a large sum of money incurred by persons in their endeavours to form the company. Unless there is an express stipulation to this effect in the deed of settlement, the members of the company, when formed, cannot be liable for the preliminary expenses. Now, it does not appear to me that there is evidence to shew that any contract was entered into by which the shareholders are liable for the preliminary expenses. There may or may not be sufficient to shew an implied contract; and if I were now in a situation to distinguish between those expenses which I think the members are liable for, and those for which I am not satisfied they are liable, what I should do would be to have that portion for which they are liable taxed, and leave the rest to be decided by action; but not being able to do that, I think the Master has acted properly in allowing the whole as a claim. I do not see how the items are to be distinguished, or how you are to say "so much is debt and the other portion claim." I do not see how the expenses incurred after the 24th of August can be separated, and I do not think that the Master could have come to any other conclusion than to allow the whole bill as a claim, with liberty for Mr. Terrell to bring such action as he might be advised, to recover the preliminary expenses. It seems to me that the only object in bringing an action would be to try what expenses were incurred prior to the debt. The Master has, I think, adopted the right course in treating the whole as a claim, and the matter must, therefore, be left as it is. The costs of the official manager will be paid out of the estate; no other costs can be allowed.

LORDS JUSTICES.
1851.
Nov. 25.

} *In re* THE IMPERIAL SALT
AND ALKALI COMPANY.

Company—Winding-up Acts, Sections 38. and 118.—Rights of Contributories.

An order was made for the winding up the affairs of a joint-stock company: the property of the company being about to be sold by auction, a meeting was held for the purpose of fixing a reserved bidding; at the meeting, the contributories claimed a right to be present, but the Master excluded them. From this decision they appealed, and the Vice Chancellor reversed the Master's determination; and, on an appeal from the order of the Vice Chancellor, this Court held that the 38th section of the statute 11 & 12 Vict. c. 45. did not give the Master authority to exclude the contributories.

In this case an order was made for the winding up the affairs of the Imperial Salt and Alkali Company, and it came on upon an appeal from an order of Vice Chancellor Parker, by which he had reversed an order of Master Tinney, the Master charged with the winding up. By such order, Mr. Tinney had directed the official manager of the company to attend him privately for the purpose of fixing a reserved bidding upon the intended sale by auction of the works of the company, and had ordered that the contributories should be excluded from attending before him upon that occasion. No notice of the order requiring the attendance of the official manager had been given to the contributories. During the hearing in the Court below, it was alleged that the ground on which the reserved bidding was to be fixed was of a private nature, and that the Master and the official manager considered it advisable that such bidding should not be made known to the general body of contributories. The Vice Chancellor, on appeal, reversed that order, on the ground that the Master had no such authority of exclusion conferred on him by the act of parliament.

Mr. Malins and Mr. Webb appeared on behalf of the official manager, in support of the appeal from the order of the Vice

Chancellor. — They contended that the appeal was not substantially that of the contributories, who had their names placed to the notice of motion, but it was in effect that of other persons, who were clients of a solicitor employed by those contributories, and who were anxious to know the amount of the reserved bidding to be fixed by the Master, so as to enable them to effect a beneficial purchase. It was also argued that everything was in the discretion of the Master which would tend to secure, for the benefit of the contributories, as much as could possibly be obtained upon a sale; and Mr. Tinney obviously considered that a secret settlement of the amount of the reserved bidding would be most beneficial to all parties; and in that view the official manager concurred. It was true that contributories might entertain particular views of their own interest, but the legislature in giving a discretion to the Master, who had the benefit of the assistance of the official manager, seemed to have intended that such interest should be represented by those functionaries.

Mr. Roxburgh, for some of the contributories, and in support of the order of the Court below, contended that under the 38th section of the 11 & 12 Vict. c. 45, (1) all persons whose names were on the list

(1) The 38th section is as follows:—"That all persons whose names shall stand in the list of contributories shall be entitled to require, and, at their own expense, to receive notice, as the Master shall direct, of all or any of the proceedings in the matter of the dissolved company, and also shall be entitled, at their own expense, either personally or by solicitor or agent, to attend the proceedings; and it shall be lawful for any such contributory, at his own expense, to submit any proposal before the Master, in writing, or otherwise as the Master may direct, in relation to the affairs of such company and the winding up the same."

The 118th section is in the following words:—"That in all proceedings under this act the Court, in addition to all powers and authorities specially given and provided by this Act, shall have and exercise the like jurisdiction, powers, authorities, and discretion, so far as the same are applicable, as would have been exercisable in a suit duly instituted and duly constituted according to the rules and practice of the Court, and to which all proper persons were parties, for the dissolution and winding-up or for the winding-up of the affairs of the company in the matter of which the petition is presented; and the general practice of the Courts of Chancery in England and Ireland in suits pending

of contributories were entitled to require, and, at their own expense, to receive, notice of all or any of the proceedings which were being carried on in the Master's office, and were also entitled, either personally or by their solicitor, to attend the proceedings; and that under the 118th section, by which the Court had jurisdiction as upon suits duly instituted, a creditor was enabled to attend the proceedings in the Master's office, and to prosecute his claim as effectually as he could have done under a suit constituted according to the rules and practice of the Court.

LORD JUSTICE KNIGHT BRUCE.—It is impossible not to see that the Court is called upon to decide, not only on behalf of persons mentioned in the notice of motion as contributories, but of persons who were represented by solicitors, some of whose clients' interests are at variance with the general interest claimed by the creditors of the company. If I felt myself at liberty to act upon the impression made on me by the materials before me, I should be disposed to take the Master's view. I am very far from saying that the Master, by the course he has pursued, has not done substantial justice, and if in his place perhaps I should have been inclined to have acted similarly. The question, however, is, whether, upon the materials before the Court, we can support what the Master has done. There may or may not be circumstances which, if presented to the Court, might induce us to alter our view of the case; but of this I wish to express no opinion. But as the law is now supposed to stand, and upon the materials before us, I think we are not at liberty, technically and in form, to sustain what the Master has done. However we may regret it, I do not consider we ought to interfere with the decision of the Vice Chancellor; and we therefore think that the appeal must be dismissed, and the costs of all parties be paid out of the estate.

LORD JUSTICE LORD CRANWORTH.—I

in the same courts respectively, so far as the same shall be applicable, and so far as the same is not or shall not be inconsistent with this act, or with any rules or orders to be made under this act, shall apply to all proceedings under or by virtue of this act."

am of the same opinion as my learned Brother as to our not interfering with the judgment of Sir James Parker. I cannot say, however, that I feel so sure as to there being anything behind—anything which does not appear. It is no doubt true that, ultimately, hard cases make bad law. Even if I did think I could see something behind, I do not feel that we should be at liberty to act upon it, nor do I see any reason why we should do so.

M.R. 1851. Nov. 25. 1852. Jan. 13.	}	LAURIE v. CLUTTON.
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Legacy Duty — Baron and Feme — Investment in Joint Names — Transfer by Wife out of Funds which had survived to her, to pay Debts and Legacies—36 Geo. 3. c. 52. —45 Geo. 3. c. 28.—*Satisfaction of Legacy.*

*A testator having large sums of stock invested in the joint names of himself and his wife made his will, by which he gave several specific legacies to his wife, to whom he also devised certain real estates. He also made several devises and bequests of real and personal estate to trustees, upon trust for his wife for life, and after her decease for the benefit of other persons; he also gave a legacy of 10,000*l.* to his daughter for life, with remainder to her children, and he appointed his wife sole executrix. Upon the decease of the testator his personal estate was found wholly insufficient to pay several specialty debts and the legacies given by his will, and under a deed executed by his wife reciting these facts, she transferred 36,000*l.*, and 10,500*l.* stock, part of the funds which had been invested in the joint names of herself and her husband, to the trustees of his will, for the purpose of being applied to satisfy the debts, among others the legacy of 10,000*l.* The Commissioners of Stamps and Taxes claimed legacy duty in respect of this payment; but upon a petition by the executors of the testator and his wife, who had since died, to obtain the opinion of the Court, —Held, that no claim for legacy duty had arisen under the 36 Geo. 3. c. 52, or the 45 Geo. 3. c. 28, and that none was payable.*

This petition was presented by the defendants, Owen Clutton and John Clutton, who were now the executors of Elizabeth Webb, deceased, and her late husband Samuel Webb, to obtain the opinion of the Court upon the question, whether legacy duty was payable in respect of a sum of 10,000*l.* mentioned in the will of Samuel Webb.

The testator, by his will, dated the 16th of January 1827, gave to his wife Elizabeth Webb as her own absolute property certain specific chattels, monies, and effects, and he devised various freehold and copyhold hereditaments to his wife, her heirs and assigns, for ever. He also devised and bequeathed several freehold, copyhold and leasehold hereditaments to or in trust for his wife during her life, with divers remainders over.

The testator also bequeathed to Kenrick Collett and John Clutton several sums of stock, in trust that his wife might be entitled to the dividends and income for her life, with remainder to several persons in the respective amounts in the will mentioned; and that they should set apart a sum of 3*l.* per cent. consolidated annuities, to include a sum of 10,000*l.* 3*l.* per cent. consolidated Bank annuities, which was directed to be held in trust that his daughter Mary Ann Collett might be entitled to the dividends and income thereof for her life for her separate use, without power of anticipation, and subject thereto in trust for the issue of Mary Ann Collett, and in default of issue to take under such trusts (an event which did not happen) the sum of 10,000*l.* consols was to fall into the residuary estate. And as to the residue of the real and personal estate the testator devised, appointed, and disposed of the same unto and to the use of his wife, her heirs, executors, administrators, and assigns as her own absolute property. And he declared that the provisions thereby made for her were meant to be in bar and satisfaction of all dower, free bench, thirds, and widow's estate, and all other claims and demands which she could or otherwise might have upon any real or personal estate or property of which he might have been at any time during his life possessed. And he declared that all government or public stocks, funds, or securities which at his decease should be standing in the joint names of himself

and his said wife, should for the purpose of answering the legacies thereby given be considered as his property, and thereby made liable to the same. And he further declared, that neither of the sums of stock thereinbefore given and disposed of, except a certain sum of 5,040*l.* 4*l.* per cent. annuities, should be considered as a specific legacy, and that he intended to give the dividends and income which would become due therefrom after her decease, or sums equal to be considered as such dividends and income. And he appointed his wife Elizabeth sole executrix of his will.

The testator made five codicils to his will, but they did not make any alteration with respect to the 10,000*l.* consols, or the directions which are previously mentioned, or which could diminish the interest given to his wife. The testator died on the 8th of February 1835, and on the 4th of March 1835 his widow proved his will. The personal estate of the testator was insufficient to pay the legacies, and his widow, the devisee of a portion of the real estate, and also the specific legatee, executed a deed, dated the 16th of March 1835, which recited, among other things, that the personal estate of the testator was wholly insufficient to satisfy some obligations incurred by the testator on bond and covenant, and the legacies given by his will, or even any considerable proportion of them, and that the testator had invested large sums in the public funds in the joint names of himself and his wife, of which she had become the owner by survivorship: and then with the view of satisfying the purposes declared by the testator in his will, and in order to avoid the sale of any of the specific bequests, or of the real estates, for payment of the remaining debts, she covenanted to transfer two sums of 36,700*l.* consols and 10,500*l.* reduced 3*l.* per cent. annuities to the trustees of the will, for the purpose of satisfying these obligations and the legacies given by the will. The transfers were accordingly made, and a sum of consols, exceeding the sum of 10,000*l.* given by the will of the testator, after paying the debts, remained in the hands of the trustees in trust for the daughter of the testator and her issue, according to the trusts declared by the will. The testator's widow

appointed the trustees of her husband's will her executors.

The question now was, whether this sum of 10,000*l.* professed to be given by the testator's will, and which the widow by the deed of the 16th of March 1835 made good, was subject to legacy duty. It was agreed between the Attorney General, on behalf of the Crown, and the persons interested in the estate, that the statements contained in the petition and in the deed should be taken as true, and the Attorney General further declined to ask for a case for the opinion of the Court of Exchequer.

Mr. Walpole appeared for the petitioners.

The Solicitor General and *Mr. James*, on behalf of the Crown.—The claim of the legatee in respect of a legacy becomes a charge upon the testator's property for which duty must be paid, and the claim for duty by the Commissioners was made, not against the donor or his estate, but against the legatee, in respect of the money paid on account of the legacy, and as the trustees had received the money they could not be heard to say that they were not chargeable. If an estate was devised subject to a legacy, payment of the duty could not be avoided merely because the parties did not want the land sold; the real question was, whether or not there was a charge.

Mr. R. Palmer and *Mr. Waley*, for parties who were interested in the fund.—The claim for legacy duty can only be supported on the ground that it was a charge on the real estate of the testator; but there was no bargain with the devisee by which she could be put to her election. This cannot be assumed, as the estate devised to her was of far less value than the sum of 10,000*l.*, and her own estate did not become liable to the payment of legacy duty in consequence of the testator having given her a portion of his real estate. In all cases of a charge upon land the gift was a part of the land, but, unless this case clearly falls within the several acts of parliament, no duty can be claimed, as they must be construed most strictly.

Matson v. Swift, 8 Beav. 368; s. c.

14 Law J. Rep. (N.S.) Chanc. 354.

Custance v. Bradshaw, 4 Hare, 315;

s. c. 14 Law J. Rep. (N.S.) Chanc.

358.

Mr. Roupell and Mr. Tillotson, for other parties.—The 10,000*l.* was not a payment under the testator's will, but under the deed executed by his wife. It has been argued that, by construction, the property of the wife surviving had become the property of the husband, and that it became subject to the legacy duty. But was this a legal claim? If a duty was given it was by a special law, and could not arise by any equitable construction of equivalents. The right of election only exists when property of the donee has been given away. In such a case, before the will was made the property belonged to a stranger, and so it remains after the will. The effect of taking under the will in such a case is the act of the donee, and not of the testator. The Crown cannot step in and insist that real estate should be considered as converted into personalty merely that it may claim a duty, and it has no right to insist upon equities merely for fiscal purposes—*Matson v. Swift*. The doctrine of election has arisen from the law of forfeitures or compensation; as when a testator had given a rent-charge upon the estate of another to whom he has made a gift of something else, the acceptance of that is the act of the party, and not of the testator.

Gretton v. Haward, 1 Swanst. 409, 433, n.

1 *Roper's Husband and Wife*, 566, 2nd edition.

Shirley v. Earl Ferrers, 12 Law J. Rep. (N.S.) Chanc. 111.

Mr. Temple and Mr. Stevens, for Mr. and Mrs. Laurie.—The Crown can make no claim for a duty which is not plainly given by act of parliament, and it is contrary to all principle to apply any forced construction to these acts. The 20 Geo. 3. c. 28. and the other earlier statutes, and also the 36 Geo. 3. c. 52. as well as the 45 Geo. 3. c. 28. s. 4. declared every gift payable out of the personal estate of the party dying to be a legacy, and this was extended to any personal estate he might have power to dispose of. These acts confined the duty to gifts out of the personal property of persons dying. In the 8 & 9 Vict. c. 76. s. 4. the same principle remains. The question, therefore, is, whether the testator's wife

by the deed she has executed converted her estate into the property of the testator. The property of the living cannot be taken towards payment of a duty, and the Crown must shew a right to a duty by act of parliament before it can enforce it, and these Courts cannot give effect to any claim by equitable or constructive rules.

Mr. Lloyd and Mr. Lewin, for the infant children of Mr. and Mrs. E. Lloyd.

In re Evans, 2 Cr. M. & R. 206; s. c. 4 Law J. Rep. (N.S.) Exch. 201.

The Attorney General v. Mangles, 5 Mee. & W. 120.

The Attorney General v. Simcox, 18 Law J. Rep. (N.S.) Exch. 61.

The Attorney General v. Holford, 1 Price, 426.

The Solicitor General replied.

Jan. 13.—THE MASTER OF THE ROLLS.—The question depends solely upon whether the words of the acts of parliament are sufficient to meet and include this case. The statutes upon which alone any question can arise are the 36 Geo. 3. c. 52. and 45 Geo. 3. c. 28. I may state here that a question might have arisen upon the 8 & 9 Vict. c. 76, but this will was in effect previous to that act. I shall first consider whether it is affected by the 36 Geo. 3. c. 52, and if not, then, whether it is liable to a duty as being a charge upon land under the provisions of the 45 Geo. 3. c. 28.

The words of the statute 36 Geo. 3. c. 52. s. 7. are, "Any gift by any will which shall by virtue of such will have effect or be satisfied out of the personal estate of the testator, or out of any personal estate which he shall have power to dispose of, shall be deemed a legacy." It is clear from this that nothing is to be deemed a legacy unless it is a gift to be satisfied out of the personal estate of the testator, or out of some personal estate which he had power to dispose of. I am of opinion that the words of the statute do not include this property. It would be a straining of words to include property which, in fact, is not, and was not, the property of the testator. The consequence also which would necessarily follow from a contrary decision would be absurd. Suppose a testator having 10,000*l.* in the funds to be-

queath it to A, and, at the same time, to bequeath to B. a sum of 5,000*l.* standing in the name of A : as A. gains 5,000*l.* on the whole by the effect of the will, it is probable that he might give effect to it, and elect to take the 10,000*l.*, and give the 5,000*l.* to B. But it would be absurd on that account to hold that, under these words of the statute, duty must be paid exactly in the same manner as if the testator had been possessed of 15,000*l.*, and had given 10,000*l.* out of the 15,000*l.* to A, and the remaining 5,000*l.* to B. And yet it is obvious that it must, if good at all under the words of this statute, be carried to that extent; because it is not in the nature of a charge that the provision of the statute operates at all, but, if sufficient to include the case, it must be because it is a gift by the testator to be satisfied out of some personal estate, which he had the power of disposing of. I am of opinion that these words in the statute apply to funds over which the testator had a power of appointment, but that they cannot be extended to funds which belong to a stranger, and which the testator might induce that stranger to dispose of, as the condition upon which he should be entitled to take another legacy given to him by the testator's will. The argument has not been carried to this extent on the part of the Crown, and I have no hesitation in saying that the mere fact of electing to take under the will does not make this property, which neither belonged to the testator nor was property over which he had the power of disposition, subject to any charge for legacy duty under the first statute.

There is, however, more difficulty in the second branch of the question, and it was on this account principally that I reserved my judgment. The 45 Geo. 3. c. 28. makes legacies charged upon land liable to the payment of legacy duty. The words of the 4th section which apply to this question are as follows. It enacts nearly in the words of 36 Geo. 3. c. 52. s. 7. that "every gift which, by virtue of any will of a person dying after the passing of the act, shall have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which he shall have power to dispose of" (then

come the new words), "or which shall have been charged upon or made payable out of any real estate, or be directed to be satisfied out of any monies to arise by the sale of any real estate of the person so dying, shall be deemed to be a legacy." This provision applies exclusively to real estate, and therefore it is not necessary to consider the various instances which were suggested at the bar of a specific chattel being by the operation of the rules of equity charged upon a pecuniary legacy, such as where a testator leaves 1,000*l.* to A, and leaves to B. a painting, the property of A, because as there is no question about the real estate in any of these cases, if any duty is payable it must be under the 36 Geo. 3. c. 52. But the question raised under the 45 Geo. 3. c. 28. is, that it not merely embraces all cases of legacies charged upon the real estate directly and expressly, but all cases where, by operation of the rules of equity, a legacy becomes payable out of the real estate. Now, if a testator shall devise his real estate to A, and by the same will dispose of 1,000*l.* belonging to A. in favour of B, whatever may be the course of conduct pursued by A, B. would, in any event, take an interest in the real estate of the testator to the extent of the 1,000*l.* If A. elected to take under the will, he would take the estate charged with the 1,000*l.* in favour of B, and if A. elected to reject the will, the heir-at-law of the testator would, in like manner, take the estate, but would do so burthened with the payment of the 1,000*l.* in favour of B; and if both A. and the heir-at-law repudiated the real estate of the testator, B. would himself take it as if he had been the original devisee thereof. It is, therefore, contended on the part of the Crown that, in any event, B. would take a bequest of the 1,000*l.* charged on the real estate of the testator, and that if the Court were to hold otherwise the effect would be, that instead of directly charging legacies on the real estate, the testator might produce exactly the same result, and escape the payment of the legacy duty, by devising real estate, and then disposing of the property of the devisee of the real estate to the extent of the legacy intended to be charged upon the land devised. It is difficult to discover

any distinction, not merely nominal, between any one of the four following cases, which were suggested at the bar, viz. : a devise of land to A, charged with 1,000*l.* 3*l.* per cent. consols to B ; a devise of land to A, on condition that A. shall transfer the 1,000*l.* consols to B ; a devise of land to A. on condition that A, out of the consols standing in his own name, shall transfer 1,000*l.* to B ; and, lastly, a devise of lands to A. and a direct bequest to B. of 1,000*l.* consols standing in the name of A : and it was argued with great force, that as in the first three cases there would be a clear legacy to B. charged upon the estate devised to A. within the words of the statute, and as the legal effect of the remaining mode of effecting the charge is the same, and that as they will all take effect by means of the doctrine prevailing in courts of equity, the consequence with regard to legacy duty must also be the same. It is suggested that there would be considerable difficulty in working out such a principle, but if that observation is correct it would not be an answer. In the present case it is admitted that the value of the land devised is below 10,000*l.*, the amount of the legacy. The duty, if I adopted the principle in this case, would be charged upon the whole value of the estate, whatever that might be, provided it did not exceed the 10,000*l.* ; and it is argued that, although in such cases this difficulty might be surmounted, still if the testator devised land to A. and bequeathed to B. a valuable picture, for instance, the property of A, and A. repudiated the devise and elected to retain his own property, it would be impossible to determine with precision what sum was to be charged on the estate. It is true that the value of the picture might be a matter impossible to be ascertained without actual sale, or even that the saleable value might be a small portion of its real value both to A. and B, which might consist in a *pretium affectionis*. But the statute only applies to cases where the gift is charged on real estate, and I have not been referred to, nor am I aware of, any case which decides that the estate would descend to the heir-at-law, charged with the pecuniary bequest in favour of a specific legatee to the extent of the supposed value of the specific legacy;

but even if this were the case, there would not be greater difficulty in valuing the specific legacy for the purpose of charging the value of it, as a sum of money in hand, than there is in valuing a chattel belonging to the testator, which is specifically bequeathed, for the purpose of probate or of legacy duty. Assuming, therefore, that the will of the testator had made this 10,000*l.* a charge upon his real estate, I should not have felt much hesitation in deciding that the legacy duty must be paid upon it ; but upon the preliminary question, which arises on the words of the clause in the statute, whether the 10,000*l.* is a gift which by the will has been charged upon, or made payable out of any real estate of the testator, I have come to a conclusion adverse to the claim of the Attorney General. It does not appear upon the facts before me that the testator has bequeathed to his daughter any stock or property which was the especial property of his wife, the devisee of the real estate. The will, as stated in the petition, is to this effect :—The testator bequeathed to his daughter and her issue 10,000*l.* consols generally, as if he himself had been possessed of stock of that nature, or had possessed personal property sufficient to purchase such an amount. But it is not a specific bequest of any existing or particular sum of consols, or of any portion of such specified consols standing either in his own name or in the name of himself and his wife. If he had expressly disposed of 10,000*l.* consols belonging to his wife, in favour of his daughter, she would have had a charge on the land devised to the extent of that legacy. But if, as appears to be the case, he has simply bequeathed a legacy of 10,000*l.* consols to his daughter and her issue, then, in my opinion, no question of election arises upon the will, but the widow might have kept the real estate and have wholly disregarded the bequest of the stock. If a testator, having no stock of any description, devises land to A. and 10,000*l.* consols to B, no obligation lies on A. to make good the bequest to B, but the bequest simply fails because the testator either has no stock, or, having some when he made his will, has disposed of it since ; or if it is not a specific bequest, but a pecuniary bequest of so much stock, it fails

from the deficiency of his personal estate. The latter is the case here. This is not a specific bequest of so much stock the property of the wife, but a bequest to the value of 10,000*l.* consols, which fails because the personal estate is deficient. There is nothing in the will, as here stated, that points specifically to the stock which became the property of the wife on surviving her husband, and in this respect the case resembles *Dummer v. Pitcher* (1); but unless that had been done by the testator, the widow could not have been put to her election, nor could any question of charge have been maintained. I am, therefore of opinion that this case does not fall within the words of the 45 Geo. 3. c. 28, and that no duty is payable on the legacy of 10,000*l.*, or on so much of it as may be equal to the value of the real estate. I have been in some degree embarrassed from not having the will before me; but I have assumed that the petition states the words of the will,—that, in fact, they could not amount to a specific bequest of the stock which was standing in the name of the widow; and having no doubt upon that, my judgment proceeds upon that ground (2).

LORDS JUSTICES.

1851.

Dec. 3.

1852.

Jan. 15.

In re LOVEDAY.

Lunacy — Traverse — Supersedeas — Costs—Statute 6 Geo. 4. c. 53.

J. W. L. was found a lunatic as from a certain day. He presented a petition to traverse, and an order was made allowing the same. On the same day an order was made, granting the care and custody of J. W. L. and his estate to C. B, who never perfected his securities, and no grant was ever made to him. On the traverse the jury found that the traverser was then of sound mind. The costs of the inquisition had been ordered to be taxed. J. W. L. presented a petition for a supersedeas of the commission and for the delivering up of his

deeds and papers in the hands of C. B. or of those who had issued the commission. These parties applied for an order for the payment of the costs out of the traverser's estate, but the Court refused to make the order, first, on the ground that, independently of the statute 6 Geo. 4. c. 53, there was no jurisdiction, either original or as delegate of the Crown; and secondly, because the 4th section of that statute only authorized the Court to deal with the property pending and notwithstanding a traverse. The Court also decided that it had no authority to make the delivery up of the property dependent and conditional upon the payment of the costs.

This was the petition of the lunatic, and it stated, that on the 21st of January 1851 a commission was awarded and issued, on the petition of John Loveday, the brother-in-law of the petitioner, and of his wife, the petitioner's sister, to inquire whether the petitioner was of unsound mind, so as to be incapable of managing himself and his affairs; and if so, from what time had he been so. That in pursuance of such commission an inquisition was held at the Shire Hall, Gloucester, before Mr. Winslow, one of the Masters in Lunacy, on the 25th, 26th, 27th and 28th of February and the 1st of March 1851; that on such inquisition the jury found that the petitioner was of unsound mind and incompetent to manage himself and his affairs, and had been so from the 16th of November 1850. That on the 7th of April 1851 the petitioner presented his petition, praying, amongst other things, that he might be at liberty to traverse the said inquisition; and that on the 28th of May 1851 an order was made, allowing him to traverse the same. That the traverse came on to be tried at the last assizes for the county of Gloucester (that is to say), on the 14th of August 1851; and that upon the trial thereof no evidence whatever was given of the lunacy of the petitioner at any time, but it was admitted that the petitioner was then of sound mind; and without any evidence, by the consent of all parties, the following finding of the jury was indorsed on the *postea*: "The jury find that the defendant is now of sound mind and sufficient for the government of himself and his manors, messuages,

(1) 5 Sim. 35; 2 Myl. & K. 262.

(2) See the Attorney General v. Metcalfe, 20 Law J. Rep. (N.S.) Exch. 329.

lands, tenements, goods and chattels." That by an order, dated the 28th of May 1851, the custody of the petitioner and the care and management of his estate were granted to Charles Baker for the time to come, until further order, upon his giving such security as should be approved of by Her Majesty's Attorney General, such security to be perfected on or before the 10th of November then next. That the said Charles Baker did not perfect the security so ordered to be given as aforesaid by the time appointed by the said last-mentioned order, nor had any further proceedings been taken under the said order: and that the said Charles Baker and the said John Loveday, or one of them, had (at the date of the petition) in his or their possession or controul various title deeds and other property belonging to the petitioner, taken possession of by the said John Loveday during the before-mentioned proceedings.

The petition then prayed that the commission of lunacy so issued and all proceedings taken thereunder might be superseded, and that the said Charles Baker and the said John Loveday might deliver over to the petitioner all deeds, documents, goods and chattels of every description in their or either of their possession or controul and belonging to the petitioner. After the finding of the lunacy and before the trial of the traverse an order was made by the Lord Chancellor, directing the taxation of the costs of the commission, and that on the return of the report of the taxation such order should be made thereon as should be just.

Mr. Roll and *Mr. Terrell*, for the petition, stated the case in the same way as set forth in the petition, and entered into a variety of details of a personal nature, which did not bear upon the question of supersedeas, or upon the right to the delivery up of the deeds and other documents.

[**LORD JUSTICE KNIGHT BRUCE.**—Is the supersedeas resisted, or do the respondents ask an addition only to the order for taxation already in existence?]

The Solicitor General said that no resistance was now offered to the supersedeas: all that the respondents wanted was an addition to the order made for taxation,

namely, that the costs incurred in the prosecution of the commission might be ordered to be paid out of the estate; those costs had already been ordered by the Lord Chancellor to be taxed. No grant of the estate had been made; and, therefore, if this addition were not made the costs would fall on those who had thrown the protection of the Court round this gentleman.

Mr. Roll and *Mr. Terrell* were heard on this point.—The inquisition having been successfully traversed, the Court has no longer the jurisdiction or authority to award the costs now claimed. The jurisdiction to give costs only arises from the jurisdiction to administer the property of a party actually lunatic; and if the inquisition be successfully traversed, the property is removed beyond the controul of the Court. This was decided to be the law by Lord Loughborough in *Ex parte Ferne* (1), and was recognized as such by Lord Eldon in *Sherwood v. Sanderson* (2). The statute 6 Geo. 4. c. 53. has not altered the law as to the power to give costs after a traverse, but only enables the Lord Chancellor or those deputed by the Crown to exercise the jurisdiction in lunacy to award costs, notwithstanding the pendency of a petition to traverse. The Court before that statute had no authority to deal with that subject until the lunacy should have been established by the failure of the traverse.

The Solicitor General and *Mr. Amphlett*, contra.—The extreme desire to assist those who throw the protection of the Court round persons in such a state of mind as *Mr. Loveday*, is shewn by the fact that Lord Loughborough expressed his regret, in the case of *Ex parte Ferne*, that he was unable to award the costs. The statute was passed expressly to remedy, among other defects in the law, that inability. The 4th section enables the Lord Chancellor, or those exercising the jurisdiction in lunacy, to make such orders as may be deemed right relative to the commitment of the person and the application of the estate and effects of persons who have been

(1) 5 Ves. 832.

(2) 19 Ibid. 280.

found lunatic by inquisition, notwithstanding the depending of any petition or order relating to a traverse of such inquisition. Such an order was made by the Lord Chancellor in this case pending the traverse, by which it was referred to the Master to tax the costs now claimed; and by the same order it was provided that upon the return of the report the Court should make such order as should be deemed just. Such being the case, the Court having recognized the costs, and payment alone remaining to be decreed, the Court can further proceed by making a further order, which will have the effect of a statutory charge on the property in the possession of the respondents for the amount of their costs incurred for the benefit of the lunatic. At any rate, as these documents and property now claimed by the petitioner came justly and properly into the possession of the respondents in the course of the proceedings under the commission, the Court will make the payment of these costs a condition of the delivery up of such deeds and property. That the commission was properly and upon good ground sued out is shewn by the verdict upon the inquisition. In fact, the commission was at the time necessary for the protection of the petitioner and his property, and the costs incurred for such protection ought, in all justice, to be paid.

Mr. Rolfe, in reply.—The very terms of the statute expressly limit the authority conferred on the Court by it to the dealing with the property of the lunatic in the interval between the inquisition and the traverse. The power over the person of a lunatic, or of an alleged lunatic, is co-extensive, and co-extensive only, with that over his property; and this is so whether as regards the statutory or the general jurisdiction in lunacy. But if the statute is to be regarded as conferring jurisdiction over the property after a successful traverse of the inquisition, the argument must of necessity be carried to the extravagant length of saying that it exists also over the person. This, however, cannot be maintained. The order for taxation does not alter the state of the case, for that order to be of avail must have been executed before the finding upon the traverse; but not having been so, the Court is left

without jurisdiction, and cannot direct its completion. The payment of these costs could be enforced only by process against the person of the lunatic, or by the appointment of a receiver of his estate, neither of which proceedings is applicable now, the jurisdiction of the Court over both person and property being ousted by the successful traverse. To impose payment of the costs as a condition for the delivery up of the papers and property would be unjust, and, in truth, of no avail, for an action of trover for them could be brought by the petitioner, and in which he must succeed.

Jan. 15, 1852.—**LORD JUSTICE LORD CRANWORTH**.—This is a petition by James William Loveday against a commission of lunacy. The prayer is, that the commission and proceedings under it may be superseded, and that Charles Baker and John Loveday may be ordered to deliver up to the petitioner the deeds, documents and property of the petitioner in their hands. The facts of the case are these:—A commission was issued at the instance of John Loveday against James William Loveday. The result was, that James William Loveday was found to be a lunatic. Upon that the parties who sued out the commission proceeded to get the appointment of a committee. The respondent, Charles Baker, was appointed, but no grant was made to him of the property of the alleged lunatic. In the meantime, the alleged lunatic traversed the inquisition. The traverse was tried at the Gloucester Assizes last summer; and the result was a finding, not perhaps strictly correct, but a finding that James William Loveday was not a lunatic at that time; that he was at that time of sound mind and capable of governing himself and his property. Upon that this petition was presented by James William Loveday, praying a supersedeas of the commission, and that Charles Baker, who was to have been a committee under the commission, and John Loveday, who with his wife sued out the commission, may be ordered to deliver up all papers, documents and property in their possession belonging to the petitioner. The grant of the prayer of the petition so far as it seeks a supersedeas of the commission is a mere matter of course.

A question then arises, which is the only question on which I wished for time. John Loveday, who sued out the commission, insisted that it was a proper thing on the part of those who exercise jurisdiction in lunacy to give the costs of suing out the commission. That was disputed by James William Loveday, and that dispute gives rise to two questions; first, is there jurisdiction? And secondly, if there is, then is this a proper case in which to exercise it? With regard to the propriety of giving costs, if there is jurisdiction to do so, that depends on the conduct of the parties in suing out the commission; that is, how far they acted upon proper motives, and other questions of that description relating to the conduct of the parties. Upon that we had before us no information, and we took the opportunity of speaking to the Lord Chancellor upon the subject, from whom we heard that he was satisfied the parties had acted *bona fide*. Under the circumstances, therefore, if we have jurisdiction, we think the case a perfectly fit one in which to give the costs.

Then arises the next and important question, whether we have jurisdiction. Now there was no such jurisdiction independently of the recent statute 6 Geo. 4. c. 53. That was decided by Lord Loughborough in *Ex parte Ferne*, in which case the form of the traverse was, that the party was a lunatic at the time of the marriage and at the time of taking the inquisition. That was not the time in question. The time was that of the verdict being given; but the verdict was, that at that time he was not a lunatic. The party not being a lunatic, a supersedeas was of course. Then came the question of costs. The then Solicitor General and Mr. Fonblanque for the family of the Wraggs, pressed for costs, observing that they had established the lunacy at the time. That appears to be a stronger case than the present, where it is left in doubt whether at the time of the inquisition the petitioner was a lunatic; the verdict found being simply that the party was not a lunatic at the time of the finding upon the traverse. In the case of *Ex parte Ferne*, the Lord Chancellor, Lord Loughborough, wished to give the costs; but he said, "Where is the fund to pay the costs?"

Where the commission is superseded there can be no fund. There is a step to be taken, possession to be taken of the property. The traverse stops that. The lands and goods have never come into the hands of the Crown. The traverse is *de jure*. It is no favour. The parties apply by petition; stating that they are dissatisfied with the finding, and that stops the commission. There is no *amoveas manus* here. If I could act *cum imperio*, it is a very proper case; and the parties have entitled themselves to all the costs I can give them; but I have no jurisdiction." That was the opinion of Lord Loughborough, and in a case of *Sherwood v. Sanderson* the principle was fully recognized by Lord Eldon. In that case he was able to give costs, not *simpliciter* by virtue of the jurisdiction in lunacy, but because the property of the lunatic consisted in part of a fund in Chancery over which he had jurisdiction. He thought he might deal with that fund for the purpose of giving costs, but he recognized the doctrine of Lord Loughborough in the previous case. The reason of the doctrine is, I apprehend, that the jurisdiction is one of administering the property of the lunatic, and if this is once gone then nothing remains in the hands of those who exercise the jurisdiction to administer. That being the doctrine previous to the statute 6 Geo. 4. c. 53, then the question is, how far it is altered by that statute. The statute is entitled "An Act for limiting the time within which inquisitions of lunacy, idiocy, and *non compos mentis* may be traversed, and for making other regulations in the proceedings pending a traverse." Now if the enactments of the statute are more extensive than indicated by this title, their effect would not be limited by the title, and the fact that the act is entitled only pending a traverse would not be material. Let us see then whether the enactments give any jurisdiction over the property of the lunatic or the costs at any other time except pending the traverse. If not, when once there is a verdict against the lunacy, the law would stand just as it did before the statute.

Now the 4th section, which is the material section of the act, enacts "that it shall be lawful for the Lord Chancellor, Lord

Keeper, or Lords Commissioners, or other the person or persons intrusted as aforesaid, from time to time after the return of any such inquisition as aforesaid, and notwithstanding any petition or order which may be depending relating to a traverse of such inquisition, to make such orders relative to the custody and commitment of the person or persons, and the commitment, management and application of the estates and effects of any person or persons who shall or may have been found lunatic, idiot or of unsound mind, by any such inquisition or inquisitions as he or they shall think necessary or proper." Does that authorize the Lord Chancellor or the persons acting in the jurisdiction of lunacy to deal with the property of the alleged lunatic after the trial of a traverse finding him not a lunatic? We have come to the conclusion (it being necessary to decide this, because if we had jurisdiction and could act, then we should be inclined to give costs) that we have no such authority given to us by the statute. There are two main grounds on which, after narrowly considering the words of the statute, we think that must be taken to be the result. We reject the words of the title to the statute, but we find exactly the same meaning in the words of the 4th section. The words are "it shall be lawful for the Lord Chancellor, &c. from time to time after the return of any such inquisition, and notwithstanding any petition or order which may be depending relating to a traverse of such inquisition, to make such orders relative," and so on; that is, notwithstanding any petition or other proceeding, the Court may proceed. That is, you need not wait, as before the statute you must have waited, till the absolute establishment of the lunacy on the trial of the traverse, but you may in the mean time deal with the property on the foundation of the inquisition pending the inquiry as to the lunacy. These considerations go far to shew that the power given by the statute beyond what existed before was meant to be conferred only pending the trial of the matter upon the traverse. But that conclusion is made abundantly clear when we see what a contrary construction must necessarily lead to. It must lead to this, that this jurisdiction is given to deal with the person as well as

the property of the alleged lunatic. The enactment enables the Court "to make such orders relative to the custody and commitment of the person or persons, and the commitment, management and application of the estates and effects" of alleged lunatics. These words are all of the same sentence, and are all governed by the words "it shall be lawful to make such orders." To what period then is it that that jurisdiction is meant to extend? Is it to the period up to the time when the non-lunacy is completely established, or is it to continue afterwards? If afterwards, it must be meant that the Court should have power to deal with the person as well as the property; and on the other hand, if the Court is not enabled to deal with the person, neither is it enabled to deal with the property. The whole is one enactment, and the whole relates to one period. This in effect is a *reductio ad absurdum*. That being so, it is unnecessary to point to the other difficulties that have been mentioned, namely, that it is impossible to say in what way the case is to be dealt with; or how to make an order except a personal order to pay, or how to make an order to take possession of the property by a receiver. We have come to the conclusion, therefore, that not being authorized to act *cum imperio*, as Lord Loughborough expresses it in the case I have referred to, we can only deal with the case under the jurisdiction conferred by the statute, and that this statute does not authorize us to give any costs whatever.

Then arises the other point which has been suggested, namely, whether inasmuch as the party who was intended to be the committee, and those who sued out the commission, have property and papers in their possession belonging to the alleged lunatic, and the petition asks that they may be ordered to deliver them up—whether, although we could not make an order giving the costs, we could not make the delivery up of the property and documents conditional on payment of the costs. We have considered that, and we are of opinion that we are not entitled to impose any such terms. The delivery up of the property and documents by the respondents, now that the alleged lunacy has been successfully traversed, is a matter

of simple justice. The respondents took into their possession property and papers belonging to the alleged lunatic, because that was deemed necessary for his protection, by anticipation, as it were, upon the assumption that the result of the inquiry would be to establish a title to them in the respondents. In that state of things it was reasonable that they should hold them; but when, upon the result of the traverse, he is found not to be a lunatic, of course they are his own property and he is entitled to the possession of them. Indeed, any attempt to impose such terms would be nugatory, and would leave the parties open to an action of trover or other action at the instance of the petitioner. The order, therefore, we make is an order to supersede the commission, and that the respondents deliver up the papers and property of the petitioner in their possession (1).

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LORDS JUSTICES.

1851.

Dec. 5, 6, 9.

In re BURCHELL.

Solicitor's Bill of Costs—Railway Company.

Solicitors in London were appointed to a projected company. Other solicitors were appointed as local solicitors, and were directed to prepare the notices to landowners, and other matters connected with the local board. Errors were discovered in these, and the scheme was ultimately abandoned. The London solicitors in their bill of costs charged for the preparation of these notices, and the taxing Master allowed them. The Master of the Rolls disallowed the claim, and "directed" the solicitors to establish their right at law, on the ground that the facts were disputed, and that on the facts, so far as they were ascertained, there were questions of law to be decided. On appeal the claim

(1) In the case of *In re Pinks*, 12 Law J. Rep. (N.S.) Chanc. 57, Lord Lyndhurst refused to make any order on the petition of a party who had sued out a commission of lunacy and the lunacy was established, but the lunatic died before a grant of the estate. The petition in that case prayed a reference for the taxation of the costs, or a declaration of the Court that the costs had been properly incurred for the benefit of the lunatic. His Lordship said the petitioner might bring his action.

was disallowed until it should be established at law, and the solicitors "were to be at liberty" to bring such action as they might be advised.

This was an appeal from an order of the late Master of the Rolls, Lord Langdale, and related to the title to certain items in a bill of costs. The facts so far as they are necessary to be stated are as follows:—

In August 1845 a company was projected for making a railway from Larne to Belfast and Ballymena, and on the 23rd of that month Messrs. Burchell, Kilgour & Parson were, by a resolution of the board of directors, appointed the solicitors of the company, and on the 4th of September following, another resolution was passed appointing Mr. Orr to be the local solicitor of the company at Ballymena. By another resolution, passed on the 20th of the same month, Mr. Orr was intrusted with the parliamentary notices and books of reference, in order that he might prepare the notices to landowners, and with other matters connected with the local board at Ballymena. On the 30th of November, the plans and sections of the railway were deposited pursuant to the Standing Orders of Parliament, but it was immediately discovered that they contained errors which, as the company alleged, and which Messrs. Burchell & Co. denied, rendered it impossible for the company to proceed with their entire scheme, and this circumstance became immediately known both to the directors of the company, to Mr. Orr, and to Messrs. Burchell & Co. In consequence of these errors (the fact of errors existing not being denied) the directors, on the 19th of December, passed a resolution, that the main portion of the line should be abandoned. The preparation of the notices to the landowners, which by the resolution of the 20th of September had been intrusted to Mr. Orr, were, at the request of that gentleman, performed by Messrs. Burchell & Co., it being necessary (if the entire scheme were carried on) that the notices should be served previously to the 31st of December. The time of this being effected was after the 9th or the 15th of December, a date strongly disputed in the evidence. After abandoning the main line, the company attempted to carry for-

ward the branch to Ballymena, for which; however, the bill being rejected by the House of Commons, they were unable to obtain an act of parliament, and the whole undertaking was consequently abandoned. On the 15th of September 1846, Messrs. Burchell & Co. delivered their bill of costs, containing their charges for the preparation of the notices, which was subsequently taxed at 1,963*l.* 2*s.* 8*d.*, of which amount the sum of 748*l.* 10*s.* 6*d.* was charged for preparing the notices to the landowners on the main line. These notices having become useless, Mr. Andrew Spottiswoode and others, the former directors of the company, presented a petition to the Master of the Rolls, praying that it might be referred back to the taxing Master to review his taxation, and that he might be directed to disallow those, among other sums of money which he had allowed; and upon that petition being heard, it was decided that, as there was great difficulty in ascertaining the real facts, and as some questions of law arising upon the facts, so far as they were ascertained, existed, the question ought to be tried by an action at law, and his Lordship accordingly directed an action to be brought against the directors for the recovery of the sum which the Master had found to be due to Messrs. Burchell & Co., on the supposition, which was not denied, that the directors were liable for the payment (1). Messrs. Burchell & Co. presented their petition of appeal, and the same now came on to be heard.

(1) On the point of the notices Lord Langdale's judgment (11 Beav. 599) was as follows:—"As to those notices, for which so large a sum of money was charged, and for which 748*l.* 19*s.* 6*d.* has been allowed by the Master, it is alleged, on the one hand, that they were prepared either by the direct orders or authority of the petitioners, or in the due discharge of the duty imposed upon the respondents as the attorneys or solicitors of the petitioners, and with the knowledge and approbation of at least some of the petitioners. On the other hand, it is alleged, that the petitioners never gave any such authority, and never employed the respondents as their solicitors, for the purpose of preparing these notices, or as their solicitors in such a manner as to make it their duty, or properly their business, to prepare the notices without special order; and that, being without special order, it was, under the circumstances in which they were placed, contrary to their duty to prepare the notices, which proved to be of no use whatever. After reading all the affidavits

Mr. Bethell, Mr. Malins, Mr. Schomberg, and Mr. St. G. Burke, appeared in support of the appeal, and argued that the right of the solicitors was a plain, undeniable legal right to be paid for business done on the order of the company; that the order having been given to them to act as the solicitors of the company, their retainer extended not only to the acts necessary to be done in London, but to all matters connected with the line of railway itself in Ireland; that their duty extended far beyond the deposit of the plans and sections, and having been desired by the directors to send over parties to Ireland in order that the surveys might be completed, and the notices duly served, it was the bounden duty of Messrs. Burchell & Co. to prepare the notices, for if they had not there would not have been time to serve them by the 31st of December, the last day allowed for such purposes. The resolution of the 19th of December for the abandonment of the main line rendered expedition necessary in the preparation of the notices in question relating to the branch line. The whole question depended solely on written documents, with which the Court was equally, if not more, competent to deal satisfactorily than a jury.

Mr. Roundell Palmer and Mr. Lewin, for the respondents, contended that the notices were wholly useless on account of the errors in the plans and sections, and that the preparation of those notices ought not to have been proceeded with after such errors were discovered. It was the duty of Mr. Orr to prepare these notices, and he had no authority to delegate that duty to Messrs. Burchell & Co. For that a special authority was required, and such authority could only be conferred by the directors, who never gave any such authority.

Mr. Bethell was heard in reply.

which have been filed, finding considerable difficulty in ascertaining the real facts, and some questions of law arising upon the facts, so far as they appear to be ascertained, and not being able to satisfy myself that the Master has come to a right conclusion, it appears to me, that the question ought to be tried in an action, which may be brought against the petitioners, for the recovery of the sum which the Master has found to be due to the respondents, on the supposition that the petitioners are liable for the payment."

LORD JUSTICE KNIGHT BRUCE.—The controversy before us relates to a sum of 748*l.* and something more, being the amount of charges in a particular section of a bill of costs. The charges contained in this section were allowed by the taxing Master, but were declined to be allowed by the Master of the Rolls until the solicitors had established their right to them at law. There were three different modes of dealing with the case as presented to the Master of the Rolls. First, the Master of the Rolls might have agreed with the taxing Master, and allowed to the solicitors all they claimed; or, secondly, the Master of the Rolls, altogether differing from the taxing Master, might, without allowing anything to have been due, have struck all these claims out of the bill, and thus ended the matter; or, thirdly, the Master of the Rolls might have given the solicitors an opportunity of establishing their title to those charges at law. The only appeal brought before us is so constituted as, in my opinion, wholly to exclude the second of these alternatives, that is, the total and final disallowance of these sums. That leaves us but two out of three alternatives to be dealt with. After listening attentively and carefully to all that has been said, I have not the least hesitation in saying that if we are to elect between the two alternatives left to our choice, we have no other course than to disallow the charges, unless the solicitors shall establish their right to them at law. At least, for one reason sufficiently obvious, I am not disposed to enter into the reasons which have induced me to adopt this view, unless the appellants' counsel should express a wish that I should do so.

[*Mr. Bethell.*—We leave the case entirely in your Lordship's hands.]

LORD JUSTICE KNIGHT BRUCE.—Then, the appellants' counsel not desiring a statement of my reasons, I content myself by saying that this demand cannot be allowed unless it be established by an action, and therefore the solicitors are to be at liberty to bring such action for this sum as they may be advised.

LORD JUSTICE LORD CRANWORTH.—That is quite my opinion, and I have nothing to add. I confess, at one time, I was struck with

the observation that the right to these costs was a legal right, and so clear that it need not go to law. In this I cannot agree. The matter is in very great doubt. It was said, too, that the title to these costs depended wholly on documents. That is not so. Here there is a great deal more than documents, and until the present petitioners establish their title at law their right to these costs cannot be sustained to our satisfaction.

On the application of the counsel of the respondents, the costs of the day were allowed them, the order being substantially the same as that of the Master of the Rolls, that is, the solicitors being at liberty to bring an action, instead of being directed to do so, the other part of the order remaining untouched.

M.R.
1851.
May 30;
Dec. 1, 16, 17. } GOOCH v. GOOCH.

Will—Construction—Remoteness.

*W. T. devised real estates to trustees, to receive the rents during the lives and life of the survivor of all the children which his daughter M. G. had or should have, and apply the same in support of his daughter, and her children, in equal shares, and when any of his children should attain twenty-one during the minority of her youngest living child, the share of such child was to be paid to him or her; and when the youngest grandchild should have attained twenty-one, the savings of the rents were to be paid amongst his grandchildren then living equally (with benefit of survivorship amongst his daughter and the survivor of his grandchildren, to be paid to the latter at twenty-one;) but in case any grandchild should leave issue, such issue was to take the parent's share. In case his daughter should be living on the youngest grandchild attaining twenty-one, then in trust to pay her an annuity of 100*l.* a year for life, and to pay the rents from that time amongst his grandchildren and the issue of those dying equally, until the decease of the longest liver of his grandchildren; and after the decease of such surviving grandchild, to*

title the estate on the then eldest living grandson of his daughter. The residue of his real estate he directed to be sold, and gave the proceeds to all his grandchildren, children of his daughter, (except such eldest grandson). The testator also gave the residue of his personal estate to be applied in like manner as the rents of his real estate. The testator died in 1797; his daughter had six children living at his death, two of whom died unmarried in his life, and she died in 1801; and upon a suit instituted by J. G. the youngest grandchild,—Held, that the trusts, substituting the issue for the parent after the youngest child attained twenty-one were void for remoteness; that the trusts of the estate, after the death of the last survivor of the children of M. G. were void for remoteness; and that the trusts of the produce of the residue of the real estates directed to be sold after the decease of the last surviving child of M. G. were void for remoteness.

William Tippell by his will, dated the 24th of October 1792, gave and devised all his freehold, copyhold, and leasehold estates to William Bazire and Jonathan Tippell, their heirs, executors, administrators and assigns, upon trust that they "do and shall receive and take all the rents, issues, and profits of my messuages, lands, tenements, and real estate during the lives and the life of the survivor or longer lives of all the children which my daughter Mary, the wife of John Gooch, hath or shall have, and pay and apply the same, first, in keeping the houses and buildings belonging to the estates in proper tenantable repair, and in discharging the annuities hereinafter mentioned; and the clear net proceeds of such rents, after the above deductions" and the payment of the expenses of trustees, "shall and will pay and apply in the support of my said daughter, and in the maintenance, education, and bringing up of all her children which she shall from time to time have living, in equal shares between her and them; that is, one equal part or share thereof to and for her, my said daughter's, own sole use and benefit, and each child's equal part and share, for his and her use, or so much thereof, and in such manner as my said trustees shall think proper and judge necessary, and in which I wish my

daughter to be consulted; save and except, and my will and mind is, that from and after any of her children shall attain the age of twenty-one years, during the minority of her youngest living child, that the part or share of such child or children attaining the age of twenty-one years shall from thenceforth be paid to him, her or them respectively, to and for his, her or their own use and disposal; and when the youngest of my grandchildren which shall live to attain the age of twenty-one years shall have arrived at that age, then I direct that such savings or overplus of the clear rents and profits as shall be then in the hands of the trustees unexpended for the purposes aforesaid, and the rents then due, shall be paid and divided to and amongst my said grandchildren that shall be then living, equally share and share alike."

"And my will is, that in case any of my grandchildren by my said daughter shall happen to depart this life under the age of twenty-one years without leaving any issue of his, her or their body or bodies lawfully begotten then living, then that the part and share, parts and shares, of the said clear rents and profits of such grandchildren and children so dying under age and without issue as aforesaid, shall be paid and applied by my said trustees to and amongst my said daughter and the survivors or others of my grandchildren by her, in equal shares,—as to my daughter's share thereof, to her for her own use and benefit, and as to her children's share, to and for their separate and respective support and benefit, in such manner as my said trustees shall think proper, during their respective minorities, or otherwise to be paid to them at their respective ages of twenty-one years; but in case any of my said grandchildren shall depart this life under the age of twenty-one years, leaving issue of his, her or their body or bodies lawfully begotten, my will and mind is, that such issue shall be entitled to the part or share of the said clear rents and profits its father or mother would have been entitled unto if living, to be paid and applied in like manner for the support and benefit of such issue; and in case my said daughter Mary shall happen to depart this life before all my grand-

children by her shall have attained the age of twenty-one years, then my will and mind is, that her part and share of the said clear rents and profits shall from her decease flow to and be paid and applied for the use and benefit of all her children and their issue, until the youngest of such children shall attain twenty-one, in equal shares, as an increase of, and with their respective parts and shares of such rents and profits, and in like manner and in such proportions as such shares are hereinbefore directed to be paid and applied to and for their respective use and benefit; and in case my said daughter, Mary Gooch, shall be living at the time the youngest of my grandchildren by her shall attain the age of twenty-one years," then, upon trust to pay to his daughter, Mary Gooch, an annuity of 100*l.* a year for life, which he directed might be charged upon his real estate for her separate use; and also in case his brother, Thomas Tippell, and his sister, Elizabeth Seawater, or either of them, should be then living, to pay to them an annuity of 20*l.* a-piece for their lives, both of which he directed might be charged upon his real estate. "And from and after all my grandchildren by my said daughter and the youngest of them shall have attained the age of twenty-one years, then I direct that the clear rents and profits of my real estates accruing from that time shall be paid and applied to and amongst my said grandchildren, and the issue of any of them that shall happen to die leaving issue, equally, share and share alike, and to the survivors and survivor of them until the decease of the longest liver of my said grandchildren; provided, that the issue of any such child or children dying in that time and leaving issue shall only be entitled to such part or share of the said clear rents and profits as its father or mother would have been entitled unto if living, and the part or share of such issue shall be applied in the maintenance and education thereof by the trustees for the time being, as they or the guardians of such issue shall think proper, during the minority of such issue." And from and immediately after the decease of the survivor or longest liver of my said grandchildren, "then upon trust that my devisees in trust, or the trustees for the time being, do and shall convey, surrender,

settle, and assure all that my messuage, &c., and real estate at Sutton, subject to the payment, with the rest of my real estate, of a proportionate part of the annuities previously given, unto such son of any one of my said grandchildren as shall at such decease of the survivor or longer liver of them be then the eldest living grandson of my said daughter, and his heirs for ever," whom he directed to take the surname of "Tippell," and use the arms of the family, with a gift over in case of non-compliance to the next eldest grandson of his daughter, who should take and use the surname and the arms of Tippell, and his heirs.

"And all the residue of my real estate, whatsoever and wheresoever, subject to the payment of the residue of the said annuities, I direct shall be sold by the then trustees as soon as conveniently can be after the decease of the longest liver or survivor of my grandchildren; and the monies arising by sale thereof, and from the rents and profits thereof, from the decease of such surviving grandchild until such sale, I give and bequeath unto all and every my grandchildren, the children of my daughter, whether male or female, other than and except such eldest grandson of my said daughter who will be entitled to the Sutton estate by virtue of the devise afore-mentioned, equally to be divided between them, share and share alike."

Power was then given to the surviving or continuing trustee, with the approbation of his daughter, to appoint new trustees.

The testator then gave the residue of his personal estate to his trustees, upon trust to invest the same until his youngest grandchild which should live to attain the age of twenty-one years should have attained that age; and after paying certain annuities out of the interest, the residue thereof was to be added to the clear rents and profits arising from his real estate, and be considered as a consolidated fund, and be paid and applied therewith to and for the benefit of his daughter and her children and their respective issue in equal shares, parts and proportions, and at such times and in like manner as such clear rents and profits were directed to be applied during

the minority of his said youngest grandchild as aforesaid; and upon such youngest grandchild attaining twenty-one he gave the principal money unto and amongst his said daughter, in case she should be then living, and her children, and if she should be then dead, then unto her said children, and the issue of any of them that should be then dead, in equal parts, shares, and proportions, save only that such issue of his said daughter's children should be entitled only to the part or share of such principal money as its father or mother would have been entitled unto if living.

Provision was then made for the accumulation of the portion of rents of his daughter's children not wanted for maintenance, and also for dividing his estate at the end of twelve, or, at the latest, at fifteen months after her youngest grandchild should have attained the age of twenty-one years; and the testator appointed William Bazire and Jonathan Tippell executors of his will.

The testator died on the 18th of January 1797, leaving Mary Gooch his only child and next-of-kin, and also his heiress-at-law, and heiress by the customs of the manors of which the copyholds were holden. She had six children, Mary Bazire, John Tippell Gooch, Anna Gooch, Maria Gooch, George Gooch and the plaintiff James Gooch. They were all living at the death of the testator, and were all infants with the exception of Mary Bazire, who was a child by a former husband. She died in 1800 unmarried. Mary Gooch died in 1801. Anna Gooch died in 1807 unmarried, and John Tippell Gooch died in 1837 intestate as to real estates, leaving the defendant Watson Gooch his eldest son and heir-at-law, who was also the heir-at-law of the testator and of Mary Gooch.

Maria Gooch intermarried with Robert Cann and had issue.

George Gooch was also married, and had issue.

The real estate of the testator consisted of freeholds and of copyholds, all of which with the exception of one were of the tenure of Borough English.

The plaintiff, James Gooch, as the youngest son of Mary Gooch, was her cus-

tomary heir, and also the customary heir of the testator.

Mr. R. Palmer and Mr. Craig, for the plaintiff.—The time for distribution is the period to ascertain the vesting of a fund. The youngest grandchild might have attained twenty-one in the lifetime of Mrs. Gooch. It was material, therefore, to ascertain who were the grandchildren contemplated, and at whose death the substitution was to take place, and whether it was a gift to those who survived the period when the youngest child should attain the age of twenty-one years, and was not, as a trust substituting the issue for the parent after they attained twenty-one, void for remoteness. The trust relating to the Sutton estate was to take effect after the decease of the survivor of the grandchildren. The trusts respecting the rents and the proceeds of the residuary real estates directed to be sold were to take effect upon the same event. A limitation to an unborn child for life has been held not to be good unless the remainder vested in interest at the same time—*Hayes v. Hayes* (1), but the authority of this case has been doubted—1 *Jar. on Wills*, 239. The construction of a will is not to be influenced either by a desire to destroy the limitations or to escape from so doing; but assuming the limitations to be void, the criterion is not whether they might be vested, or whether in the events that have happened they would have vested, but whether they ought not to be considered according to the circumstances as they existed at the death of the testator—*Cadell v. Palmer* (2). The gift would comprise all grandchildren who came into existence before the youngest child of Mary Gooch attained twenty-one. Cases are not wanting to shew the gift will not be confined to children living at the death of the testator.

1 *Rep. Leg.* 42, 3rd edit.

2 *Jar. on Wills*, 78, 81.

Hughes v. Hughes, 3 Bro. C.C. 352;
14 Ves. 256.

(1) 4 Russ. 311; a. c. 6 Law J. Rep. Chanc. 141.

(2) 1 Cl. & F. 372.

Singleton v. Gilbert, 1 Cox, 68.

Whitbread v. Lord St. John, 10 Ves. 152.

Mr. Walpole and Mr. Dickinson, for *Watson Gooch*.—The limitations cannot be considered as too remote. The words of the will can only be satisfactorily construed by confining the reference to such only of the children of *Mary Gooch* as were living at the death of the testator; it would otherwise be inconsistent with the direction, that on the youngest attaining twenty-one, *Mary Gooch* was to become entitled to an annuity, and was to cease to participate in the rents.

Bateman v. Roach, 9 Mod. 104.

Sprackling v. Ranier, 1 Dick. 344.

Ringrose v. Bramham, 2 Cox, 384.

Builer v. Lowe, 10 Sim. 317.

Storrs v. Benbow, 2 Myl. & K. 46; s. c. 2 Law J. Rep. (N.S.) Chanc. 201.

Leake v. Robinson, 2 Mer. 368, 388.

Vanderplank v. King, 3 Hare, 1; s. c. 12 Law J. Rep. (N.S.) Chanc. 497.

Mr. Lloyd and Mr. Bromley, for *George Gooch*.

Mr. Roupell and Mr. Bailly, for *Mr. and Mrs. Cann*.—The deed which was to grant the annuity to the testator's daughter was by his will to secure it to her for her separate use. It is evident therefore that the gifts in the will were confined to children who should be living in her lifetime—*Jee v. Audley* (3). When time, express or implied, is referred to in a will, it must be considered with reference to the class. The will refers to all the children of *Mary Gooch* which "she hath or may have." This is a construction which the Court will adopt in the absence of anything to prevent it. In *Mogg v. Mogg* (4), respecting the Lower Mark estate, the words of the testator's will were narrowed in the range of objects by limiting it to the children who were living at the death of the testator; but in this case every one of the donees was to attain twenty-one, and it could not operate during the life of the daughter. The words of this will therefore ought to be narrowed in their construction so as to bring its

limitations within legal limits. The testator has also used the words "my grandchildren by my daughter." This is a possessive pronoun, and it is not likely he would have applied it to persons to be born—*Harvey v. Harvey* (5).

Mr. Miller and Mr. Grenside, for other parties.

Mr. Craig, in reply, cited *Gilmore v. Severn* (6).

Dec. 1.—The MASTER OF THE ROLLS.—By this will the testator gave all his freehold, copyhold, and leasehold estates to trustees, their heirs, executors, administrators, and assigns—"In trust to receive the rents and profits of my real estate during the lives and life of the survivor or longer liver of all the children which my daughter *Mary*, the wife of *John Gooch*, hath or shall have," to be held in trust,—which may be divided for the sake of reference into three branches:—The first set of trusts relates to the income of the trust estates from the death of the testator until his youngest grandchild attains twenty-one: the next set of trusts relates to the income of the trust estates after the time of the youngest grandchild attaining twenty-one until the death of the last surviving grandchild: and the third set of trusts professes to dispose of the property after the death of the last surviving grandchild of the testator. The first set of trusts which relate to the income of the trust estates until the youngest grandchild attains twenty-one are, that the rent shall be applied first in keeping the houses and buildings relating to the estate in repair, and in discharging annuities after mentioned; secondly, in paying expenses of trustees; thirdly, "in support of my daughter *Mary Gooch*, and in the maintenance and education of all her children who may be living, from time to time in equal shares, that is to say, one share to my daughter, and one other equal share to each of the children," and when any child attains twenty-one during the minority of the youngest living child, the proper share is to be paid to that child. If any child dies under twenty-one without issue the

(3) 1 Cox, 324.

(4) 1 Mer. 654, 658.

(5) 4 Beav. 215; s. c. 5 Ibid. 134.

(6) 1 Bro. C.C. 582.

share of that child is to be equally divided between Mary Gooch and the surviving children. If any child dies under twenty-one with issue, the issue are to take the share of the parent. If Mary Gooch dies before the youngest child attains twenty-one, her share is to be divided among the children and their issue until the youngest child attains twenty-one. Then comes the second set of trusts, which provides, that when the youngest child attains twenty-one all arrears and accumulations, and the rents then due, are to be divided among the children then living equally. If Mary Gooch shall be living when the youngest child attains twenty-one, then the estates are to be charged with an annuity of 100*l.* per annum for Mary Gooch for her life for her separate use, and also an annuity of 20*l.* to the testator's brother, Thomas Tippell, and a similar annuity to the sister, Elizabeth Seawater, if they are then alive; and subject thereto, when the youngest child has attained twenty-one, the rents and profits are to be divided among the children and the issue of any of them that shall happen to die during the life of the surviving child, and providing that the issue of a child dying within that time shall only take the parent's share. Then comes the third set of trusts, which provides, that on the death of the surviving grandchild the trustees shall convey the property at Sutton charged with the subsisting annuity to the eldest living grandson of his daughter Mary Gooch in fee, with a proviso for shifting the estate to the next eldest grandson of Mary Gooch, in case the eldest does not take the name and arms of Tippell; and the testator then directs the residue of the real estate, subject to the payment out of that residue of the subsisting annuities, to be sold, and the produce thereof, together with the rents until sale to be paid, in these words, "unto all and every my grandchildren the children of my daughter other than and except such eldest grandson of my daughter who may be entitled to my Sutton estate, equally." The will contains a clause directing the receipts of the trustees to be good discharges. It contains a power of appointing new trustees, and a direction to the trustees and executors to convert the whole personal estate into money, and thereout to pay legacies,

finer, or admissions to the copyholds. And the testator then directs that the residue of his personal estate shall be invested until his youngest grandchild attains twenty-one, and out of the produce thereof they are to pay the annuity, and the balance of the income is to be applied in aid of the rents of the real estate as before directed; and upon the youngest grandchild attaining twenty-one, the principal is to be divided between his daughter and her children, or such of them as should be then living, and the issue of the deceased child is to take the parent's share. The testator then appointed his trustees executors of his will, and died in 1797. He left his daughter Mary Gooch surviving. She had at that time by her first husband one daughter living, but who died before her mother without leaving issue; and by her second husband, Mary Gooch had living, at the death of the testator, five children, all of whom survived her, and of whom three are now living, one of them is James Gooch, the plaintiff, who is her youngest son and customary heir in Borough English of the testator, and also his legal personal representative. Watson Gooch, the first defendant on the record, is the grandson and heir-at-law of the testator as far as regards the freeholds. Mary Gooch had no children born after the death of the testator.

The plaintiff contends the true construction of the will of the testator to be, first, that the trusts for the substitution of the issue for the parent after the youngest child has attained twenty-one; secondly, that the trusts of the Sutton estate, after the decease of the last surviving child; and, thirdly, that the trusts as to the proceeds of the residue of the real estate directed to be sold on the death of the last surviving child, are all void, because they are not limited to take effect within the time prescribed by law; and that being void, the testator has not by his will made any disposition of his property given to each child of Mary Gooch after the death of that child, and that, consequently, the plaintiff is entitled to the lands held in Borough English, as the heir of the testator, according to the custom, on the decease of each child of Mary Gooch. This question depends on what children of Mary Gooch

are included in the words of the will, and whether the word "living" confined the gift to the children of Mary Gooch who might be living at the date of the testator's death; or secondly, whether it is to be extended to the period of the decease of Mary Gooch, and thus include all children whom she might by possibility have; and thirdly, whether it is to be considered as including the children who might be alive from time to time until the youngest of them for the time being attains the age of twenty-one years.

The words of the gift are "during the lives and the life of the survivor or longer liver of all the children which my daughter Mary Gooch hath or shall have." It is urged by those who contend for the validity of this devise, that the time specified for ascertaining the class is the death of the testator, and although the words "shall have" import children born after the date of the will, they are, it is said, usually satisfied by referring them to the period which might elapse between the execution of the will and his decease; and in support of this view of the case, I might refer, among others, to the cases of *Sprackling v. Ranier*, *Storrs v. Benbow* and *Builer v. Lowe*. In all those cases, the words importing futurity were so confined; and it was held by Sir J. Leach in *Storrs v. Benbow*, that the Court would not interfere to construe a will to include all the issue which might be born, for this reason, that the Court will not impute to any testator an intention so improbable as to postpone the distribution of the residue until the death of all the children who might be born to the person named in the will. They contend also, that the rule prevailing in the construction of instruments of this description is, that the class is to be ascertained when the distribution is to take place, and that the distribution here takes place immediately on the decease of the testator, by the devise of the rents between Mary Gooch and her children; but the cases cited relate exclusively to personal estate, and have been considered as defining an excepted class, but not as shaking the general rule, and where, in the absence of any particular words importing the contrary, the class to take would be determined at the death

of the testator; if effect is to be given to the words importing futurity, it must be to admit children born subsequent to that period. This was determined in the case of *Mogg v. Mogg*; where the testator devised an estate to trustees, in trust to pay the rents for the maintenance of the child and children begotten and to be begotten of his daughter Sarah. The same argument was urged there, as was urged here, that the words might be satisfied by admitting the children born after the date of the will and previous to the death of the testator; but the Court of King's Bench certified that all the children born after the death of the testator took interests under this devise, and Sir William Grant confirmed this certificate. Upon looking attentively at the words of this will, I am unable to distinguish the expressions contained in it from those employed by the testator in *Mogg v. Mogg*. There the words were "begotten and to be begotten." Here the words are "hath and shall have." The case of *Mogg v. Mogg* has always been considered a leading case in illustrating the rules which regulate the class of children entitled to take under devises, whether immediate or future. I concur in the conclusion come to in that case, and I consider that it settles and concludes the question here as far as to let in the children of Mary Gooch who might be born subsequently to the death of the testator, unless there are other passages in the will cutting down or destroying the effect of these words. The circumstance that no child of Mary Gooch was born after the death of the testator cannot, it is manifest, affect or alter this conclusion. The rule of law is clear, that the gift is bad altogether if some of the class are incapable of taking by reason of that rule, and were it not so, the validity of the devise would depend on the fact of whether the testator died a few years sooner or later.

Upon looking through the rest of the will, I find no words to qualify or weaken the effect of the words I have referred to, letting in the children of Mary Gooch. On the contrary, the whole scope and object of the will plainly points to their admission to share in the rents of children who might be born after the testator's death. Thus he afterwards speaks of "all the children

she shall from time to time have living," and the ultimate devise of the rents, on the youngest child attaining twenty-one, is, "amongst my said grandchildren that shall then be living." Assuming, however, children born subsequently to the date of the decease of the testator, it is still a question up to what period it was the testator's intention to admit them. On this subject I have arrived at the conclusion, that the words of the will do not point to the death of Mary Gooch as the period, and for this reason, the will provides for the event of the youngest child of Mary Gooch attaining twenty-one in her lifetime. It is obvious that it would be wholly inconsistent with this provision that it should remain a matter of uncertainty until the death of Mary Gooch who was or might be her youngest child. I think that the words used by the testator here and throughout the will, shew that he considered that the class of his grandchildren was to be ascertained when the youngest child of Mary Gooch for the time being attained twenty-one, and that he considered the possibility of any child being born to Mary Gooch after the next former living child had attained twenty-one as a contingency so remote as not to be worth providing against.

The real construction of the will of the testator appears to me to be the only remaining point I have not referred to, namely, that it includes the children who might be let in from time to time during the life of Mary Gooch, whether born after or before the death of the testator, until the period when the youngest of her living children attained the age of twenty-one years. This is confirmed by various expressions in the will, which, with what I have already stated, is sufficient to shew the meaning of, without reading the context, such expressions as these, "all the children she shall from time to time have living," "the youngest living child," "when the youngest of the grandchildren shall have attained twenty-one years," "among my said grandchildren who shall then be living, equally." The obvious *prima facie* meaning of all those expressions is, not only to include children of Mary Gooch who might be born after the

decease of the testator, but also to point to the fluctuations that might take place in that class until the youngest child for the time being attained the age of twenty-one years.

The result of this construction, if correct, is, that the testator has attempted to do that which by law he is not permitted to do, and has attempted to give interests as purchasers to the unborn children of his daughter, Mary Gooch.

I am of opinion, therefore, that the limitations to the issue of Mary Gooch who might be born after the decease of the testator, are void for remoteness, and that in these respects I must declare that the testator died intestate.

The description of the residue of the real estate is obscure, by reason of some clerical error, which appears to have crept into the copy of the will. The words I read again are, "unto all and every my grandchildren, the children of my daughter, other than and except such eldest grandson of my daughter who will be entitled to my Sutton estate." As it stands, there is a contradiction in terms, but I think that the meaning is clear. The testator has previously exhausted the limitations in favour of his grandchildren, and, after the decease of the survivor of them, has disposed or endeavoured to dispose of the Sutton estate in favour of one great-grandchild, namely, the eldest; and he then proceeds to dispose of the residue of the real estate in favour of the remaining grandchildren other than his great-grandson who takes the Sutton estate. Any other construction than this would be absurd and repugnant to the rest of the will, and this is obviously the only construction which is intelligible and consistent with what he has previously declared. It is manifest to my mind that the testator has not given this residue to his grandchildren, and unless I can put upon it the construction in favour of the great-grandchildren which it appears to me that the testator intended, I should be compelled to say that the passage was unintelligible, and that an intestacy from uncertainty of meaning would be the result. Assuming it to mean a gift to the great-grandchildren, here, again, the testator has attempted to do what the law

will not permit, and has directed persons to take his real estate as purchasers whose parents may not be in existence at the time of his death. I am of opinion, therefore, that the devise of the Sutton estate, and the devise of the residue of the real estate, or rather the produce of the residue of the real estate after the decease of the last surviving grandchild of the testator, are both void for remoteness.

I have also considered the point suggested, that the children might take estates tail under the *cy-pres* doctrine and under the authority of *Vanderplank v. King*; but in my opinion that case and the rules relating to the *cy-pres* doctrine, whereby the particular interest is sacrificed to the general interest of the testator, would not be effected in this case by giving the children of Mary Gooch estates tail. There are many observations which are obvious which shew that the general intent of the testator is not that each grandchild's share shall devolve on the children of that grandchild. Among them may be stated that the class of great-grandchildren to take is not to be ascertained until the decease of the last surviving grandchild; and thereupon the grandchildren then living are, if the testator's wishes should prevail, to take the residue of the estate equally between them, although several great-grandchildren might have previously died leaving issue; and where the class is ascertained, they are not to take the estate themselves, but the estate is to be sold, and the produce of the sale is to be divided among them; that is, the legal estate, which up to that time has remained vested in trustees. Upon the whole, therefore, I see nothing in this will which can enable the Court to put such a construction on the expressions used by the testator as will prevent an intestacy as to the limitations I have above referred to. I am of opinion, therefore, that I must declare that the trusts for the substitution of the issue for the parent, after the youngest child of Mary Gooch attained twenty-one, are void for remoteness; that the trusts of the Sutton estate, after the death of the last survivor of the children of Mary Gooch, are void for remoteness; and that the trusts as to the produce of the residue of

the real estate, directed to be sold after the decease of the last surviving child of Mary Gooch, are also void for remoteness.

Dec. 16, 1851.—The MASTER OF THE ROLLS.—I have been considering this case since it was last before me. I was then of opinion that it was a contingency with a double aspect, in which the testator intended, when the youngest child should attain twenty-one, the property should be divided in this manner, if all the six grandchildren were alive to be divided amongst them; if any died without leaving issue it was to be divided amongst the number of children who were surviving; if any died leaving issue, then it was to be divided into the joint number of the surviving children and the children of the child leaving issue. In that case, of the child dying leaving issue, there would have been an intestacy. That is my decision. But what is there illegal in a man saying "I give to A. for life, and after his death to his children for their lives, and on the death of the survivor of those children to A. B. if he is then alive in person"? That would be perfectly good; "but if A. B. is dead then I give it to the children of those children." That would be clearly bad. But because he has given in one event to the children of his child, that would not make the gift to A. B. bad. That is the general view I take of this case.

Mr. Walpole and *Mr. E. F. Smith* were then heard upon this point.

The MASTER OF THE ROLLS.—I look at this will from the death of the testator. He gives a set of trusts, (which it is not necessary to regard because it has nothing to do with the present question), which is to continue until the youngest grandchild shall attain twenty-one. Then he says what is as nearly expressed as possible in these words,—upon the youngest grandchild attaining twenty-one, I desire that the rents shall be divided into as many shares as there shall be grandchildren then living and grandchildren dead having left issue. It follows, if there are no grandchildren then living but there are grandchildren who died leaving issue,

it would be divided into this number of shares; if there are only grandchildren alive without grandchildren dead leaving issue it would only be divided into the number of shares of the grandchildren then alive. He had six grandchildren, two had died not leaving issue; by what possibility in accordance with the terms of the testator's will can you divide it into six parts? He says it is to be divided then into as many shares as there are composed of those two classes of persons, that is to say, living grandchildren and *stirpes* of deceased grandchildren,—just as much as if he had said grandchildren and children of A, as many as there are of those two classes combined; then, if there are none of the grandchildren who died leaving issue, why are you to give them shares? It appears to be directly opposed to the words of the testator's will; he has directed it to be divided into as many shares as there are to be derived from two sources; one of those sources fails, the other takes the whole; and then what is there that is void in it, because it is only in case there were grandchildren who had left issue that it would be void? He might have said, I desire it to be divided into as many shares as there are children of A. and children of B, and I desire to die intestate with respect to those shares of the children of B; that would be perfectly good; and if there were no children of B. the children of A. would take the whole. In my opinion, therefore, the order of 1812 is correct (7).

(7) The order referred to was dated the 5th of November 1812, and was made upon the petition of John Tippell Gooch, Maria Gooch, George Gooch and James Gooch, stating that the plaintiff, as the youngest child of Mary Gooch, attained twenty-one on the 8th of July 1812; that they conceived themselves entitled, under the will of the testator, to be let into the possession of the freehold, copyhold and leasehold estates for life, and to be let into receipt of the rents and profits thereof, from the 24th of June 1812. It was ordered that the petitioners should be let into possession of the estates and into receipt of the rents, issues and profits from the 24th of June 1812, and the tenant was directed to attorn, and the receiver was discharged; and it was further ordered that the personal estate of the testator then remaining to the credit of the causes should be paid to the petitioners in equal shares.

It was a class of shares to be ascertained when the youngest child attained twenty-one; and the number of shares according to the testator's will were four, and accordingly it is to be so divided. It seems, therefore, according to the construction of the will, the same process was to take place upon the death of any child until they all died, and when the survivor died a new set of limitations was to take place. By the same process there was to be a new class ascertained whenever any grandchild died. Then, supposing a grandchild died without leaving issue, it would be divided into thirds; and supposing two grandchildren died without leaving issue, it would be divided into halves; on the other hand, supposing a grandchild died leaving issue, it was to be divided into fourths; then that fourth given to those children was too remote and was void. I may be wrong; but at the same time it is fit that the view I take should be clear that it may be set right if I have miscarried. It does not appear to me that the order of 1812 goes further than to say that upon the youngest grandchild attaining twenty-one the rents were to be divided into fourths. That appears to be correct. That order does not appear to go beyond that upon the death of a grandchild leaving issue. My view of the case is, that thereupon it was still to be divided into fourths and that one of those fourths would become void for remoteness, and it would go to the heir-at-law or customary heir. I will mention the case to-morrow morning.

Dec. 17, 1851.—The MASTER OF THE ROLLS.—I have looked carefully at this case, and I adhere to my decision, when I stated that the new distribution took place on the death of each successive child. I had present in my mind that the words which relate to the distribution of the fund when the youngest child attained twenty-one were repeated. The fund is given to them and their survivors, and the limitation over being void will not cut down or destroy their estate.

LORDS JUSTICES. 1851. Dec. 15, 16, 19. 1852. Jan. 22.	}	MORISON v. MOAT.
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Injunction—Medicines—Breach of Confidence—Secret of Compounding Unpatented Medicines.

A party who has a secret in a trade and employs persons under contract express or implied, or under a duty express or implied, can restrain by injunction such of those persons as have gained a knowledge of the secret from setting it up against the employer.

The particulars of this case, and the judgment of Vice Chancellor Turner are reported at full length in 20 *Law J. Rep.* (N.S.) Chanc. 513. It will be sufficient here merely to say, that the arguments before the Court below were substantially repeated on the appeal of the defendant, Mr. William Crofton Moat; and that ultimately the injunction was made perpetual.

The Solicitor General and Mr. Metcalfe were for the appeal.

Mr. Bethell and Mr. Shapter supported the order of the Vice Chancellor.

LORD JUSTICE KNIGHT BRUCE expressed an opinion that the injunction should be continued on an undertaking, which the plaintiffs' counsel gave, to be answerable in damages if the injunction should ultimately be dissolved: but the judgment of the Court was deferred.

Jan. 22.—LORD JUSTICE LORD CRANWORTH.—The principles that were argued in this case are principles really not to be called in controversy. There is no doubt whatever that where a party who has a secret in a trade employs persons under contract, express or implied, or under duty express or implied, those persons cannot gain the knowledge of that secret and then set it up against their employer: that is perfectly clear, and the only doubt there is in the case is on the question of fact here, as was put by Vice Chancellor Turner in giving his judgment. Now, the preponderance of evidence is immensely in

favour of the plaintiffs here. The statement made by the defendant Moat is extremely vague. I take the statement from his first affidavit, which is a little varied in the answer, but is substantially the same. He says, "That pursuant to the articles of agreement" (and I do not mean to advert to all the facts of the case, because they are fresh in the memory of every one present), "I did attend in the office of the said co-partnership, and I conducted the affairs thereof in the place of my said father the said Thomas Moat, and in the performance of my duties I gained a knowledge of the ingredients used in making and compounding the said medicine and medicines, and of compounding, preparing and mixing the drugs for the same." Now, that is a very vague statement of it, if it is meant to be a statement that is to lead the Court to suppose that he thereby acquired a knowledge of the secret. Then it goes on, "And I further say that when I did, as hereinafter mentioned, become possessed of the recipe or prescription in writing for making and compounding such medicine or medicines, the said written recipe or prescription agreed with the facts respecting the making and compounding the said medicine or medicines of which I had so previously acquired a knowledge as aforesaid." With regard to the mode in which he did acquire the recipe, what he says, is this—which I will presently advert to, and in the mean time he goes on further to speak about his acquiring that knowledge, that it was by superintending the workmen. He says, "My father having died on the 11th of August, I became an active partner in the said co-partnership in the place of my said father, and I was so treated and acknowledged by the said James Morison, and by the said plaintiffs, and upon so becoming a member of and active partner in the said co-partnership, I did for a period of about two months in common with my co-partners, or some of them, superintend the business of the said partnership, and during that time I saw the mode and manner of making and compounding the said medicine or medicines called 'Morison's Vegetable Universal Medicine,' and the ingredients thereof, and the proportions in which such ingredients

were used, and I thereby acquired a complete practical knowledge of the ingredients of the said medicine or medicines, and of the mode of compounding and mixing the same, and I became fully capable myself of making and compounding the said medicine or medicines." Then, with regard to the mode in which he acquired the actual recipe, he says, "That the recipe for making and compounding the medicine or medicines called 'Morison's Vegetable Universal Medicine,' in the handwriting of the said James Morison, was communicated to me by my said father immediately before his death, and in contemplation of my succeeding him as a member and active partner of the said co-partnership." That is what he represents as to how he acquired the knowledge of it; and to the extent to which that language goes, it shews he did acquire the knowledge between the last day of July, I think, and the 11th of August, and also by superintending as a partner from the 11th of August for a period of two months; and he also says, that immediately before the death (that would be about the same day, we will say the 11th of August,) his father in contemplation of his succeeding him as a member in the partnership gave him the recipe in writing, which he has.

Now, it is to be observed, if the knowledge which he had acquired was by that communication from the father, the plaintiffs fully make out their case, because the father had no right whatever to communicate that recipe; the father was bound not to communicate it. If he acquired it by being, with the consent of the Morisons, admitted as a partner, and so permitted to superintend and see everything that was necessary for him to see in order to acquire the knowledge of the secret, then I should hold, and I have no doubt my learned Brother would hold, that was, in fact, a communicating of the secret by the Morisons; whether in writing or letting the party see it, is quite immaterial. But when we are called on to decide on the balance of testimony, there cannot be a doubt on which side the balance preponderates, and it preponderates to a most enormous extent in favour of the plaintiffs; for, putting out of the case the acquisition of the recipe from the father,

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all he says is, that for the time, during the eleven days, I think, he was acting as his servant, he was employed in the concern and so acquired a knowledge of the ingredients and the mixing and so forth; and, then, when admitted a partner, he superintended in common with the other partners the manufacture of the medicine, and so acquired the knowledge which he says he had acquired, because he says it corresponds with the recipe. Now, it must be observed, that in order to meet that, there is, in the first place, the positive denial by Morison, and the denial, as far as I can collect, by all the servants,—certainly by five different servants,—who all swear positively that that is absolutely untrue, and they go into a great deal of detail, which it is not necessary for me to go into here, as to the mode in which the drugs were kept locked up in a particular closet, and the mode in which the mixing took place, in which they say it is quite clear that Moat had no participation. The result of that is, that the evidence is overwhelmingly strong in favour of the plaintiffs and against the defendant, and therefore we think that this injunction ought to be continued. Of course, the undertaking will be given which was called for, namely, that the parties will be responsible to make compensation or reparation in damages if it shall eventually turn out they do not sustain the injunction. That is the judgment of the Court.

Jan. 22.—On this day *Mr. Shapter* stated that an order had been taken for making the injunction perpetual, and making arrangements as to the application of the assets of the testator.

LORDS JUSTICES. }

1852.

Jan. 28.

In re MANSON.

Lunacy—Committee—Defending Suit.

A lunatic was made a defendant as one of the next-of-kin of an intestate. He and his committee presented a petition entitled in the suit, and also in the lunacy, praying that the lunatic might defend by his guardian, and that the committee might be appointed

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such guardian. The committee prayed that, as such, he might be at liberty to prosecute the claim of the lunatic as next-of-kin, and that all such costs as should be properly incurred, and as should not be paid out of the estate to be administered in the suit might be raised and paid out of the lunatic's estate. The Court gave liberty to the committee to defend the suit, but refused to appoint a guardian as being unnecessary, or to make any prospective order as to costs, and directed the title in the cause to be struck out.

This was a petition presented by the lunatic and the committee of his person and estate, and was entitled as well in the lunacy as in a suit in Chancery, to which the lunatic had been made a defendant. After stating the lunacy of James Manson; the appointment of the committee, William Thacker; that the committee's accounts had been passed; that on the 20th of December 1851, W. Anderson and G. Delmar filed a bill against the lunatic and several other persons who claimed as next-of-kin of Margaret Manson deceased, who (under the circumstances stated in the petition) left personal estate divisible among her next-of-kin, praying that administration accounts might be directed and taken, and the rights of the parties declared; and that the undisposed-of residue of her estate consisted of 6,000*l.* or thereabouts. Other facts were then stated not necessary to be adverted to, and it was prayed by the lunatic that his committee might be appointed his guardian, by whom he might answer the bill, and appear in the suit and prosecute his claim to be one of the next-of-kin of Margaret Manson; and the committee prayed that he might be at liberty as such committee to take and concur with the other defendants or any of them in taking all necessary steps to prosecute the lunatic's claim as one of such next-of-kin. The prayer of the petition concluded thus: "and that all such costs as shall be properly incurred by both your petitioners, James Manson and William Thacker, in appearing to and answering the said bill, and generally in the said suit, or otherwise relating or incidental to the said claim and suit, and consequent thereon, respectively, and as shall not be paid out of the estate

to be administered in the said suit, including the costs of this application and consequent thereon, may be raised and paid out of the estate of the said petitioner, James Manson."

Mr. W. Collins, who appeared for the petition, stated in answer to questions from the Court, that the reason why the prospective order as to costs was asked, was that extensive inquiries were expected to become necessary in proving that the lunatic and five other persons were the only next-of-kin of the intestate. The family had been extremely numerous, and although it was almost certain that no more than six persons were now in the situation to claim as next-of-kin, the inquiries would probably be very extensive.

LORD JUSTICE LORD CRANWORTH said it appeared to him that speaking of such costs was crying out before the petitioner was hurt. The preliminary inquiries in the Master's office might shew that such further investigation was not necessary, and the costs would not be incurred. His Lordship was quite willing to give leave to the committee to defend the suit in the ordinary manner. If costs should be incurred by the inquiries suggested, and the same were not otherwise provided for, the committee could come to the Court and proper attention would be paid to him. As to making any prospective order, that was quite out of the question.

LORD JUSTICE KNIGHT BRUCE considered that the entitling the petition in the cause as well as in the lunacy was wrong, and should be altered. It must be entitled in the lunacy only. No appointment of a guardian was necessary. The lunatic, having been made a defendant, would answer the bill and defend the suit as a matter of course by his committee, and in the common and ordinary manner. All that the Court could do would be to make the common order, giving leave to defend, and reserve liberty to apply.

LORDS JUSTICES.
1852.
Jan. 23.

Ex parte STAPLES, in re BROWN, AND In re THE OXFORD, BLETCHLEY JUNCTION AND BUCKINGHAMSHIRE RAILWAY COMPANY'S ACTS.

Railway Company — Re-investment — Tenant for Life—Remainder-man—Service of Petition.

Lands had been settled on A. for life, with remainders over. A railway company took part of the lands and the money was paid into court. An eligible property being found for the re-investment of part of the money, the tenant for life petitioned for the payment of so much out of court for that purpose :— Held, that the petition need not be served on the parties entitled in remainder, but the order could be made on the petition of the tenant for life alone.

This was a case where the Oxford, Bletchley Junction and Buckinghamshire Railway Company had purchased a portion of certain estates, which were settled, by the will of the grandfather of the petitioner, Mr. Brown, upon the petitioner, Mr. Brown, for life, remainder to his children in equal shares as tenants in common, and in default of children then upon similar trusts successively for two other of the testator's grandsons and their children, with an ultimate limitation to the testator's own right heirs. The purchase-money of the land taken had been paid into the Bank and invested in consols by order of the Court, pursuant to the provisions of the Lands Clauses Consolidation Act. The petitioner contracted for the purchase of property, upon which a part of the money could be re-invested upon the trusts of the will. This purchase was approved of by the Master, and the petitioner, the first tenant for life, presented a petition, praying that the Master's report might be confirmed, and that so much of the fund in court as would be sufficient to raise the purchase-money of the lands the subject of contract might be sold out and the proceeds paid to the vendor on his executing a conveyance of the same. The petition was originally heard before Vice Chancellor Sir Richard Kindersley, who declined to make the order until the parties entitled

in remainder to the inheritance of the settled estates should have been served with the petition. Upon that occasion the 69th, the 70th, and other sections of the Lands Clauses Consolidation Act were cited, which provide for the payment into court of money paid for settled lands and the re-investment of the same, at the instance of the party who would be entitled to the rents and profits for the time being; and it was then argued that the Court of Chancery was, in effect, the protector of the interests of all parties, and that it had never been the practice to require the presence of the parties entitled in remainder upon a petition for re-investment; and further that the expenses of the company, who had to pay the costs of the re-investment, would be greatly increased if such a practice were adopted. It was admitted that possibly the practice was more that of the Registrar's office than of the Court. Vice Chancellor Kindersley observed that in fact the clause referred to was the same as the clause for sale and exchange in an estate act, and that his own opinion and that of two other Judges with whom he had conferred was, that the persons entitled in remainder ought to be before the Court, as that was the only mode in its power of protecting the interests of all parties. His Honour also observed that, in his opinion, the legislature never could have intended any other mode of proceeding to be followed. The fact was, it was admitted, that the practice was that of the Registrar's office, and not one sanctioned by decision; and that no person having been hitherto interested in raising the point, the question had not been discussed, and orders had been taken *sub silentio*. His Honour then declined to make the order, but said that if the parties wished it, he would permit the petition to be mentioned to a higher Court, so that the question should be finally settled and the practice rendered certain and unambiguous. The petition was then, by leave, placed in their Lordships' paper, and now came on for hearing.

Mr. Bethell and *Mr. Speed*, for the company.—The requisition now made by Vice Chancellor Kindersley is an entire novelty. It has been the uniform practice, since the commencement of railway transactions

in the year 1832, to make these orders without requiring the parties interested in remainder to be served. The Court in these cases acts, not by virtue of its ordinary jurisdiction, but under a statutory power conferred upon it by the legislature, and which it is enabled to exercise upon a summary application by the tenant for life or the parties entitled to the rents and profits of the lands in settlement. By the 7th section of the statute conferring this power, the Lands Clauses Consolidation Act 1845, the party entitled to the rents is enabled to convey without the concurrence of the parties interested in remainder; and by the 70th section the same power is given to the tenant for life, upon petition, to have the money laid out in the purchase of other lands, and to have the money invested in government or real securities in the mean time. In none of these cases has the Court ever refused to act in the absence of the parties entitled in remainder. The legislature intended to make the tenant for life a sort of protector of the settlement in the same way as he is so made by the real property statutes. In all instances the acting party throughout is the tenant for life, who pursues the course pointed out by the statute. He conducts the sale to the company, and upon the purchase-money being paid into the Bank he suggests the manner in which it is to be dealt with by the Court. The Court acts upon that suggestion, and itself has regard to the interests of the parties entitled to the inheritance. That has been the course hitherto invariably pursued. If after twenty years of uniform practice, and after hundreds of thousands of pounds have been invested on the faith of this uniformity of practice, a contrary rule is to be adopted, the effect will be to put in hazard all this enormous amount of capital paid away by railway companies and to shake the safety of numberless titles founded on such practice. If this old custom is not now adhered to, the effect will be to defeat the whole scheme and object of the statute, which was to enable such purchases and investments to be made in a summary way at the instance of a tenant for life.

LORD JUSTICE LORD CRANWORTH.—Your contention, I observe, is, that the legisla-

ture intended to make the tenant for life a sort of protector of the settlement. I observe, too, that where the fund is less than 200*l.* the 71st section of the act provides that it may be paid to two trustees nominated by the tenant for life and approved of by the company, and by them applied in the purchase of other lands. It appears that in that case the trustees might act without the consent of the *cestui que trust* under the settlement.

LORD JUSTICE KNIGHT BRUCE.—In the case of a private settlement the tenant for life alone consents, but there the trustees are present to protect the inheritance. You contend that here the same practice is pursued, except that the Master or the Court is substituted for the trustees. As Vice Chancellor, I, for nine years, made many orders similar to that which is here asked, and no one seems to have considered them wrong.

The case of a private settlement where the estate of inheritance is protected by the trustees, and the Court being substituted for the trustees, is probably the analogy most applicable. Where the Court proceeds under a statutory power, it acts only under the statute; otherwise it would be necessary to apply all the rules of the Court upon these summary applications. If the presence of the inheritance be necessary, all the parties interested must be ascertained, but as no machinery is provided by the statute for this purpose, how is it to be done except by the ordinary dilatory and expensive machinery of the Court? The effect of such a course would be extremely onerous upon companies already sufficiently burdened by the expenses of carrying into effect these purchases. In the present case, where there are several successive tenants for life, with limitations over to their children at twenty-one, and an ultimate limitation to the testator's right heirs, service upon a multitude of parties would be requisite, and their separate attendance by counsel at the expense of the company would be entailed upon that body. If the party intrusted to sell, namely, the tenant for life, be not intrusted to reinvest, where is the limit to the expense? Put the case of land charged with

a number of legacies, would it be necessary in such a case to serve all the legatees?

Mr. Baggallay appeared for the tenant for life, and submitted that service on the parties in remainder was needless.

LORD JUSTICE LORD CRANWORTH. — Great difficulty might frequently occur where the parties in remainder are under disabilities. It would appear that the party intrusted to sell the property might be equally intrusted to select a proper re-investment, especially as such investment is required to be made with the sanction of the Master. I have inquired of the Registrar whether the practice has been to serve the *cestuis que trust*, and he says that it has not. If this question had come before me in 1832, when first the statutes were passed, and had I been called on to say what course ought to be adopted, and what rule of practice ought to be laid down, I might have come to the same conclusion as now presses on Vice Chancellor Kindersley, or probably my decision would have been in accordance with the practice hitherto adopted; but (whether my opinion would have been according to the present rule or not) when it appears as a matter of fact that this practice has gone on for twenty years, and that no inconvenience has resulted from it, I am certainly not prepared to say that that practice should not be persevered in. Taking analogy and practice together, I think it inexpedient to interfere to change the course hitherto pursued in these matters.

LORD JUSTICE KNIGHT BRUCE.—By way of security in cases of this description, there is the superintendence of the Master, the improbability of the tenant for life seeking to injure the inheritance, and lastly the presence of the railway company, which, if anything gross were done, and through supineness or collusion they should be held to have connived at it, they would probably be themselves treated upon the footing of trustees, and thus have to pay the money over again. For these reasons I think, and Lord Cranworth concurs, that the order may be made as asked by this petition without any service on the parties entitled in remainder under this will.

KINDERSLEY, }
V.C. } WOOD v. SUTCLIFFE.
Dec. 2, 3, 4. }

*Watercourse—Injunction—Long User—
Pecuniary Compensation—Acquiescence.*

The plaintiff had occupied for many years a manufactory for worsted spinning on a stream, and claimed a right of having the water come to his works in a pure state. The defendant erected dye-works on the same stream, by which the water was polluted. The plaintiff brought an action against the defendant and recovered a farthing damages, and now applied for an injunction to restrain the defendant from a continuous infringement of his rights. Held, that a person may by long user acquire a right to the water of a stream free from pollution, though he may have no proprietorship in the stream, and may acquire a right to pour polluted matter into a stream as against all new comers: that a person having established his right at law is not, as a matter of course, entitled to an injunction, particularly where the injunction would not restore the plaintiff to the right he has established, and where the act complained of may be compensated by pecuniary damages: that in this case the evidence proved that, owing to the increase of polluting matter poured into the stream from other sources than that of the defendant's works, the plaintiff never could be re-instated in his original rights: that the damage might be compensated by money; and that the plaintiff had been guilty of such an amount of acquiescence as would disentitle him to an injunction. Injunction refused.

The facts of this case and the arguments used are fully stated in the judgment.

Mr. Bethell and *Mr. Daniel* appeared for the plaintiffs.

Mr. Roll, *Mr. Malins*, and *Mr. Elder-ton*, for the defendant.

Cases cited during the argument:—

Attorney General v. Nichol, 16 Ves. 338.

Smith v. Collyer, 8 Ibid. 89.

Baily v. Taylor, 1 Russ. & Myl. 73; s. c. 8 Law J. Rep. Chanc. 49.

Parrott v. Palmer, 3 Myl. & K. 632.

Elmhirst v. Spencer, 2 Mac. & Gor. 45.

Earl of Ripon v. Hobart, 3 Myl. & K. 169; s. c. 3 Law J. Rep. (N.S.) Chanc. 145.

Duke of Bedford v. the British Museum, 2 Myl. & K. 552; s. c. 2 Law J. Rep. (N.S.) Chanc. 129.

Dann v. Spurrier, 7 Ves. 231.

Barret v. Blagrove, 6 Ibid. 105.

Pickford v. the Grand Junction Railway Company, 3 Rail. Cas. 538.

The Rochdale Canal Company v. King, 20 Law J. Rep. (N.S.) Chanc. 675.

KINDERSLEY, V.C.—If I thought that by a careful perusal of the affidavits, which are very numerous, I should acquire a more full and accurate knowledge of the facts than I consider myself now to have, I should certainly postpone giving judgment until I had read through those affidavits; but in this case, as in many others, although the affidavits are numerous, when attention is paid to them throughout, the matter which those affidavits purport to contain is far more bulky in paper than it is with respect to the substance of the facts which the evidence goes to; and feeling as I do that I have a sufficiently full and accurate knowledge of the facts of the case, so far as any facts are at all material to the decision of this question, I think it better not to postpone giving judgment, but at once to express my opinion upon the whole case.

The injunction which is asked is an injunction to restrain the defendant Sutcliffe from pouring into this stream or beck, called the Bowling Beck, by means of that channel which connects his works with the beck, any dye water, or dye liquors, or madders, or indigo, or potash, or matters of that description, or any other matters which tend to pollute the stream, to the damage of the plaintiffs' works. Now, the case which the plaintiffs make in support of this application may be stated in substance to be this:—They say that more than twenty years ago, they established their works on this stream or beck, their works being those of worsted-spinners; that at the time when they established their works the stream came to their works in a pure and serviceable state; that they have acquired by long user as against all new comers a right to have the water still come

to them in that pure state,—not that they affect, of course, to be proprietors of the stream, or the proprietors of the water through the stream, but the proprietors of the right to have the water come to their works in a pure and serviceable state, and that they have that right against Mr. Sutcliffe, whose works are of comparatively recent construction, being only completed in the early part of the year 1845; and that Mr. Sutcliffe, by means of his dye works, does pollute the stream—pollutes it by a colouring matter and the other matters which are held in suspension in the water as it flows down to the plaintiffs' mill, and by that means the plaintiffs are damnified in carrying on their works; and that, moreover, the plaintiffs have brought an action against Mr. Sutcliffe, in which action Mr. Sutcliffe did not raise the question of the right of the plaintiffs, but put in issue only the questions whether the operations of the defendant did damage the right of the plaintiffs; and whether there was any and what damage arising from the works of the defendant; that in that action the plaintiffs have recovered a verdict, and that verdict was followed by judgment, and that judgment was entered up on the 7th of January 1851.

The plaintiffs insist that, inasmuch as their right is clearly established, and not, in fact, controverted by Mr. Sutcliffe, and inasmuch as the verdict of the jury has established that that right is infringed and damaged by Sutcliffe, and inasmuch as the acts constituting that inquiry are continuous acts, they have a right to come to a court of equity and ask the Court to give effect to the legal right by restraining the defendant in the continuance of those acts. Now, there is no doubt that a person establishing works on a stream may, by long user of the water of that stream, although he has no proprietorship of the river or the water, acquire a right such as that which the plaintiffs here insist they have; and it appears to me clearly established that the plaintiffs have such a right, such a legal right I mean; a right to have the water come to them in a pure and unpolluted state, so that no pollutions or impurities in the water which are poured in by other persons who may be called

new comers shall interfere with the effective carrying on of the works of the plaintiffs' manufactory. And not only may a person acquire such a right as that which I have mentioned, but, I may observe, he may also acquire another right, which is, that whereas the carrying on of his manufactures may require him to pollute the water which he uses, he may have acquired a right to pour his polluted water into the stream as against all new comers, so that those below him coming after he has acquired the right may not have the right to complain of what he does to the stream, while he may still have the right to complain of what new comers do above him with respect to the pollution of the stream. Those legal rights may be acquired; it is not necessary to consider whether the plaintiffs have acquired the latter right, that is, the right to pollute the stream as against those below them, because that is not now in question. It appears to me, as I have said, that the plaintiffs have clearly established the first of those rights, namely, the right to have the water come to their works in a pure and unpolluted state.

Now, that being the legal right of the plaintiffs, another question arises, and that is a question which comes into controversy here. What right does that give them to apply to a court of equity for an injunction? It is not my intention to enter at all into a general disquisition upon the grounds on which courts of equity will interfere in all the different sorts of cases that arise where the Courts have been applied to for injunctions to restrain acts done to the injury of the plaintiffs. I shall confine my observations entirely to the precise sort of case that this is. Now, I conceive that if the plaintiffs have established such a legal right, as that which I have mentioned, and while they are in the enjoyment of that right, another person comes and erects machinery or any manufacturing works on that same stream above the plaintiffs' works, and by his manufacturing process so fouls the water as that, instead of coming as before pure and unsullied to the plaintiffs' works, it comes in a less pure and serviceable state than before, so as seriously and continuously to obstruct the effective carrying on of the plaintiffs' manufacture; if that be the case, and if the restraining of

those acts by injunction will restore or tend to restore the plaintiffs to the position in which they have a right to stand and in which they before stood, and if, moreover, the injury which is occasioned by the works complained of is of such a nature as that the recovery of pecuniary damages would not afford an adequate compensation, that is, such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before: and if, moreover (for there are several conditions), the plaintiffs do not sleep upon their rights and do not acquiesce either actively or passively in the acts which they now complain of, but use due diligence and vigilance to take such steps as are proper and necessary for the vindication and protection of their rights—if these conditions occur in such a case as that which is now presented here, the plaintiffs, the parties so injured, I conceive, have, as a general rule, a right to come to the court of equity and say, "do not put us to bring action after action for the purpose of recovering damages, but interpose by a strong hand and prevent the continuance of those acts altogether, in order that our legal right may be protected and secured to us." I say as a general rule and principle, because it must not be forgotten that, of necessity, whenever a court of equity is asked for an injunction in cases of this nature, or at all resembling this, it must have regard not only to the dry, strict rights of the plaintiff and defendant, but must have regard to the surrounding circumstances, to the rights and interests which may be more or less involved in it. It must have, I say, regard to those matters in using its discretion as to whether it shall exercise the strong jurisdiction, for unquestionably it is a strong one, of granting the injunction which is asked for.

I have said that if the water, by the acts of the defendant, arrives in a less pure and serviceable state at the plaintiffs' works, so as to cause a serious obstruction,—I have used the term *serious* because I cannot concur in the proposition, if it is meant to be asserted, that the mere dry fact of the plaintiffs having the abstract right, as of itself, and that right be infringed in ever so minute a way, or ever so little to the

practical damnification of the plaintiffs,—the court of equity will, as a matter of course, interfere upon the right being established at law by an injunction; that is a proposition which, I conceive, according to all the cases, not to be a tenable proposition, and therefore I have used the term serious. On the other hand, I am far from saying that because, in the action at law, the court of law and a jury have only given 1s. damages or a farthing damages, that is a ground for saying that the injury is not serious and that it may not be a case for granting the injunction. I have also used the term continuous injury. By continuous I do not mean never ceasing, but recurring at repeated intervals, so as to be of repeated occurrence, and to be the same root of damnification to the plaintiffs as an actual continuous mischief would be. It appears to me also, as I have said, that one of the conditions requisite to induce the Court to grant an injunction in such a case as that is, that by granting an injunction, and by stopping the acts complained of, the party complaining who has got the legal right will be restored, or rather that the injunction will restore, or tend to restore, the party complaining to the right he has established as against the defendant. And I put it in that way for this reason :—I conceive that it would be no defence to an application of this sort for the defendant to say, “It may be true that what I am doing does in some degree damage the plaintiff and prevent the effectual carrying on of his works, but there is another person, A. B, who is as much a wrong-doer as I am, who is doing ten times more harm to the plaintiff than I am doing; and, in fact, although what I pour into the stream is not pure, it is so much purer than what he pours into the stream, that, in fact, when you get the water it is purer when it arrives at your mills or your works than it would have been if A. B.’s pollutions had been poured in without the admixture of any less polluted water.” I do not understand that that is meant to be contended for by the defendant’s counsel; but I mention it as a reason why I use the term, in endeavouring to enunciate what I conceive is applicable to this particular sort of case. I am not speaking of copyright cases or other cases which

may stand on a different footing, but I am stating the reason why it appears to me that to induce the Court of equity to interfere by injunction, the injunction must restore, or tend to restore, the plaintiff to the full exercise of his rights.

Now the facts of the case, as I think they fairly appear as the result of the masses of affidavits presented, seem to lie in a narrow compass. Here is a stream flowing through a valley which flows into and through the town, or part of the town, of Bradford, a great manufacturing place, whose worsted and woollen manufactures have become, I may say, perfectly gigantic at present. From time to time persons have established different works on the banks of this stream; and we all know that most manufactures—perhaps you may say all manufactures—at least, when carried on upon a large scale, require, if not worked by water power, at least the use of water in very large quantities for the various purposes connected with their manufacture. A very great number of those different works and factories appear to have been established at different intervals of time, some more remote, some more recent, on the banks of this stream, or on the tributaries and feeders which flow into the stream. I mention that, because one of the tributaries, called Low Beck in the map, on which, in fact, the defendant’s premises may be considered to stand, and a drain or water-course through which it is said the defendant pours this matter, is almost parallel to the channel of that tributary stream, called Low Beck. Among the various works which have been thus established on the banks of this stream are the works of the plaintiffs. The plaintiffs, I understand, are wool-spinners, and for the purpose of their works it is of great importance to them to have pure water; and, as I collect, the purposes for which pure water is most essential to the effective carrying on of their works may be considered as resolving themselves under three heads. The one is, that they want water to wash the wools, when it is perfectly obvious purity is an essential ingredient in the character of the water that is used; another is, to use the water in the boilers of machinery for the purpose of generating steam; a third is, to use it in a cold state

for the purpose of condensing the steam. Other wool-spinners, or wool-combers, or persons connected with the manufacture of wool and worsted, have all at different intervals of time, many of them at comparatively recent periods, established works upon this stream. Among the works established are two dye-works,—the one is the dye-works of the Messrs. Ripley, higher up the stream than that of the defendant, and the other is that of the defendant Mr. Sutcliffe. With respect to Messrs. Ripley's dye-works, it appears by the evidence that they have been established on a more or less extensive scale for a great number of years. It appears from Mr. Ripley's affidavit, that even as far back as eighty years his father and grandfather had works there. It is admitted that the works were upon a less extensive scale than they have since become, and I think Mr. Ripley also speaks of his own carrying on the works there for some forty years or thereabouts, a period considerably anterior to the time when the plaintiffs' works were established. The defendant purchased his land only in the year 1844, and he immediately proceeded to build his works, and had completed them, so as to bring them into operation in his manufacture and his trade as a dyer, as early as February 1845. Besides the various manufacturing works which have been established on the banks of this stream, a very large and dense population has gradually sprung up on the banks, or contiguous to the banks, of the stream. There was no doubt a time, and probably a time not very far remote, when the stream, or that portion of it which lies between Messrs. Ripley's works and the plaintiffs' works, flowed through open fields and meadows and cultivated ground; that for some time past has ceased to be the case, and a very large population has arisen, contained in about 1,660 houses, which have been built in streets and otherwise, as a sort of continuation of or suburb to Bradford, which lies somewhat lower down the stream. These houses have had the effect of more or less polluting and altering the character of the stream, as an inevitable consequence; it is impossible but that the aggregation of human beings on the banks of the stream must tend to make that stream a polluted sewer,

more or less, instead of being a pure stream. I am satisfied from the evidence that to some considerable extent the pollution of this stream, I do not say from the defendant's works or anybody's works in particular, is inevitable, and that no court of law or equity, nor all the courts in the world, except there were a power of removing all that mass of human beings which is congregated about its banks, ever could restore this stream to the state in which it once was. But still it does not follow that, because there is a certain degree of pollution, which perhaps cannot be very accurately measured, and which is inevitable, everybody has a right to make the stream, by pouring in immense quantities of filth and pollution from his own works, ten thousand times worse than it was without it.

These being the general facts of the case, and although doubtless there had been a considerable degree of deterioration of the stream, from various causes, up to 1844, there appears never to have been any dispute between the different riparian owners upon the stream. The plaintiffs have themselves been obliged to submit to the inevitable effect upon such a stream,—that of ceasing to use it for the purpose of washing their wool; and one sees obviously, even without any information from affidavits, that to wash wool and worsted must necessarily require very pure water. The plaintiffs, for many years past, before the defendant commenced or brought his works at all, had been obliged in that respect to submit to the inevitable necessity of seeking for pure water from another source; and they and the other proprietors of works upon this stream seem to have sunk artesian wells or bored holes, and by that means have been able to raise large quantities of pure water for the purpose of washing the wools. It appears, moreover, that for several years, and before the defendant had begun to use his works, the plaintiffs had been also under the necessity, for their advantage, to cease using generally the waters of the stream for boiler purposes, because from the quantity of matter held in suspension in this water, the use of it in the boilers, as the steam evaporated, caused a large deposit of matter round the

boilers, and we know what the effect of that is, that as that incrustation increases, the water no longer touching the iron, the iron is very easily burnt through, and a great impediment is produced to the carrying on of the works. They had been obliged for years to resort to the artesian water for that purpose also; they still continued, however, to use the waters of the beck for the purpose of condensing. Now, in the year 1844, which is the first time that any litigation had arisen about these water-rights in this part of the stream, Messrs. Waud having established some works, they being also themselves worsted-spinners, in the business carried on by the plaintiffs, and having established works a little way above those of the plaintiffs on this stream, and the plaintiffs, complaining that they injured the water by their works, brought an action against Messrs. Waud to recover damages for polluting the stream. The defence set up by Messrs. Waud to that action raised not merely the question whether their operations did damage the stream, but the question of the plaintiffs' right and title. A verdict was obtained in 1845, subject to the opinion of the Court upon a special case. The question upon the special case affected the question of the right of the plaintiffs, and the judgment of the Court was not obtained upon that special case until Easter term, 1849, when the Court of Exchequer gave final judgment for the plaintiffs (1); and on the 1st of August 1849 that judgment was signed and entered up. About the time that that action began, namely, in the year 1844, the defendant, Mr. Sutcliffe, bought the land on which he has since proceeded to erect his works. Now Mr. Sutcliffe states most positively, and I see no reason to doubt the truth of his statement, for there is no contradiction to it, that he was not at all aware of any question or action whatever as between the plaintiffs and Messrs. Waud on the subject of the polluting this water, until a considerable time after his works had come into operation. The defendant continued to carry on his dye-works, pouring in, in not any less quantity, as far as I can see on

the evidence, than he does now, the dye liquors and dye wares, and so on,—in short, the matter which is complained of as polluting the stream from the beginning of 1845, without any notice from the plaintiffs, until the 8th of January 1850, a period within a few weeks of five years; and then, on the 8th of January 1850, a formal notice was given on the part of the plaintiffs to the defendant to cease, in effect, from polluting the water. After that notice was given, and on the 3rd of June 1850, the plaintiffs entered into that deed of arrangement with another proprietor, another manufacturer, who is likewise on the stream, Mr. Dixon; the effect of which is this, that instead of litigating the question, Mr. Dixon agrees that he will pay at the rate of 2*l.* per horse power per annum for the same, the plaintiffs not bringing an action against him, and as damages for what he is doing to this water, from the hour of five in the morning to seven in the afternoon; and I understand, though it is not very distinctly in evidence, similar deeds of arrangement, that is, more or less similar, have been entered into between the plaintiffs and some of the other proprietors of the factories immediately contiguous to those of Messrs. Waud, Messrs. Greenwood, and other persons whose names are not material, all lying in what is aptly enough called the nest of factories, immediately above the works of the plaintiffs. The notice having been given to Mr. Sutcliffe on the 8th of January, on the 5th of June 1850 an action was commenced against Sutcliffe by the plaintiffs, to which the defendant pleaded "not guilty;" and it is admitted the question of the plaintiffs' title was not in controversy there at all. The question really in issue there was, whether the acts of the defendant were acts which went to the damage and injury of the plaintiffs. The trial came on on the 27th of July 1850, and then a verdict is given for the plaintiffs, with one farthing damages. I should further mention, that after the trial of the action and the verdict, on the 24th of December, (the verdict having been given in July,) the plaintiffs served a written notice upon the defendant to desist, and stating that they should file a bill against him for an injunction to restrain his continuing the

(1) *Wood v. Waud*, 18 Law J. Rep. (N.S.) Exch. 305.

acts which they complained of. That was on the 24th of December, and on the 7th of January following, 1851, judgment in the action against Sutcliffe was entered up. On the 19th of February 1851 the bill was filed; on the 27th of February 1851 a notice of motion was given for the 10th of March.

Adverting to what I conceive to be the conditions which must concur to induce this Court to interfere, the first question which arises is, whether, assuming that damage is done by the defendant's works, the restraining of that damage will restore, or tend to restore, the plaintiffs to the right which they had originally of having the water clean to their works. Now, as I have said, if it was only this, "there is somebody else fouling the water besides me," the saying that would be no defence to such an application; but if by reason of the whole change in the condition of the surrounding country and neighbourhood the stream has become polluted to such an extent that it cannot be used for the purposes of the plaintiffs' works, the granting the injunction to restrain this one wrongdoer, if he be such, from continuing his works would do no good to the plaintiffs. It will not do them that good, the doing of which is alone the ground on which a court of equity will use its strong power to interfere to restrain the defendant's works from going on. If, notwithstanding a certain degree of pollution of the water, the plaintiffs can still use the water, although not so usefully, and then the defendant pollutes it to make it so much worse that they can use it in a less effective manner than they did before, or if the degree of pollution existing, we will say, from Messrs. Ripley's works, may be prevented by the plaintiffs by the same process which they were using against Mr. Sutcliffe; if that were the state of the case, of course they would have a right to say, "This is a case in which an injunction would restore, or tend to restore, us to the rights which we originally had with regard to the stream." Now, there is nothing to shew me, and I am not able to say from the evidence before me, how far the non-user of Messrs. Ripley of that extent of pollution which they have of late years caused to this water—how far, if they were away, the water is polluted by the other

works (for there are a great many of them, and I have only three brought here before me particularly), or how far the pollution arising from these works would be so comparatively small as that the plaintiffs might continue to carry on their business effectively by using the water. But I have this fact, that Messrs. Ripley's increase of works has been comparatively recent, the defendant's dye-works did not come into operation until the early part of 1845. Then, were the plaintiffs, before the defendant's works came into operation, able to use the water of the stream for their works, either in the shape of using it for washing wool, or in the shape of using it in boilers? Clearly not. And, therefore, I think that that affords a very strong ground for saying that the mere removal of the defendant's works, or preventing the defendant from carrying on his works in the manner in which he now does, really would not have the effect of causing the water of this stream to come down to the plaintiffs' works in the same pure and unpolluted state, which the plaintiffs, according to their original right, ought to have. I do not feel sure, therefore, even if it turned upon this part of the case, that the granting the injunction, while it would have the effect, if not of ruining the defendant, of doing him most serious mischief, would, on the other hand, have the effect of benefiting the plaintiffs by restoring them, or tending to restore them, to the rights which they contend for, and which I admit that they have.

But it does not rest merely upon that; another condition, which I conceive, beyond all controversy, is a necessary condition to induce a court of equity to interfere by injunction in a case similar to that now before me, is, that the mischief complained of is such as cannot properly and equitably be compensated by pecuniary damages. Now, let us see how this matter stands; for years past, and long before the defendant began his works, the plaintiffs had not the use of the beck for washing purposes, or for boiling purposes. Other persons carrying on either the same trade as the plaintiffs themselves, or trades of a similar description, have entered into arrangements with the plaintiffs, whereby, very wisely indeed I must say, in order to avoid litigation, it has been agreed that

although what those other parties do tends to pollute the stream to the damnification of the plaintiffs, they shall continue to do that (I am speaking now of Dixon's case, and the others are said to be of a similar character,) during fourteen hours out of the twenty-four, and shall pay a certain rent or tax for the right to do it. Now, if an arrangement can be made such as that, by which even without litigation the defendant and other parties of whom the plaintiffs complain may come to an arrangement which is to give each a certain fair use of the water, the plaintiffs ought in fair dealing, and it would be right for them to say this :—"We do not want to ruin you ; we do not want merely, like a dog in the manger, to prevent your using the water while we cannot ; but we want, by having reservoirs and filtering beds, or some other method, to come to such arrangement with you as we have come to with other persons." If that be the purpose (and it is a very legitimate purpose), it is perfectly right, and I do not at all agree with the defendant's counsel that that amounts to an attempt to levy a tax upon those persons, and to use a strict right merely to enforce an unrighteous demand of money from the party. But if that be the case, surely the bringing an action against the party who ought, as the plaintiffs say, to come into such arrangement, would be nearly as efficacious and might just as well be used to bring them to those terms. Ought I then to say I will grant the injunction in order to compel the defendant to come into terms, by which he is to pay you so much for using it so many hours, or any other arrangement? If any force applied to the defendant would bring him to that, I think I ought to leave him to the force which would be applied by means of an action brought. If all this were represented to the jury, and if the jury were satisfied that he did not come into terms, they could say, instead of a farthing or 1s. or 40s., "We will give you 50l. or 100l. for the damage that has been inflicted upon you by the defendant." It appears to me, therefore, that upon that ground even, the plaintiffs themselves have shewn that it is a matter which may in some way be compensated by money.

But I do not rest my decision upon either

of those two points. The principal ground upon which I conceive I must refuse this injunction is, I will not say the acquiescence, using that term in the active sense, but that from the beginning of 1845 down to the beginning of 1850 the defendant was allowed to construct and to use his dye-works for a period of five years, without any hint being given on the part of the plaintiffs that he was doing anything that he had not a lawful right to do. Now, let us see for a moment how this matter stands. The plaintiffs say, "What we knew was, that there were some works being erected in the neighbourhood. We did not know who the person was that was erecting those works, still less did we know to what purpose those works were to be applied." Now, it must be borne in mind that at this very time, when the defendant was erecting his works, the plaintiffs were stirring about the protection of their own rights in this water; they were then commencing the first of a series of proceedings, to protect and vindicate their rights in this water, by bringing an action against Messrs. Waud; they were informed, as they say, that somebody, they did not know who, was erecting some works, they did not know for what purpose, in a situation upon the banks of a rivulet which flowed into this very beck; was it not their business not to be content with their ignorance, but to ascertain who it was that was building these works, and to give notice to the person who was erecting those works that if he used them for any purpose which tended to the pollution of the stream, he would erect and carry on those works at his peril, for that they, the plaintiffs, had a right to have the water come pure to their works, and that they would apply to a court of equity for an injunction to restrain them? Instead of that, not only are the works allowed to be erected, but for five years the works are carried on, and not a word said. Without admitting that the defendant has a right to come and erect works upon a stream without asking questions, and then leave others to find out whether he is infringing their rights or not, what does he find? He finds that there are, I think it is said, some thirty different works of different kinds, all more or less pouring noxious, or injurious, or polluting

matter into this stream, and among the rest of those works, an actual dye-work, which has subsisted for seventy or eighty years, so long that it was not to be supposed there was any question about the right to use the dye-works upon that stream, and pour the dye wares and dye liquors into the beck. Therefore, although I do not at all mean to suggest that the defendant is not put to inquiry, still the defendant, if he did inquire, would have seen the same thing being done all round him which he was proposing to do himself, and it is a striking circumstance that he erects his dye-works upon a pre-existing open drain which was not, so far as I can see, a drain for the purpose of draining the upper country, but actually being used for the purpose of draining off the refuse matter from other factories—I mean the factories of Mitchell and Turner, and two or three other names that have been mentioned as having their works in the neighbourhood of Mitchell & Turner's. Well, the defendant, I feel, was put upon the inquiry, but the answer would be—"Circumspice,—see what is being done around. I see every manufacturer here has poured his refuse matter, more or less pollusive to the stream, into the waters of the stream." What else was he to do? Was he to go to every man—because that is what he was bound to do if he had done more—who had got works built upon this stream, not only down to Bradford, but all through the town of Bradford, and inquire of him—"Do you mean to say that you have any right to use this stream as a sewer, that is, as a drain, and that I am not to be able to do so?" I cannot conceive that there was any necessity for that. But what were the plaintiffs put upon? The plaintiffs were really put upon this, it was not that they were caught napping, for they were then in the very act of stirring and rousing themselves, even to the point of conflict with Messrs. Waud, to protect their rights. They knew the defendant had purchased or was purchasing ground, and was erecting works in such a manner so that the refuse of his works, whatever they turned out to be, whether that of a worsted-spinner or a worsted-comber, would come into the stream; surely their business was to have gone or sent to the spot and ascertained who the

gentleman was who was erecting the works, and communicated with him. If they had only done that, and if they had followed that up as soon as they found the defendant was using this stream in the way of which they complain, and had come at once for an injunction, the Court would have said, and with great justice, "You have used due diligence, and *vigilantibus non dormientibus servit lex*"; instead of which, not only is no notice given to prevent the outlay in these works, which is stated to be to the amount of some 10,000*l.*, but the carrying on is permitted for five years and it is not suggested as being a nuisance, nor is any complaint made of it by the plaintiffs to the defendant. Now the answer is, "Yes, but all that time the plaintiffs were busy establishing their title as against Messrs. Waud." Still, that was no reason why notice should not be given to the present defendant to prevent his incurring the enormous expense. It was no reason why he should not have been told there were things that he was doing which the plaintiffs objected to,—“We are litigating actually with Messrs. Waud, and we tell you that you will come under the same sort of litigation if you do the same thing which Messrs. Waud are doing, namely, erecting works, and by the refuse of those works polluting the stream.”

Although I do not think the judgment ought to turn upon this, I cannot say that I think anything like activity or diligence was used even when they began to bestir themselves. For only see what occurred: they had got the final judgment against the Wauds establishing their right in Easter term, 1849, but the judgment was not actually signed and entered up until August 1849. Then, if they were only waiting until they had got their right decided against the Wauds before they took any step with regard to Mr. Sutcliffe, were they not bound as soon at least as they got that, to take steps? But what do they do? Having got final judgment pronounced by the Court of Exchequer in Easter term, they never stir a step until January 1850, and then they send their formal notice to the defendant Sutcliffe to require him to desist from his works. Then again what do they do? So far from stirring again, it is not until the 5th of

June 1850, that they commenced an action against Mr. Sutcliffe, a year and a quarter after the Court of Exchequer had established their right by pronouncing final judgment in the case against the Wauds. Then the action against Mr. Sutcliffe being brought, proceeds speedily to trial: there is no delay there on the part of the plaintiffs. It is tried on the 27th of July 1850; and then what takes place? Instead of entering up judgment in the Michaelmas term following, it is entered within two or three days after the commencement of the following term. In the mean time no bill is filed and no step taken, except that on the 24th of December 1850, there is a threat that they will file a bill. Well, that bill was not filed until the 19th of February 1851. Now, without saying that upon this portion of the delay alone the judgment ought to turn, it does appear to me that there has been that sort of very serious delay in prosecuting the proceedings against the defendant when once they were begun, which ought to make me hesitate very much about granting the injunction; but when I couple this with what I must call the acquiescence for five years in the defendant carrying on his works, it does appear to me that I should be violating the elementary principles of a court of equity in granting an injunction in such a case as this, and therefore I say that if it turned on this last point, and if I considered this the principal point, I should be of opinion that the plaintiffs were not entitled to an injunction upon this motion. Upon the second of the points, as to its being capable of being compensated by money, I incline to think if it turned upon that, I should not grant the injunction. I also doubt very much whether there would be upon the first of the points I have mentioned sufficient ground, namely, that by granting the injunction and inflicting such serious damage upon the defendant, I should be doing any real practical good to the plaintiffs; but, however, upon the last of the grounds—the delay at the commencement of the five years—suffering the defendant to erect his works, I had almost made up my mind, but I could not decide finally until I had heard the whole case. Having heard the whole case out, I think

justice requires not that I should refuse the motion with costs, but that I should refuse the motion, reserving the costs until the hearing of the cause.

M.R. }
1851. } GREENWOOD v. ROBERTS.
Aug. 7; }
Dec. 22. }

Will—Construction—Remoteness.

A testator directed his trustees to set apart sufficient stock to produce 700l. a year, and pay, among others, an annuity of 200l. a year to his brother Thomas for life, and after his decease to continue it amongst his brother's children then living, in equal shares, during their lives, and, at the decease of any of them, the stock, from which the 200l. a year arose, was to be sold, and the produce divided equally amongst the children of him or her so dying, as they should severally attain twenty-one, with interest in the mean time to be applied for their benefit; and he said, "I give them vested interests therein;" and if any of his brother's children should at his decease be dead, and have left issue, such issue should be entitled amongst them to the money they would eventually have been entitled to had their parent outlived his brother. If any of the parties anticipated the payment, or sold his interest before due, it was declared to be forfeited, and applied as if such parties had died before the legacy fell due. The testator then appointed his trustees, executors and residuary legatees. 23,333l. 6s. 8d. was set aside to answer the 700l. a year. The testator's brother Thomas died leaving six children, of whom Richard was one living at the date of the will, and he, after the decease of his father until his death, received an annuity of 33l. 6s. 8d., being one-sixth of the 200l. a year. Richard died leaving three children surviving, one of whom was born in the lifetime of the original testator:—Held, that the children of Richard were not entitled to the money representing the annuity to which he was entitled, but that it fell into the testator's residuary estate.

Richard Nicholson, by his will, dated the 18th of April 1827, after reciting that he was possessed of considerable capital in the public stocks or funds, gave and

bequeathed the said capital stock, with the accumulations thereof, and all other Government stocks and securities and personal estate and effects which he might hold or be the proprietor of at the time of his decease, unto his brothers Thomas Nicholson and Joseph Nicholson, his nephew Richard Greenwood (one of the plaintiffs), and Richard Nicholson, the son of his brother Thomas Nicholson, their executors and administrators, upon trust, in the first instance, to appropriate and set apart, immediately after his decease, so much thereof as would produce an annual dividend of 700*l.*, and then, upon trust, to pay or retain therewith and thereout, as the case might be, the several life annuities therein mentioned, viz., to his said brother Thomas Nicholson, the annuity or yearly sum of 200*l.*, and to various other parties therein mentioned, including those mentioned and excepted in and by the clause next hereinafter set forth (and to which other persons the question in the case does not in any way relate), the several yearly sums therein mentioned, all which amounting in the aggregate to 700*l.*, the testator directed to be paid to the several annuitants during their natural lives, half-yearly, at such times as the dividends of the stocks or funds from whence the same were to arise should become due. The will then proceeded in the words following:—"And from and immediately after the decease of the said annuitants, or any of them, except the said Richard John Greenwood, and the son, and three first-named daughters of my sister Mary Pickup, it is my will and desire to continue and extend the annuity of each of them to the persons and in manner following, that is to say, my brother Thomas Nicholson's annuity of 200*l.* to and amongst such of his children as may be then living, in equal shares and proportions, during their respective natural lives; and at the decease of any of them, I order and direct that so much principal or capital stock as had been adequate to the payment of the annuity to which the child so dying had been entitled during his or her life, shall be forthwith sold and converted into money by my trustees, or the survivors or survivor of them, his executors or administrators, and the actual produce thereof shared and

divided equally amongst the children of him or her so dying, as and when they shall severally attain the age of twenty-one years, with interest in the mean time to be applied for their benefit and advantage; and I give them vested interests therein. And I further direct, if any of the children of my brother Thomas shall at his decease be dead and have left issue, that such issue shall nevertheless be entitled, amongst them if more than one, to the same sum of money as they would eventually have been entitled to had their parent outlived the said Thomas Nicholson the father."

And by the will, after the dispositions hereinbefore set forth, the testator also extended and continued the several other life annuities, and disposed of the capital stocks or funds which should be set apart to answer the same; and the will also contained a provision, to the effect that if any of the therein above-mentioned parties should, in order to anticipate the payment of the money thereby given to them, sell or dispose of the same previous to the time of its falling due and payable, then and in every such case the share and interest of such parties should be forfeited and cease, and should be applied and paid in such manner as was thereby directed in the event of the death of such parties before the time of their legacy falling due. And after giving several pecuniary legacies, the will concluded in the words following:—"I do hereby constitute and appoint the said Thomas Nicholson, Joseph Nicholson, Richard Greenwood, and Richard Nicholson executors of this my will, and also my residuary legatees, revoking all former wills by me made." The testator died on the 6th of May 1829; and on the 13th of June 1829 the will was proved by all the executors in the Consistorial Court of the Bishop of London. The executors set apart 23,333*l.* consols, in their joint names, for raising an annual dividend of 700*l.*

The testator's brother, Thomas Nicholson, received the annuity of 200*l.* a year during his life. He died on the 16th of December 1832, leaving six children surviving, namely, Richard Nicholson, who was living at the date of the will, and was named in it, and five others, and no children or child of the said Thomas Nicholson

died in his lifetime leaving any issue them, him, or her surviving.

After the decease of Thomas Nicholson, an annuity of 33*l.* 6*s.* 8*d.*, being one-sixth of the annual sum of 200*l.*, was paid to Richard Nicholson up to the 26th of June 1847, when he died.

Richard Nicholson had four children, one still born, and three others ; the defendant, Frances Amelia Roberts, born on the 5th of June 1824, in the life of the testator, and who intermarried with William John Roberts on the 13th of July 1842 ; and the defendants, Richard Thomas Nicholson and George William Nicholson, who were respectively born on the 2nd of June 1833, after the testator's decease.

No settlement or agreement for a settlement was ever made between W. J. Roberts and his wife.

By an order, dated the 24th of July 1851, Thomas Burleigh Stott was appointed the guardian of the infant defendants, R. T. Nicholson and G. W. Nicholson, for the purpose of concurring on their behalf in this special case.

And the questions now raised were, whether the children of Richard Nicholson, or any or either of them, became upon his decease entitled to the principal monies or capital stock producing the annuity to which the said R. Nicholson was entitled during his life, or to any part or parts thereof ; or whether such principal monies or capital stock upon such decease fell into and became part of the testator's residuary personal estate.

Mr. Roupell and *Mr. Baggallay*, for the plaintiffs, the residuary legatees.—The limitation to the children of R. Nicholson is a limitation to a class, and as this might and did in this case include a party *in esse*, the vesting of whose interest depended upon the same event which was to give effect to the interests of others of the same unascertained class, the entire gift was void. The interests of those living and those unascertained cannot be separated ; if they cannot be supported together, they must wholly fail. The limitation over to the children of the children of Richard Nicholson is open to the same objection ; it is or it may be given over after the death of a person not *in esse* at the testator's death, and who

could not take any vested interest, and consequently was too remote. The limitation, therefore, to the children of Richard Nicholson, with the gifts over, are too remote, and on his death fell into the residue—*Porter v. Fox* (1).

Mr. R. Palmer and *Mr. F. T. White*, for W. J. Roberts and Frances Amelia his wife.—The gift of the principal stock was to the children of Richard Nicholson as a class, with a direction that it was to be equally divided between them. It was also expressly stated that they should have vested interests, and though the gift might be expressed in words which would include all the children coming *in esse* after the decease of the testator, yet as each share was defined and was to be vested, that interest could not depend upon any contingency, but immediately on the decease of the testator became an interest vested in such of the children who were living ; and consequently Mrs. Roberts became entitled, and her being joined as a co-defendant with others, who were not entitled, did not deprive her of her right—*Roberts v. Roberts* (2), *Bristow v. Warde* (3), *Roulledge v. Dorril* (4).

Mr. Lloyd and *Mr. Rogers*, for Richard Thomas Nicholson and George William Nicholson.—The gift was made to a class, which must of necessity be ascertained in the lifetime of Richard Nicholson. One of that class was living at the decease of the testator ; the interest of that child in the fund was therefore vested, and was subject only to be divested by the birth of other children of Richard Nicholson ; this, therefore, was within the time allowed by law for vesting, and the children born subsequent to the decease of the testator were entitled to participate in the principal monies jointly with the child who was living at the decease of the testator—*Viscount Dungannon v. Smith* (5), *Leake v. Robinson* (6), *Jee v. Audley* (7).

Mr. Roupell, in reply.

(1) 6 Sim. 485.

(2) 2 Phill. 534 ; a. c. 17 Law J. Rep. (N.S.) Chanc. 174.

(3) 2 Ves. jun. 336.

(4) Ibid. 357.

(5) 12 Cl. & F. 546.

(6) 2 Mer. 363.

(7) 1 Cox, 324.

The MASTER OF THE ROLLS.—I must declare that the children of Richard Nicholson did not, nor did any or either of them, become entitled upon his decease to the money representing the capital stock from which the apportioned annuity of 33l. 6s. 8d., to which Richard Nicholson was entitled during his life, arose; but that such money or capital stock upon his decease fell into, and became part of, the testator's residuary personal estate.

K. BRUCE, V.C.
1849.

July 25, 26;

August 6.

L.C.

1851.

June 7, 9, 10;

Nov. 7.

BRIGGS v. PENNY.

Will — Trust — Precatory Words —
"Well knowing"—Resulting Trust for Next-
of-kin.

A testatrix by her will gave to S. P., whom she appointed her sole executrix, 3,000l., and a like sum of 3,000l. in addition for the trouble she would have in acting as executrix; and she gave all the residue of her personal estate to S. P., her executors, administrators and assigns, "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes." Among the papers of the testatrix were found some memorandums in writing made since the statute 1 Will. 4. c. 40. and unattested, specifying certain charitable and other bequests which the testatrix desired to be made, one of which was addressed to S. P. S. P. by her answer denied all knowledge of the "views and wishes" of the testatrix previously to her death:—Held, affirming the decision of the Court below, that upon the words of the will S. P. did not take the residue beneficially, but that she was a trustee for the next-of-kin.

Quære—whether the unattested papers were admissible in evidence for the purpose of explaining the intentions of the testatrix.

This was a suit, instituted by the executors of the will of the late Earl of Oxford,

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for the administration of the estate of the Hon. Frances Harley, of whom the Earl was the sole next-of-kin at her death, and to obtain the declaration of the Court as to the effect of the residuary clause in her will. The sole defendant to the suit was Sarah Penny, her executrix and residuary legatee.

Frances Harley, by her will, dated the 13th of May 1835, after giving various charitable and other legacies, gave and bequeathed "to Sarah Penny 3,000l. and a like sum of 3,000l. in addition for the trouble she will have in acting as my executrix." And after divers other specific and pecuniary bequests and a devise of all her real estate, the testatrix bequeathed as follows:—"And lastly as to all the residue and remainder of my personal estate and effects, subject to and chargeable with the aforesaid several legacies and annuities, save and except such of them as are of a charitable nature which I exclusively charge upon such part of my personal estate as by law I am empowered to charge therewith, and not out of any part of my lands, tenements and hereditaments, I give and bequeath the same unto the said Sarah Penny, her executors, administrators and assigns, well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes: and I hereby appoint the said Sarah Penny sole executrix of this my last will."

The testatrix, on the 19th of March 1836, made a codicil to her said will, revoking a bequest contained in her will, of her house and furniture, pictures, books, &c. but not further altering or affecting her said will. The testatrix further wrote a certain memorandum, without date and unattested, by which she gave certain annuities and pecuniary and specific legacies, but did not thereby otherwise alter or revoke her said will and codicil.

The testatrix died on the 25th of November 1848, leaving her brother, Edward Earl of Oxford, her sole next-of-kin, her surviving; and on the 28th of December 1848 Edward Earl of Oxford died, having by his will duly executed appointed the plaintiffs his sole executors. Probate of the will, codicil, and memorandum in writing of the testatrix was granted to Sarah Penny,

though the granting of the same was opposed on behalf of the next-of-kin.

The bill, after setting forth the above facts, stated that a great portion of the annuities and legacies given by the will had lapsed, and that the residue in the hands of the defendant was of large amount; and it charged that, it not appearing by the will, &c. of the testatrix that Sarah Penny was entitled to take the residue beneficially, the next-of-kin were entitled, and that by virtue of the statute 1 Will. 4. c. 40. the defendant was a trustee of such residue for the next-of-kin; and that certain papers in the handwriting of the testatrix marked B, C, D, and E. not admitted to probate, clearly shewed that the defendant was intended to take in trust, to carry out the wishes and intentions of the testatrix expressed or to be expressed, and that no valid declaration of such views and wishes was ever made; that the testatrix was desirous of bequeathing her property for charitable purposes, and being aware that such bequests were void in law, communicated her views and wishes in that respect to the defendant, and it was arranged between them that such charitable intentions should not appear upon the face of the will, but that the testatrix should afterwards disclose the same to the defendant, who undertook and agreed to carry them out, and that upon the faith of that understanding and agreement the residue was bequeathed to the defendant.

The bill then set out the four several papers B, C, D, and E, which were found in the writing-desk of the testatrix, and were exhibited in the proceedings in the Prerogative Court in respect of the probate of the will.

Paper B. was as follows;—"It is my desire that Mary Lyford and Thomas Wheatley, if living with me at my death, shall have an annuity of 30*l.* a-year during the term of their natural life, free of legacy duties. I give to St. George's Hospital the sum of 1,000*l.*; to the Middlesex Hospital and the St. Marylebone Hospital the sum of 1,000*l.* each; to the Charing Cross Hospital, the London, the Fever, the Ophthalmic, and the Consumptive Hospitals, 500*l.* each; to St. Ann's School, to the London Orphan, and the Infant Orphan Asylums, 1,000*l.* each; to the National

Benevolent, 1,000*l.*; to the Propagation of the Gospel, and the Society for Promoting Christian Knowledge, 1,000*l.* each; to my goddaughter Mary Prior 1,000*l.*; to my goddaughter Frances Darby 1,000*l.*; to my goddaughter Maria Frances Owen, 1,000*l.*; to the Church Building Fund, 5,000*l.*"

Paper C.—"My dearest friend,—You will see by my will that I have appointed you my sole executrix and residuary legatee, being well aware of your peculiar integrity in fulfilling my wishes. In law, I cannot leave much of my property in charities; I therefore request that you will consult with Mr. Harrison in what manner you can carry my wishes into effect. This paper must not appear. I wish some land to be purchased, and six almshouses erected and endowed in the same manner as those at the Hay; a marble tablet to be put up in Brampton Church to the memory of my dear father, mother, brother, sister, and self; 1,000*l.* to the Propagation of the Gospel; Miss Margaret Hewell, daughter of the late Benjamin Hewell, 20*l.* per annum during the term of her natural life; to Brecon Infirmary 1,000*l.*; to give at the rate of 500*l.* towards building churches, where there are to be free sittings for the poor; to build and endow a school for girls to be taught reading, writing, plain work, and their duty to their God; 20*l.* per annum to each of six clergymen's daughters that are old and infirm; to Mr. Harrison 10,000*l.* for his faithful services."

Paper D.—"My wishes, F. Harley.—The school I built at Cowley I wish to be endowed, with a salary to the schoolmistress of 30*l.* per annum, the sole controul of which to be vested in the rector of Cowley. I likewise wish to leave 500*l.* to the poor of Cowley, the interest to be laid out in any way the rector thinks best at Christmas. I leave 100*l.* to my goddaughter Frances Darby; to my goddaughter Mary Prior 1,000*l.*; to Caroline Watchurst, 1,000*l.*; to Augusta Maryon, 500*l.*; to Sophia Kennedy, 500*l.*; to Miss White, 100*l.*; to Mrs. Evans, 500*l.*; to E. Dalton, Esq. 200*l.*; to Mrs. Harrison, 1,000*l.*; to Wheatley and Lyford 30*l.* per annum during their lives; my law books to William Hilliard and 100*l.*; my books

on divinity to Joseph Hilliard and 100*l.*; to the Society for bettering the Condition of the Poor, 100*l.*—F. Harley."

Paper E.—"Directions for Miss Penny. A piece of land to be purchased in a convenient spot near a market town in Brecon or Herefordshire, and almshouses erected on the same plan as those at the Hay, with a garden to each and 20*l.* per annum to each, allowance to each woman; a marble tablet to be put up in Brampton Church to the memory of my dear father, mother, brother, sister, and self, plain but handsome; 1,000*l.* to the Missionary Society; ditto to the Bible Society, and 5,000*l.* to the building of different churches, where the seats will be free for the lower class of people; 500*l.* to the ; 300*l.* to the Humane; 300*l.* per annum for yourself to keep a carriage during your life, at your decease to be distributed in charities as you think proper."

The bill then charged that the defendant ought to set forth whether she had ever been informed by the testatrix of the contents of the said several papers, or had any communications with the testatrix on the subject of the said charitable bequests contained therein. The bill prayed the usual decree in an administration suit, and a declaration that the plaintiffs, as representing the next-of-kin, were entitled to the clear residue of the testatrix's leasehold and other personal estate, and that the defendant was a trustee thereof on behalf of the plaintiffs, and for an injunction and a receiver.

The defendant, by her answer, stated that she was on intimate terms of friendship with the testatrix for upwards of forty years before the date of her will, and she denied that the testatrix communicated to her her views and wishes in respect to such charitable disposition of her property as alleged in the bill; or that the testatrix ever communicated to her, or that she knew of the dispositions of the testatrix's property until after her death, or that it was ever arranged or promised by or between them that the will should be so prepared that the charitable intentions of the testatrix should not appear, or that she should afterwards explain to the defendant her views and wishes in respect thereof, or

that the bequest of the residue was made upon the faith of any such agreement. The answer further stated that the will and two codicils of the testatrix were found in her desk inclosed in an envelope, and that the papers B, C, D, and E, were found lying loose in the same desk, and were in the handwriting of the testatrix and without date; that the defendant brought the said four writings into the registry of the Prerogative Court, and that she was advised that she ought not and that she did not propound the same for probate; she submitted that the same could not be regarded for the purposes of the suit, and she insisted that she was entitled to the whole residue beneficially; or if the said paper writings should be held to be valid declarations of trust, then she claimed what should remain of the residue after the performance of such trusts, and she denied that the said paper-writings or the contents of the same were ever communicated to her by the testatrix.

Mr. Turner, Mr. Malins, and Mr. Walford, for the plaintiffs, on the hearing before Knight Bruce, V.C. cited—

Love v. Gaze, 8 Beav. 472.

Andrew v. Andrew, 1 Coll. 686.

Wood v. Cox, 2 Myl. & Cr. 684; s. c. 6 Law J. Rep. (N.S.) Chanc. 366.

As to the effect of the legacy of 3,000*l.* to Miss Penny for her trouble, they cited—

Rachfield v. Careless, 2 P. Wms. 158.

May v. Lewin, Ibid. 159, n.

Duke of Rutland v. Duchess of Rutland, Ibid. 210.

Dawson v. Clarke, 15 Ves. 409; 18 Ves. 247.

Whitaker v. Tatham, 7 Bing. 628; s. c. 9 Law J. Rep. C.P. 189.

Mapp v. Elcock, 2 Phill. 793; s. c. 18 Law J. Rep. (N.S.) Chanc. 217.

And as to the precatory trust—

Stubbs v. Sargon, 2 Keen, 255; s. c. 3 Myl. & Cr. 507; s. c. 7 Law J. Rep. (N.S.) Chanc. 95.

Hudson v. Bryant, 1 Coll. 681; and *The Corporation of Gloucester v. Wood*, 3 Hare, 131.

As to the admissibility of the four paper writings in evidence, they cited—

Smith v. Attersoll, 1 Russ. 266.
Earl of Inchiquin v. French, 1 Cox, 1.
In the goods of Dyer, 1 Hag. Ecc. 209.
Rymes v. Clarkson, 1 Phillim. 35.
Metham v. the Duke of Devonshire, 1 P. Wms. 529.
Taylor v. George, 2 Ves. & B. 378.
Muckleston v. Brown, 6 Ves. 68.
Trimmer v. Bayne, 7 Ibid. 517.
Stickland v. Aldridge, 9 Ibid. 516.
Podmore v. Gunning, 7 Sim. 644; s. c. 5 Law J. Rep. (N.S.) Chanc. 266.
Habergham v. Vincent, 2 Ves. jun. 204.

Mr. Bethell, Mr. Russell, and Mr. Hislop Clarke, for the defendant, contended that the 1 Will. 4. c. 40. was confined to cases in which there was no express gift of the residue; and that the defendant claimed not as executrix, but as residuary legatee.

As to the precatory trusts, they cited—

Gibbs v. Rumsey, 2 Ves. & B. 294.
Knight v. Boughton, 11 Cl. & F. 519.
Wood v. Cox, 2 Myl. & Cr. 684; s. c. 6 Law J. Rep. (N.S.) Chanc. 366.
 and contended that where no express trust was declared, and no objects specified, the legatee would take beneficially; that the words used merely denoted the motive of the gift, and did not create a legal obligation.—
Malim v. Keighley, 2 Ves. jun. 333.
Ommanney v. Butcher, Turn. & R. 260.
Vesey v. Jamson, 1 Sim. & S. 69.
Ellis v. Selby, 7 Sim. 352; s. c. 1 Myl. & Cr. 286; 5 Law J. Rep. (N.S.) Chanc. 214.
Lechmere v. Lavie, 2 Myl. & K. 197.
Bardswell v. Bardswell, 9 Sim. 319; s. c. 7 Law J. Rep. (N.S.) Chanc. 268.

Mr. Turner replied.

Aug. 6, 1849.—KNIGHT BRUCE, V.C.
 —The plaintiffs in this cause sue as the executors of the Earl of Oxford, lately deceased, who for a short time survived his sister, Miss Frances Harley, of

whom the defendant is the executrix; the object of the bill being to establish the claim of Lord Oxford as Miss Harley's sole next-of-kin at her death, which he is admitted on each side to have been. The residuary personal estate, however, is by her will given in terms to the defendant, who contends that it is so given to her beneficially without qualification or with such qualification only as is effected (if any is effected) by four papers written by Miss Harley, which are mentioned in the pleadings, and marked respectively B, C, D, and E, under no one of which, as the defendant contends, Lord Oxford took or could have claimed any benefit. The plaintiffs insist, that Miss Harley gave the residue of her personal estate to the defendant, not beneficially, but for certain purposes, either wholly undisclosed and wholly unknown, or apparent only on one or more or all of the four papers just mentioned; and that the purpose, if any, thus apparent, being, to a considerable extent such as the statute of Geo. 2, called the Mortmain Act, has prohibited from being so effected, must, to that extent at least, be held to have failed for Lord Oxford's benefit; and the plaintiffs lay claim to the whole of the residuary personal estate, or, failing that, to a great portion of it, accordingly. They therefore do not admit that any one of the four papers, marked B, C, D and E, is, for any purpose or to any intent, valid, effectual, or to be regarded. The defendant, on her part, distinctly maintains that, as against her, the four papers are, for every purpose, void; and that the case ought, as against her, to be treated as if none of them had ever existed. I may here observe, that on neither side has any objection been made on the ground that the four papers are, as I believe them to be, unstamped; nor has the defendant, by her answer or at the bar, objected that the suit is defective in parties. Of the four papers, neither has been admitted to probate, and neither can, for any purpose of this cause, be treated or considered as testamentary. If either of them is valid at all, it can only be deemed valid in some other character than as a testamentary instrument; therefore, as far as the present suit is concerned, the two codicils were admitted to probate with

Miss Harley's will; but of these two codicils it has not been contended, and it does not seem, that either is material for any present purpose.

The first question is on the construction of the will, and arises as well on the manner in which particular legacies are given to Miss Penny, the defendant, as on the language in which the residue is bequeathed. Among various legacies to various persons there is this bequest to the defendant:—"To Sarah Penny, of Great James Street, Bedford Row, 3,000*l.*, and a like sum of 3,000*l.* in addition for the trouble she will have in acting as my executrix." The residue is given thus.—[His Honour here read the residuary bequest.]—The will is dated the 13th of May 1835, one of the codicils the 19th of March 1836, the other is neither dated, attested, nor signed. The testatrix died in 1848. Now, though the language of the particular bequest to the defendant is not conclusive as to the construction of the gift of the residue, yet a person reading the will for the first time and pausing immediately after that particular bequest would, of necessity, I think, expect to find in the succeeding part of the instrument either no express disposition of the residuary personal estate or a disposition of it otherwise than for the benefit, absolutely and without qualification, of the executrix. The effect of the terms of that particular bequest must, I say, as it appears to me, be thus to affect the mind of the reader. Anything much less likely to be said by a testatrix, particularly one in Miss Harley's circumstances, if she designed the residue for the absolute benefit of her executrix, can hardly, perhaps, be reasonably imagined, especially when it is observed that the particular bequest consists of two legacies, to one of which the declared motive or object appears confined. Under the law, as it stood before the 1 Will. 4. c. 40, those or equivalent words used in a case of two executors having unequal legacies, or of whom one only had a legacy, would have excluded them from all title to the residue beneficially in the character of executors. On the whole, I cannot agree that on the question of the interpretation of the residuary gift in this will the language of the particular gifts is to be for-

gotten or disregarded, especially when, to borrow a remark made by Lord Eldon in *Langham v. Sanford* (1), it is remembered that every part of the will became, at one and the same time, the will of the testatrix, namely, by the act of subscription, not one part before another; the will says together and at the same moment everything that it does say. The words, "her executors, administrators and assigns," and the words "make a good use" are probably rather favourable than unfavourable to the defendant's argument, but are also not conclusive; nor is the remark, if indeed well founded, that the words "in a manner in accordance" are, in point of grammar and syntax, connected as directly and as much with the words "good use" as with the word "dispose." This observation was, I think, suggested by myself; but I am not sure that it is correct, and I attribute no weight to it against the defendant. The words "make a good use," however, cannot be read as if they were disjointed and separated; they are part of the same sentence or paragraph that contains the word "dispose;" and the expression "views and wishes," which forms an important part of the context, seems to affect materially and restrict the phrase "good use." Then, as to the words "well knowing," these cannot be understood literally. The testatrix did not nor could know that which she professes to know. She used the expression in a sense in which it is often used, as indicating belief and confidence with respect to the future: and how do belief and confidence differ from faith and trust? The phrase, "well knowing," and the expression "being well assured," that of "not doubting," that of "desiring," and that of "hope," have in various cases—some, if not all of which, and many others relative to the present dispute, are collected by Mr. Lewin in his valuable book—been held sufficient to denote an intention to create a trust, in the sense in which the Court of Chancery uses that word. Then, what is the force, what the meaning of the words "my views and wishes," as used in the will? If the testatrix had made her will and had died before the statute of 1 Will. 4.

(1) 19 Ves. 641.

c. 40, had not given any legacy to Miss Penny, and had not expressly disposed of the residuary personal estate, but had said in the will, "I have certain views and wishes concerning the residue of my personal estate, and in accordance with these views and wishes I know that my executrix will dispose of it," would the executrix, in the absence at least of any knowledge by her, and of any evidence of what the testatrix meant by those words "views and wishes," have been a trustee of the residue for the next-of-kin? An affirmative answer to this question could not properly be given by a person taking the defendant's view of the construction of the will before the Court; but the words "in addition, for the trouble she will have in acting as my executrix," being, in my opinion, as I have said, material and weighty in this case, a negative answer to it would not be necessarily inconsistent with that of the plaintiffs. Whether the statute 1 Will. 4. c. 40. has a bearing on the present cause may be a disputable point. Certainly, however, it cannot affect the cause favourably to the defendant. Part of the argument for her has been tantamount, perhaps, to a contention that the words "my views and wishes" are to be read as if they were Miss Penny's views and wishes. It was, in terms, argued that the language accompanying the residuary gift was only the statement of a reason for making a bequest to a legatee beneficially, as if the testatrix had merely said, "I give her the residue of my property because I know how worthy she is of it," or "because, from her past conduct, I know how well and wisely she will employ it;" and it is true that the words may be, in a sense, said to denote the cause or motive of the gift, but the cause or motive of the gift for what purpose? If not the cause or motive of a gift to the legatee beneficially, the argument fails. The words appear to me, in denoting the cause or motive, to denote also the object and end, and that object and that end, not the benefit, or not necessarily the benefit, of the legatee. It was contended also for the defendant, that the expression "views and wishes" ought to be construed as referring to the testatrix's general habits and character, or to the general course, manner, and tenour of

her own life. It is, however, as it appears to me, more specific and particular in its nature and application. She has used, I think, the word "views," as meaning design, plan or intention, or, plurally, designs, plans, or intentions; and the word "wishes," which cannot, surely, be interpreted to mean "example," must be taken, I conceive, to have a meaning little, if at all, different from "desire" and to be not less strong, certainly, in the plaintiffs' favour, than the word "views." "To wish" is explained by Mr. Charles Richardson as meaning "to look after eagerly, desirously; to desire." Dr. Johnson gives to the substantive three interpretations, which are, "longing desire, thing desired, desire expressed."

The testatrix, by the will, appears to me to have said, in substance to Miss Penny, "I give you the residue, believing and trusting that you will dispose of it in accordance with my design, intention and desire"; and this in a will, in a prior part of which the testatrix had treated the appointment to the executorship as a burden and charge, by the words "in addition, for the trouble she will have in acting as my executrix." According, however, to the proper construction of the words "my views and wishes," understood as I have said, and considered in connexion with the context, do they also mean views and wishes, that were designed to be, or that had been, communicated by the testatrix to Miss Penny, either in writing or verbally, but otherwise than by the will? I am of opinion that they do, understanding the expression "communicated by the testatrix to Miss Penny" as extending, though not necessarily confined, to any paper on the subject that might be left for the purpose by the testatrix at her death. Miss Penny could not, of course, execute a plan of which she was left in ignorance, and except from the testatrix's information the scheme of the testatrix could not be known. If I am right in thus reading the will, does it or does it not exhibit an intention, that, merely by virtue of the will, without more, Miss Penny should not take the residue beneficially? I think that it does exhibit such an intention. I think, in effect, that by it the residue is given to that lady, not necessarily for her benefit

wholly or in part, but is given to her for a purpose possibly not for her benefit wholly or in part—that is to say, for a purpose of which the instrument does not contain an explanation and disclosure, but refers for the explanation and disclosure to some other source of information, past, present, or future. Supposing, then, that source of information to fail—supposing the explanation and disclosure to be not obtained, and to be unattainable, the executrix, being also the residuary legatee, must be treated, in my judgment, as holding the residue in trust for the next-of-kin—a conclusion which appears to me not opposed to *Gibbs v. Rumsey*, *Lechmere v. Lavie*, *Wood v. Cox*, or any of the authorities cited at the bar during the argument; but is probably, if I rightly interpret the will, necessary in order to avoid a departure, at least, from some of them. I may observe that, in *Wood v. Cox* the will contained the words “for his and their own use and benefit for ever,” and though it contained the word “wishes,” the codicil or additional testamentary paper had the word “wish”; and the Lord Chancellor appears to have thought that the latter was to be considered as declaring and explaining the words mentioned in the will; and that the gift to Sir George Cox was not a gift in trust, but a gift subject to a charge. In the case of *Mordaunt v. Hussey* (2), which occurred long before the stat. 1 Will. 4. c. 40, the then Lord Chancellor thus expressed himself:—“Upon the whole disposition the testatrix has made, she has reserved an ulterior disposition of the residue; that ulterior disposition being either not made, or not known to be made; of course the executors can claim nothing.” The cases of *Morice v. the Bishop of Durham* (3), *Lord Cranley v. Hale* (4), *Mence v. Mence* (5), *Giraud v. Hanbury* (6) and *Ellis v. Selby* are decisions, or contain at least observations, by Lord Eldon, by Sir William Grant, and by the present Lord Chancellor, which have, I think, a bearing, and as to some of them a strong bearing, on this case. There are also the

cases of *Ozmanney v. Butcher* and *Vezey v. Jamson*; nor is perhaps *Braddon v. Farrand* (7) inapplicable. And in the judgment delivered by Sir James Wigram in the case of *The Corporation of Gloucester v. Wood* I find these two passages:—“Upon the cases I have referred to,” he says, “the plaintiffs founded the general proposition, that, if a will contains an absolute gift to an individual, that individual must take for his own benefit, unless by other parts of the will that absolute gift is with certainty reduced to a trust. Now, after repeated consideration of this case, it appears to me, as it did during the argument, that the cases referred to have no application to a case like that before me. Those cases suppose the whole intention of the testator, so far as he has committed it to writing, to be before the Court. In such cases it may be right (in the first class referred to) to hold, that a gift in one part of a will to an individual, in terms which, if uncontrouled by the context, would give him an absolute interest, shall not be reduced to a trust by equivocal expressions in another part of the will. And (in cases of the second class) it may be a sound rule of law that a gift which, if uncontrouled by the context, would give an absolute interest, shall not be reduced to a trust by a mere recommendation to the legatee to give an unascertained part of the legacy to an individual, or any part of the legacy to an unascertained object. But I confess my inability to apply the reasoning upon which those cases are founded to a case like the present, in which the difficulty arises from this: that the Court has not the expressions of the testator before it for its guidance. I cannot accede to the proposition which was urged upon me, that—because in both classes of cases referred to, uncertainty (in a sense) is the foundation of the judgment of the Court in favour of the legatee, excluding trust,—it is immaterial what the cause of uncertainty in any other case may be. The testator tells me, in the third codicil, that his ascertained intentions are declared in another place: those ascertained intentions are not before me; and the plaintiffs’ argument requires me to believe that, if

(2) 4 Ves. 117.

(3) 10 Ibid. 522.

(4) 14 Ibid. 307.

(5) 18 Ibid. 348.

(6) 3 Mer. 150.

(7) 4 Russ. 87.

those intentions were brought before me, the case would necessarily fall within one or other of the cases I have mentioned. Taking this, then, as the case of a legacy to an individual, I am satisfied I should be making and not expounding a will, if I were to give the plaintiffs the decree they ask, so far as the 60,000*l.* is concerned." Then, further on, he says, "But no rule of law can be better settled than this,—that, unless the legatee intended to be benefited by a particular bequest can be ascertained, the mere intention that the residuary legatees of a testator should not take will be inoperative. The whole doctrine of lapsed legacies assumes that the interests of residuary legatees are abridged only in favour of particular legatees, and if the particular legacies fail, the residuary legatees take the whole." The Vice Chancellor was dealing with a question upon a particular legacy given, in effect, as it was successfully contended, to an unascertained legatee. But with reference to a claim of residue by a testator's next-of-kin (at least since the statute 1 Will. 4. c. 40), it may be equally asserted that such a claim does not need the existence of intention in his favour—does not require the absence of expressed intention against him, but sustains itself where there is an inability to shew, by any means which our law allows, the existence in another's favour of a settled intention, legitimate in its nature, expressed intelligibly, and capable of execution. Lastly, on the appeal from the decision just mentioned, my Lord Lyndhurst is reported (8) as saying: "But the former codicil is not produced, no account is given of it, and we have, therefore, no means of ascertaining the purpose for which the gift was made, or to what it is to be applied. In the same sentence in which the legacy is given, and immediately after the words of gift, the gift is stated to be for a purpose which the testator had defined, but which is wholly unknown, and cannot be discovered. How, then, could the legatee be allowed to take the legacy for his own use? The purpose is a qualification of the legacy; it is an essential part of it, and

till this is ascertained, it is wholly uncertain what the legatee is to take, whether for his own benefit, or for the benefit of others, and for whom; whether for private purposes or for public or charitable objects. It is, therefore, I think, clear that if the legacy had been to an individual, it must have altogether failed. What the testator intended, whom he meant to benefit, does not appear, and cannot be ascertained."

I proceed to the question, whether this testatrix has in an effectual or available manner explained or disclosed, wholly or to any extent, her views and wishes; that is to say, as I read her will, the purpose for which it gave the residue of her personal estate to Miss Penny. The only evidence in the cause, exclusively of the probate, and the four papers marked B, C, D, and E, consists of the answer, which affords probably accurate information, and beyond which it is probable that there cannot be obtained, and does not exist, any useful information either on the subject of the intent or object of the residuary bequest, or with reference to either of the papers marked B, C, D, and E. The only parts of the answer to which it can be material to refer, for any present purpose, seem to be the following passages.—[His Honour here read at length all the passages of the answers, the substance of which is before set out.]—It is not, therefore, admitted or proved, nor do I think it likely to be proveable, that the testatrix made or gave, communicated or left, any explanation or disclosure, wholly or partially, of her views and wishes mentioned in the will, save so far, if at all, as the papers marked B, C, D, and E. contain any such explanation or disclosure, or that either of those four papers was written before the making of the will, or before the year 1838. I mention the year 1838 with reference to the act passed in 1837 for the amendment of the law with respect to wills. But is either of the four papers effectual or available for any purpose? Assuming, as the Ecclesiastical Court is said to have held, and, as at present I consider at least highly probable, that each of them was written in or after the year 1838, I do not, considering the statute of 1837, think that either of them can be treated as of any avail, or effectually for any purpose. Whether if

(8) The Corporation of Gloucester v. Osborn, 1 House of Lords Cases, 284.

the statute of 1837 had not passed, either of them might properly have been admitted to probate, is a question which, on the facts, so far as they appear, and on cases decided at Doctors' Commons, and on appeal from Doctors' Commons, so far as I am acquainted with them, may, perhaps, be thought disputable. But, however this may be, the statute of 1837 seems to me to exclude them. Before that statute—(I need not particularly refer to cases such as *Addington v. Cann* (9), *Habergham v. Vincent*, *Muckleston v. Brown*, and *Stickland v. Aldridge*,)—a man could not, by his will, enable himself to devise freehold estate by an unattested codicil.

But the rule may, I conceive, be more largely stated. I apprehend that a testator, by a will, whether made before 1838 or after the commencement of that year, could not enable himself to make a disposition of any of his property by any means which, if the will had not been made, he could not effectually have used. Nor do I recollect any exception or qualification beyond the well-known one, as to affecting real estate, by means of a will, with debts incurred and legacies given, after it, which is now restricted, so far as the statute requires particular formalities for the effectual gift of a legacy. The power of a testator to incorporate in his will another existing paper, which the will by specific reference and description identifies, and the prevention of fraud, by compelling a legatee to perform, after the testator's death, a promise made by him to the testator, upon the faith of which the testator, to the knowledge of the legatee, gave the legacy, are scarcely exceptions or qualifications. The four papers under consideration being assumed not to have existed before 1838, being not testamentary, and being unattested, can, as I conceive, have only such effect (if any) on Miss Harley's property as they could have had if she had died intestate. But would either of them, in that case, have been of any force or efficacy as an agreement, or gift, or a declaration of trust, or in any other manner? I am not aware of a ground or principle on which that question can be answered, otherwise than in the negative. It follows that,

subject to the consideration that I am about to mention, I must hold the plaintiffs entitled to an administration decree. It may be as unnecessary, formally, as it is substantially, to direct an inquiry whom the testatrix left her next-of-kin; though of this I am not quite sure. But can it, in point of form at least, or indeed in point of substance, be, even on this record, right to make an administration decree, without ascertaining, by means of a report, whether the testatrix explained or disclosed the views and wishes mentioned in her will, and in what manner, if at all? Is it, even on this record, certainly right to assume the total invalidity of these papers? If not, will it be correct to declare the decree to be without prejudice to the rights (if any) of persons not parties, though no such persons could probably, even without a declaration of that kind, be precluded by the decree: (and the case is not, perhaps, within the 40th Order of the 26th of August 1841,) or what course should, with regard to the four papers, be taken? These are points on which I shall be glad to receive any suggestions from the Bar. In the absence of any such suggestions, the decree that I am disposed to make is to this effect:—"Declare that the testatrix bequeathed the residue of her personal estate to the defendant, as a trustee, for some purpose or purposes which the will and codicil of the testatrix do not disclose, and the nature of which does not at present appear. Refer it to the Master to inquire and state whether the views and wishes concerning the disposition of the residue, which are mentioned in her will, were ever and when declared or made known by her, in or by any instruments, papers, or writings, or any instrument, paper, or writing; and if the Master shall so find, he is to state what the same was or were, and the particulars and circumstances thereof; but if the Master shall not so find, then there must be the common administration decree, with liberty to state any circumstance specially."

The defendant appealed from this decree.
The Solicitor General, Mr. Malins, and
Mr. Walford, for the plaintiffs.
Mr. Bethell, Mr. Russell, and *Mr. Hislop Clarke*, for the appellant.

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Nov. 7, 1851.—The LORD CHANCELLOR. —This is an appeal from the decree made by Vice Chancellor Knight Bruce, on the hearing of the cause, declaring that Frances Harley, the testatrix in the pleadings mentioned, bequeathed the residue of her personal estate to the defendant, as a trustee, for some purpose or purposes which her will and codicils did not disclose, and directing an inquiry whether the views and wishes of the testatrix concerning the disposition of such residue were declared by her in any instrument, paper or writing; and if the Master should find that they were not so declared, the decree directed the usual accounts to be taken and the estate to be administered in the usual manner. The question arises upon the terms of the residuary bequest of the testatrix. The question involved in this case has very frequently occurred, and is the subject of very numerous decisions; and considering the infinitely various forms of expression and the minute differences in them to which those principles had to be applied, it is not surprising that it should be difficult to reconcile them all one with the other. But I think the principles themselves are now sufficiently certain, and that the duty which remains consists in the application of them to the peculiarities of each case as it arises. I therefore think that it would be an unnecessary occupation of time to go through the very long series of cases in which they have been recognized. The greater part of them occurred in the case of *The Corporation of Gloucester v. Osborn*, in which I was of counsel, and which was argued, a few months before I left the bar, in the House of Lords; those numerous decisions there came under review, and they will be found collected in that case as reported in 1 *House of Lords Cases*, 272. I shall therefore content myself with stating the principles which I deduce from the present state of authority, and how I apply them to the words of the will in question, so as to lead me to the judgment which I have formed, referring to the judgment given in this case in the court below, in which I generally concur.

I conceive the rule of construction to be that words accompanying a gift or bequest expressive of confidence or belief or desire or hope that a particular application

will be made of such bequest, will be deemed to import a trust upon these conditions—first, that they are so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not; secondly, the subject must be certain; and thirdly, the objects expressed must not be too vague or indefinite to be enforced. With respect to the first of these conditions, I am of opinion that there is no doubt that the words “well knowing” used in the present case are equivalent to, if not synonymous with, the expression “in the fullest confidence,” and that they are, in my judgment, used in such a manner as to exclude all option or discretion. Similar words have occurred in some of the cases, but they have been accompanied with other words which have had a material effect in construing them; such as the words following the gift “for his and her own use and benefit,” and other expressions of a similar nature. With regard to the second condition no question exists. With reference to the third condition, it has been contended that the object is not certain; and it has been argued, and with truth, that vagueness in the object is regarded as evidence that no trust was intended to be created; and it has been in effect argued, and indeed with great plausibility, that the words which are superadded to the bequest are merely expressive of the testatrix’s full conviction from her reliance on the character of Miss Penny, that she would make as good use of what was given her, as of her own property, and would, in fact, dispose of it in such a way as would further those objects which, as the intimate friend of the testatrix, she well knew that the testatrix was desirous of promoting. Specious, however, as this construction undoubtedly is, I am of opinion that it is not the true construction of these words. It is assuming the whole question to say that “views and wishes” are too vague to import a trust. The fact that the testatrix “well knew” or believed that Miss Penny would dispose of the property in a manner in accordance with the testatrix’s views and wishes, of necessity implies that the testatrix assumed that such views and wishes were already, or would thereafter, either in writing or verbally, be made known. There is, there-

fore, nothing on the face of the words which necessarily implies what is vague or indefinite, as in those cases where the Court has held that the uncertainty of the object has afforded evidence that no trust was intended.

But suppose that it cannot be found that the testatrix did, in fact, ever make known her views and wishes, or has made them known in a manner of which the Court cannot take judicial notice; even then it is impossible to say that she never did express them in writing. She may have done so, and the writing may have been lost or destroyed, or be incapable of receiving judicial notice. But it is not necessary even to argue this. It is sufficient that the will distinctly indicates that Miss Harley intended to make them known, or had previously made them known, as otherwise the legatee could not do that which the testatrix "well knew" the legatee would do, namely, act in accordance with them. There is no real and substantial distinction between such a case and the case of a testator who gives all his property to A. on trust, but never declares that trust. In the latter case, the objects are unknown, but there is the fact that a trust *nominatim* exists or was intended. Here is the fact that views and wishes exist, and the bequest is made in confidence that they will be accomplished, but the objects of the views and wishes are unknown. It is true that, possibly, the objects included in such views and wishes might, if known, be too vague and indefinite to be enforced, but so might the objects of the trust *nominatim* if they were known. It is most important to observe that vagueness in the object will unquestionably furnish reasons for holding that no trust was intended; yet this may be countervailed by other considerations which shew that a trust was intended, while at the same time such trust is not sufficiently certain and definite to be valid and effectual. And it is not necessary to exclude the legatee from a beneficial interest that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended. Now, this is precisely the case with the present bequest. I agree with the Vice Chancellor in interpreting

"views and wishes" to mean "designs and desires"; and the very expression of confidence that Miss Penny would make a good use and dispose of the property in a manner in accordance with the testatrix's designs and desires or intentions, appears to me to amount to a declaration that Miss Penny was to hold the property for that purpose, or in other words to the same effect, upon trust. It seems to me to be tantamount to a bequest upon trust, and if so, that is sufficient to exclude Miss Penny from taking the beneficial interest. On establishing that a trust was intended, the legatee is excluded from taking beneficially. If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still, in all these cases, as is well known, the legatee is excluded and the next-of-kin take. But there is no peculiar effect in the word "trust." Other expressions may be equally indicative of a fiduciary intent, though not particularly apt or clear. But in this case we are not left to spell out a trust from the residuary clause alone. There are collateral circumstances in the will which tend to authorize that construction. The fact that besides a legacy of 3,000*l.* another legacy, in addition, is expressly given to Miss Penny "for the trouble she will have in acting as executrix," clearly shews that she was not intended to take the residue beneficially; because, if Miss Penny was to take the whole residue beneficially, as the testatrix must be presumed to have acted upon the belief, which the fact warranted, that her estate was abundantly sufficient to satisfy all the bequests, there could be no object in taking out of that residue, of which she was to have the whole, 3,000*l.* for her trouble. The legatee gained nothing by the legacy. The fact of the legacy not only strongly confirms, but is only consistent with the hypothesis, that the whole residue was not to be taken beneficially. Further, this cannot be referable to the trouble she would have in the execution of the bequests in the will itself or the proved codicils, for though the bequests are numerous, not one of

them involves any amount of trouble, whereas the views and wishes of the testatrix to which she alluded might be such that the carrying them into effect might involve the executrix in very difficult trusts.

I am clearly, therefore, of opinion upon these grounds, that a trust was intended; and consequently the question whether the unproved papers may be looked at in order to prove the intention to create a trust does not arise, or at all events it is unnecessary for me to consider it. I have, therefore, wholly excluded them from my consideration, and my judgment is formed on the words of the will alone.

The judgment of the Court below must be affirmed.

M.R.
1851.
Nov. 11. }

POPE v. POPE.

Will—Construction—“Issue” restricted to Children.

Under a bequest for all and every the “issue” of E. living at the decease of her and her husband, but if any of the issue of E. should die in the lifetime of the survivor of E. and her husband leaving issue, the issue of such issue so dying should take the share his parent would have been entitled to:—Held, that the word “issue” meant children, and that if the testator had intended to express descendants, the words “issue of issue” would not have had any meaning.

This was a special case, filed under the 13 & 14 Vict. c. 35.

John Field, by his will, dated the 13th of January 1833, appointed his two sons John Field, since deceased, and the defendant William Field, and Joseph Smith, since deceased, executors and trustees, and he directed his trustees to appropriate 10,000*l.* consols, and to stand possessed thereof and of the dividends thereof, upon trusts for the benefit of his daughter Mary and her issue, similar to those declared for the benefit of his daughter Elizabeth and her issue, which were as follows:—upon trust to pay the income thereof to his daughter Elizabeth during her life, and after her decease to pay the income to the husband

of his daughter Elizabeth who might survive her during his life, and after the decease of the survivor of his daughter Elizabeth and her husband, the testator directed the trustees to stand possessed of the trust fund, and the interest, dividends, and produce thereof, “upon trust for all and every the issue of my daughter Elizabeth as shall be living at the time of the decease of the survivor of them my daughter Elizabeth and the husband of my daughter Elizabeth; but my will is, that in the event of any of the issue of my daughter Elizabeth dying in the lifetime of my daughter, and the husband of my daughter, or the survivor of them, leaving issue, the issue of such of the issue of my daughter so dying shall stand in the place of his or their parent as to the share which such parent would have been entitled to if such parent had not departed this life.” This was followed by a bequest over on the decease of his daughter Elizabeth and her husband, and “in the event of the decease of all the issue of my daughter Elizabeth, and of the issue of such issue of my daughter Elizabeth, without taking a vested interest in the stocks or securities,” to the testator’s sons John, William and James, and his daughters, as tenants in common.

The testator died on the 19th of April 1833.

Mary Field intermarried with John Gould, who died in her lifetime, and she died on the 27th of August 1849, leaving Mary Gould her daughter, and only child, her surviving.

Mary Gould, the daughter, intermarried with John Robinson Pope, and there were two children of the marriage, John Gould Pope and Ernest Pope. And the questions now raised were, whether Mary Pope was entitled to the whole fund, subject to the life interest of her mother, or whether she and her children John G. Pope and Ernest Pope were entitled to any and what interest in the fund.

Mr. Roupell and Mr. Shapter, for J. R. Pope and his wife.—The question in this case is, whether from the context the word “issue” is not to be read “children.” Under the first clause in the will the children would have taken under the word “issue,” but the second clause restricts it, for in

speaking of issue the testator shewed an intention that they should take the parent's share by substitution.

Sibley v. Perry, 7 Ves. 522.

Pruen v. Osborne, 11 Sim. 132.

Mr. R. Palmer and *Mr. Bevir*, for the infant defendants *J. G. Pope* and *Ernest Pope*.—*Evans v. Jones* (1).

THE MASTER OF THE ROLLS.—The word "issue" means descendants; if the testator did not mean to specify more, he should have stopped at that word, but when he speaks of issue of issue, it was clear that he did not speak in the larger sense. Here the gift was general to issue, so that the word "issue" was applied to the *stirps*, in place of the parent; the word "issue," therefore, was restricted to children, the testator meaning that if any child of his daughter should die in his lifetime, the children of that child were to take the share to which that child would have become entitled. I must, therefore, declare that by the word "issue" the testator meant children, and that *Mary Pope* is entitled to have the fund paid over to her.

M.R. }
Nov. 13. } BAILEY v. BOULT.

Legacy Duty—Annuity.

A testator gave real and personal estate, subject to one "clear" yearly rent-charge or annuity of 100l. a year to S. G.:—Held, that it was to be paid without any deduction for legacy duty, and that the legacy duty was to be paid out of the real estate, as the personal estate of the testator was exhausted.

Kendrick Cofield, by his will, dated the 28th of May 1822, gave his real and personal estate to his wife, *Ann Cofield*, for life, "but subject, nevertheless, to one clear yearly rent-charge or annuity of 100l. a year, which it is my will shall be paid to *Sarah Gregory*;" and after the decease of his wife the testator gave his real and personal estate to other persons. *Sarah Gregory* intermarried with *Henry*

(1) 2 Coll. 516.

Bailey, and now filed this claim to obtain payment of the annuity, and insisted that the legacy duty ought to be paid out of the real estate of the testator, as the personal estate was exhausted.

Mr. Buxton, for the plaintiff.—The word "clear" in the gift of the annuity implies an intention to give that sum free from all deductions, and it was not liable to the payment of the legacy duty, which ought to be paid out of the testator's estate.

Barksdale v. Gilliat, 1 Swanst. 562.

Courtney v. Vincent, Turn. & R. 433.

Gosden v. Dotterill, 1 Myl. & K. 56;

s. c. 2 Law J. Rep. (N.S.) Chanc. 15.

Gude v. Mumford, 2 You. & C. Exch. 448.

Mr. Forster, on behalf of the parties entitled to the real estate.—The liability to the payment of the legacy duty is not disputed; but the question is, who is to bear the burthen as the personal estate of the testator has been exhausted? The defendants insist that the amount of duty ought to be deducted by them, from time to time, out of the annuity; and that the annuitant, and not the estate of the testator, ought to pay the legacy duty upon the annuity, the same as any other legatee would upon the legacy of a given sum of money. The word "clear" meant only that an annuity of that amount was to be raised out of the estate, but by no means meant that it was to be clear of parliamentary charges, which could only attach upon the annuity, and not upon the estate of the testator.

Sanders v. Kiddell, 7 Sim. 536; s. c. 5

Law J. Rep. (N.S.) Chanc. 29.

Marris v. Burton, 11 Sim. 161; s. c. 9

Law J. Rep. (N.S.) Chanc. 373.

Mr. Waller, for *H. Bailey*, the plaintiff's husband.

THE MASTER OF THE ROLLS.—In *Gude v. Mumford* the words "without deduction," "clear of all deductions," &c. were considered sufficient to free a legacy from duty, though, from the nature of the property upon which it was charged, there were other outgoings to which they might apply. In this case, was it intended that

the legatee should take the legacy free from the legacy duty, and was that intention to be collected from the will itself? In *Sanders v. Kiddell*, the testatrix gave such a sum of money to trustees as, when invested in the funds, would produce the "clear" yearly sum of 500*l.*: she then declared the trusts of the fund in favour of relations and other persons, some of whom were not ascertained at her death. The Vice Chancellor was of opinion that the investment ought to be made at once, and as the rate of legacy duty chargeable on the successive interests must depend upon the relationship of the parties to the testatrix, and render it uncertain what sum ought to be invested to meet the charge, he held that the legatees were not entitled to have the bequest free from legacy duty. In this case the annuity itself is to be "clear," and in *Marris v. Burton* the testator directed his executors to set apart a sum not more than 7,500*l.*, the dividends of which, when invested, would produce the clear yearly sum of 300*l.*, "clear of all deductions whatsoever"; and it was held that the annuity was to be paid clear of legacy duty. I think these cases govern the present, and that the annuity must be paid free from legacy duty.

M.R. }
1851. } *In re KENDALL.*
Dec. 1. }

Will — General Bequest — Restriction — Specific Enumeration of Articles.

A specific enumeration of articles after a bequest to J. E. K. of "all and everything I die possessed of," followed by a declaration that "I leave everything I die possessed of to J. E. K. for her entire and sole use and benefit," held to be a general residuary bequest.

Russell Kendall, while travelling on the Continent, made his will, dated the 2nd of February 1846, as follows:—

"I, Russell Kendall, at present residing in the Albergo d'Italia at Venice, being very ill, but in sound possession of my senses, do will and bequeath to my adored mother Jemima Elizabeth Kendall, of

Aldeburg, in the county of Suffolk, all and everything I die possessed of, namely, money at my bankers Messrs. Coutts & Co., as contained in my letter of credit of 2,000*l.* now here, and bills of Messrs. Coutts, my carriage now here, my plate, books, clothes; harness and sundries as existing here and in custody of Messrs. M'Cracken, of Old Jewry, London, for her sole use and benefit. And lest there be any dispute, I declare again that I leave everything I die possessed of to my dearest mother for her entire and sole use and benefit, as stated above. I beg my dearest mother to let M. Noel Poidebard select whatever books he wishes from all my books. I should like Mrs. Reynolds to have 20*l.* at least, and George Lappet a very handsome present in clothes; and I beg my mother to continue the 10*l.* a-year I allow Elizabeth Hinton. I beg my mother will be sole executrix, and guardian of my children during her life, and that she will at her death appoint a successor. To my dearest father I owe every affection, and to my wife I bequeath my fond love and my blessing, also to my dear children."

The testator died on the 9th of February 1847, leaving his wife, who was provided for by the settlement made upon their marriage, and three children him surviving; and at the time of his decease he was possessed of very considerable sums of stock in the public funds, and he was also interested in other sums of stock which were vested in trustees upon the trusts of his marriage settlement.

Mary Kendall, the testator's widow, had since intermarried with Francis Gresley.

The funds of which the testator was possessed were paid into court under the 10 & 11 Vict. c. 96, and this petition was presented by Peter Kendall, the husband of the testator's mother, who had since died, asking for a declaration that the stock was by the testator's will well and effectually bequeathed to Jemima Elizabeth Kendall.

Two questions were now raised: first, whether the general words in the testator's will were not limited to things *ejusdem generis* with those enumerated; and secondly, whether the general words did not amount to a general residuary bequest, by which the testator intended to include the whole of his property unre-

stricted by the enumeration of the specific articles.

Mr. R. Palmer and Mr. Simpson, in support of the petition.—The testator, in the bequest to his mother, intended to include the whole of his property. This was manifest on the face of the will. He contemplated that in the commencement and concluded by the same expression. The intermediate enumeration of various articles was not intended as a restriction to the general gifts.

Saumarez v. Saumarez, 4 Myl. & Cr. 331, 339.

Fleming v. Burrows, 1 Russ. 276; s. c. 4 Law J. Rep. Chanc. 115.

Parker v. Marchant, 1 You. & Coll. C.C. 290; s. c. 11 Law J. Rep. (N.S.) Chanc. 223.

Bennet v. Batchelor, 3 Bro. C.C. 29.

Michell v. Michell, 5 Madd. 69.

Taylor v. Taylor, 6 Sim. 246.

Arnold v. Arnold, 2 Myl. & K. 365; s. c. 4 Law J. Rep. (N.S.) Chanc. 123.

Mr. Metcalfe, for Mary Moss, a legatee under the will of the testator's mother. The general words in the will coupled with the words for her "sole use and benefit" expressed a general bequest, intended to comprise the entire residuary estate, and the enumeration of specific articles was not intended to limit the general expression to a mere restricted sense.

Mr. Shebbeare, Mr. Estcourt and Mr. Thring, appeared for other parties.

Mr. Walpole, for the testator's widow.—The general words of the will were not intended as a residuary bequest. They were explained by the enumeration of particular articles, which must confine the general gifts to things of the same sort. Had that not been intended, their introduction was wholly unnecessary, unless they were considered as an indication of the meaning intended to be conveyed by the will.

Cook v. Oakley, 1 P. Wms. 302.

Ommanney v. Butcher, Turn. & Russ. 260.

French v. Jutting, 3 Beav. 521.

THE MASTER OF THE ROLLS.—It is important to abide by a general principle, but each case must be governed by its

own peculiar circumstances, the particular words used, and the express or clearly implied intention of the testator from which the extent of the bequest may be arrived at. Had the bequest stopped at the words "sole use and benefit," I might have considered that the intention was to confine the gift by the specific enumeration of articles, upon the principle that enumeration would have been unnecessary if the testator had contemplated a gift of his general residue. But that idea seemed to have crossed the mind of the testator, as he adds, "and to avoid all disputes, I again declare I leave all I die possessed of to my dearest mother." Has he then expressed an intention not to confine the bequest by the enumeration of articles? I think he has by his subsequent declaration. So far his meaning is distinct and clear. "I have made a general bequest, and then enumerated particular articles, but to avoid disputes as to my meaning, I again declare that I leave all I die possessed of to my dearest mother." That is rendered rather obscure by the words "for her sole use and benefit," but, as his father was living, I consider that was a gift to his mother, who was to take and enjoy the gift, and that they were used to secure the enjoyment to her, and this is confirmed by the request made to her to continue allowances to various persons. At the time also of making his will, his wife was present in his mind. He bequeathed to her his love and blessing. It is a singular expression to use if he meant her to take any benefit, as she would have taken had there been no residuary bequest. This Court does not go so far as the Roman law, which required that the heir should be present to the mind of the testator before he could be disinherited. Still it may be a circumstance in favour of a party to whom a bequest is made; but in this case the wife was present to the testator's mind, and all question respecting any intention that she should take any thing is set at rest. I, therefore, consider that the words "sole use and benefit" express the purpose of the bequest, and do not refer to the thing given, and I must declare this to be a gift of the general residuary estate.

LORDS JUSTICES. }
 1852. } *In re* PATTINSON.
 Jan. 14, 21. }

Lunacy—Trustee Act, 1850.

Whether the Lords Justices acting in lunacy under the royal sign manual have jurisdiction to make an order vesting a trust estate, of which a person of unsound mind, who was heir-at-law of a deceased trustee, was seised,—the words of the Trustee Act, 1850, 13 & 14 Vict. c. 60, being "the Lord Chancellor intrusted by virtue of the Queen's sign manual"—quære.

This was a petition for a vesting order under the 13 & 14 Vict. c. 60. the Trustee Act, 1850. The heir-at-law of a last surviving trustee, in whom the estate was vested, was of unsound mind not found so by inquisition.

Mr. J. V. Prior supported the petition.

LORD JUSTICE LORD CRANWORTH.—Without meaning to say that we have no authority to make this order, there is certainly a point well deserving consideration. The statute which constitutes this Court, 14 & 15 Vict. c. 83, enacts in section 13. that nothing therein contained shall affect any of the powers, duties or authorities of the Lord Chancellor under and by virtue of any appointment under the sign manual of the Crown, as having the custody of the persons and estates of lunatics. It is true we also are now exercising a jurisdiction in lunacy by a warrant under the sign manual, but then the Trustee Act, 1850, like the former act, 1 Will. 4. c. 60, only authorizes the Lord Chancellor, empowered by the Queen's sign manual, to do what is here asked. It seems to us that it would be safer to make the application to the Lord Chancellor, who strictly comes within the words of the statute. I repeat, we do not mean to say that we have not the power, but we think the point one well worthy of consideration. Had the statute contained after the words "Lord Chancellor" the words "or other person or persons authorized as aforesaid," or some such words, the case would have been free from the difficulty we find.

LORD JUSTICE KNIGHT BRUCE.—If that which my learned Brother has suggested be

the true construction—and I do not dissent from it,—all that we can do will do the applicant no good. If we make the order, and the property is offered for sale, the vendors will fall into the hands of the conveyancers. It rests with the Crown who shall be the person or persons to exercise these functions in lunacy. The warrant is directed so that the Lord Chancellor and ourselves, or the Lord Chancellor alone, or his Lordship with either of us, can adjudicate on such a matter; but this statute speaks only of the Lord Chancellor. We have called your attention to the point; but if you like to hazard the difficulties liable to be raised by the conveyancers, we may be disposed to make the order.

Mr. J. V. Prior said he would make the application to the Lord Chancellor.

On a subsequent day, the petition was brought before the LORD CHANCELLOR and the order was made,—the Lord Chancellor saying, that without deciding whether the Lords Justices had or not the jurisdiction, it was clear that he had, and therefore it was the safer course that he should make the order. The inclination of his opinion was that the Lords Justices now had the same authorities in lunacy as his Lordship himself possessed.

M.R. }
 Feb. 9. } *NAYLOR v. ROBSON.*

Claim—Rectifying Errors in Proceedings—Supplemental Claim.

Where errors had been committed in carrying out the proceedings under an original claim, leave was given to file a supplemental claim.

Mr. Wickens moved for leave to file a supplemental claim to render effective proceedings upon an original claim, which had been carried on after abatement caused by the marriage of one of the plaintiffs.

The MASTER OF THE ROLLS gave the permission asked.

PARKER, V.C. } In the matter of YATES'S
Dec. 6, 8. } TRUST.

Will—Construction—Vesting—“Die before entitled in possession.”

*A testator gave 25,000*l.* to trustees upon trust to pay the income to his daughter for life, and after her death to pay the capital to the children of his daughter equally, on their attaining their ages of twenty-one years; the interest of their shares until their becoming entitled to the principal to be applied for their maintenance; and in case any of the children should die before being entitled in possession to his, her, or their shares, the shares of those so dying should go to the survivors. The testator's daughter had two children living at his death, who both attained twenty-one, one of whom died in the lifetime of her mother:—Held, that the representatives of the deceased child were entitled to a moiety of the fund.*

William Yates, by his will, dated the 15th of January 1810, bequeathed the sum of 25,000*l.* to trustees, on the usual trusts for investment, and directed them to pay the income to his daughter Elizabeth Peel for her life. The will then proceeded as follows:—“And, from and after the decease of my said daughter, in trust to pay and apply the said principal sum of 25,000*l.* unto and amongst all and every the child and children of my said daughter Elizabeth equally, share and share like, if more than one, and their respective executors, administrators and assigns, and, if but one, then the whole to such one child, his or her executors, administrators and assigns, on the respective attainments of such children to the age of twenty-one years, being sons, or on their respective attainments to that age or day or days of marriage, which might first happen, being daughters; the interest, dividends, and proceeds of their respective portions being from time to time, until their respectively becoming entitled to the principal, to be applied in their respective maintenance and education, and all surplus of the said interest, dividends, and proceeds being from time to time placed out at interest, or vested and applied in like manner as the respective principal sums in respect of which the same surplus should arise. And, in case any of the children of

*my said daughter Elizabeth should happen to die before being entitled in possession to his, her, or their share or shares under this my will, I do direct that the share or shares of such of them as may so happen to die shall go and be applied unto and amongst all and every the survivors of them, if more than one, equally share and share alike; and, if but one, then the whole to such one child, at such time and in such manner as their, his, or her original shares or share are and is by this my will directed to be paid and applied. And, in case all the children of my said daughter Elizabeth shall happen to die before being entitled in possession to their respective shares under this my will, then the principal sum of 25,000*l.*,” &c. The testator then declared certain trusts of this sum.*

The testator died in 1813, and Mrs. Peel died in 1850.

Mrs. Peel had two children who attained twenty-one. One of them, Mrs. Cockburn, attained the age of twenty-one in the lifetime of her mother, and died before her. The other, Mrs. Ethelston, attained twenty-one, and survived her mother.

The trust fund was paid into court under the Trustees Relief Act, and a petition was presented for the purpose of determining the rights of Mrs. Peel's children to it. This petition now came on to be heard.

Mr. Russell and Mr. Milne, for Mrs. Ethelston, contended that, by the words “in case any of the children of my said daughter should die before being entitled in possession,” it was intended that, in case any child should die in the lifetime of the mother, her share should go to the other children. In the case of Henderson v. Kennicott (1), the gift was to the testator's brothers and sisters, with a gift over if any should die before they became entitled. On the authorities there cited, Vice Chancellor Knight Bruce held, that these words meant before they were entitled in interest; but he added, that but for these authorities he should have thought that the word “entitled” ought to be read as “entitled in possession.” The use of the words “in possession,” in his opinion, would then

(1) 2 De Gex & Sm. 492; s.c. 18 Law J. Rep. (N.S.) Chanc. 40.

have removed all doubt. They also cited *Crowder v. Stone* (2).

Mr. Malins and *Mr. Collins* contended, that the words "entitled in possession," must be taken to mean "entitled in interest," and cited *Schenck v. Legh* (3), *Fry v. Lord Sherborne* (4), (which were cases where, in settlements, the words used were "die before the money became payable," and the death in the lifetime of the tenant for life did not divest the interest), *Hallifax v. Wilson* (5), and *Jones v. Jones* (6), (which were cases where, in wills, the words used were "die before the money became payable," and the death of the legatee in the lifetime of the tenant for life did not divest the interest). They also referred to—

Bouverie v. Bouverie, 2 Phill. 349; s. c.

16 Law J. Rep. (N.S.) Chanc. 411.

Cripps v. Wolcott, 4 Madd. 11.

Parker v. Golding, 13 Sim. 418.

Maitland v. Chalie, 6 Mad. 243.

Ridgway v. Ridgway, 20 Law J. Rep. (N.S.) Chanc. 256.

Casamajor v. Strode, 8 Jurist, 14.

In re Williams, 12 Beav. 317; s. c. 19

Law J. Rep. (N.S.) Chanc. 46; and

Bright v. Rowe, 3 Myl. & K. 316.

Mr. Russell replied.

PARKER, V.C. said, that his opinion in this case was that the personal representatives of *Mrs. Cockburn* were entitled to a moiety of the funds, although she had not survived the tenant for life. He thought that the case was governed by the authorities cited. The general rule was not to divest an interest vested unless there was a clear direction to that effect in the will. There were many cases under wills, and also under settlements for the benefit of children, in which the Court had applied this rule, so as not to make the interests of the children depend on their surviving the tenant for life. In other cases the Court had tried to construe the interests as

vested at the particular ages at which the testator intended, and not to make the vesting depend on their surviving. In the case of *Powis v. Burdett* (7) the circumstances were stronger than in the present. Lord Eldon in that case, referring to the cases which had been cited to him, said, "These cases, if they are to be shaken, must be shaken in the House of Lords." In the same judgment, speaking of a former case decided by him (8), he said "that he had looked to see whether, under the words of that settlement, he could not put it upon the circumstances that there happened to be some children living." And then he said, "But if that circumstance had not occurred, the result of my opinion is, that I should have been called upon by preceding authorities to decide that case upon a larger principle, and I agree it is mischievous to decide these cases upon small circumstances." That was a case of a settlement, but it appeared to him that these principles of construction applied to wills as well as settlements. That was shewn, amongst others, by the cases of *Maitland v. Chalie* and *Casamajor v. Strode*. He considered that this case was governed by *Hallifax v. Wilson*. That case turned upon the meaning of the word "payable." He thought that the words "entitled in possession" were not more ambiguous than the word "payable." "Payable" might be taken in two senses: one the literal signification, the other short of its full meaning. In *Hallifax v. Wilson* it was used in this latter sense. The words "entitled in possession" were open to the same observation; that is, they were capable of two meanings: one, the being in the actual possession of the subject; the other, in a subordinate sense short of its full meaning. Here, there was a life estate given to the daughter, and, after her death the fund was to go to her children at twenty-one or marriage. The testator intended to provide for the event of the children marrying or attaining twenty-one. He also directed the interest of their respective portions to be applied for their maintenance, on the assumption that the children would be under age or unmarried at the death of the tenant for life. Then

(2) 3 Russ. 217; s. c. 7 Law J. Rep. Chanc. 93.

(3) 9 Ves. 300.

(4) 3 Sim. 243; s. c. 8 Law J. Rep. Chanc. 25.

(5) 16 Ves. 168.

(6) 13 Sim. 561; s. c. 13 Law J. Rep. (N.S.) Chanc. 16.

(7) 9 Ves. 428.

(8) *Hope v. Lord Clifden*, 6 Ves. 499.

he said, "And in case any of the children of my daughter should die before being entitled in possession to his, her, or their shares" under his will, such share or shares should go over—that is, if any of those children of whom he had been speaking, should die, &c. This part of the will obviously referred to the case of children not having had any interest in the money at all, in case of their dying before they attained twenty-one or married. He thought that the representatives of Mrs. Cockburn were entitled to one moiety of the fund, and that, in deciding thus, he was not going beyond the authorities.

PARKER, V.C. }
Feb. 11, 13. } TRIBE v. NEWLAND.

Will—Construction—Vesting—Benefit of Survivorship.

*A testator bequeathed the interest of 3,000*l.* at 5*l.* per cent. to his daughter for life, and, after her death, he gave the said sum of 3,000*l.* to trustees in trust for all the children of his daughter, share and share alike, to be paid to sons at their ages of twenty-one and daughters at their ages of twenty-one or days of marriage, with interest in the mean time on their shares for their maintenance and education, and benefit of survivorship, in the event of any of the said children dying without issue. The testator's daughter had five children living at his death, one of whom attained twenty-one and died in her lifetime without issue:—Held, that the representatives of the deceased child were entitled to his share.*

John Newland made his will, dated the 30th of October 1804, which was in part as follows:—"I give and bequeath unto my daughter Mary, the wife of William Tribe, the interest of 3,000*l.* sterling, at 5*l.* per cent. per annum, to be paid unto her for the term of her natural life; and, from and after her decease, I give and bequeath the said sum of 3,000*l.* unto my sons, George Newland and Richard Newland, their executors and administrators, in trust for the use and benefit of all and every the children of her my said daughter, Mary Tribe, share and share alike, to be

paid in equal proportions unto such of them as shall be a son at his or their age or ages of twenty-one years, and unto such of them as shall be a daughter or daughters at her or their age or ages of twenty-one years or day or respective days of marriage, which shall first happen, with interest in the mean time upon their respective shares or proportions of the said sum of 3,000*l.* at 5*l.* per cent. for their maintenance and education, and benefit of survivorship, in the event of any of the said children dying without issue; which said sum of 3,000*l.* and the interest thereof as hereinbefore directed I hereby charge my said manor and farm, lands and hereditaments, hereinbefore devised unto my eldest son John Newland, with the payment thereof accordingly."

John Newland died in 1806. At the death of the testator Mrs. Tribe had five children. One of these children, Frances Tribe, attained twenty-one, and died in 1848, in the lifetime of Mrs. Tribe, without ever having been married. Afterwards Mrs. Tribe died.

The question in this suit was, whether one-fifth of the fund belonged to the representatives of Frances Tribe or to the four surviving children.

Mr. Bacon and *Mr. Grove*, for the plaintiffs, contended that the share of the deceased child belonged to the four surviving children.

Mr. Malins and *Mr. Freeling*, for the representatives of Frances Tribe, contended that the share had absolutely vested in her.

The following cases were cited—

- Billingsley v. Wills*, 3 Atk. 219.
- Hallifax v. Wilson*, 16 Ves. 168.
- Cripps v. Wolcott*, 4 Mad. 11.
- Sturges v. Pearson*, 4 Ibid. 411.
- Pope v. Whitcombe*, 3 Russ. 124; s. c. 6 Law J. Rep. Chanc. 53.
- Crosier v. Fisher*, 4 Russ. 398; s. c. 6 Law J. Rep. Chanc. 118.
- Wordsworth v. Wood*, 4 Myl. & Cr. 641; s. c. 9 Law J. Rep. (N.S.) Chanc. 29.
- Bouverie v. Bouverie*, 2 Phill. 349; s. c. 16 Law J. Rep. (N.S.) Chanc. 411.
- Jones v. Jones*, 13 Sim. 561; s. c. 13 Law J. Rep. (N.S.) Chanc. 16.
- In re Yates's Trust*, ante, p. 281.

PARKER, V.C.—It was contended in this case that nothing vested in the children of Mary Tribe until after her death, and, for this construction, the case of *Billingsley v. Wills* was relied on as an authority. I think that this case has been sometimes misunderstood. The gift there was to the younger son and sons, in case there were any younger sons, and all and every the daughter and daughters of Capel Billingsley, share and share alike; but, in case he should have only daughters, then only unto and amongst the younger daughter or daughters, and to be paid to them all at their respective ages of twenty-one years. Upon a careful examination of the provisions in that will Lord Hardwicke considered that younger sons and daughters meant those only who should be living at the death of Capel Billingsley, and, consequently, that Letitia, one of such daughters, who died in his lifetime, took no share under the bequest. She was excluded, not because she took an interest which did not vest, but because she did not come within the class which the testator intended to benefit. The question in that case was, at what time the class was to be ascertained, not whether individuals of the ascertained class took vested interests. In the present case the question is very different. The gift here is for the use and benefit of all and every the children of Mary Tribe, share and share alike; and therefore the question is not as to the class, but whether a child included in the gift took a vested interest in her share. I think that this question does not admit of a doubt. I consider it very plain that every child of Mary Tribe living at the testator's death or born afterwards took a vested interest in the fund.

The question remains as to the effect of the words "with benefit of survivorship in the event of any of the said children dying without issue." I consider that these words were meant to divest the share of any child dying without issue before the time of payment mentioned previously in the sentence, which fixed the period of payment. The collocation of the sentence seems to point to that construction. It runs thus:—"with interest in the mean time upon their respective shares or proportions of the said sum of

3,000*l.* at 5*l.* per cent. for their maintenance and education, and benefit of survivorship in the event of any of the said children dying without issue." These words form part of the sentence providing when the shares were to be payable and what was to be done in the mean time, that is, until the shares become payable under the preceding clause which I have just mentioned. The difficulty is as to the words "dying without issue" applied to daughters. In my view they ought to be read as applicable to sons, and as surplusage or incorrect, with respect to daughters. They do not refer to survivorship before the death of Mary Tribe; they are found in the clause which referred to an event not to take place until after her death, and which proceeded throughout on the assumption that her life interest had previously ceased. The Court does not, without a clear indication of intention, admit a construction which would make the provisions for children depend on the circumstance of their surviving the parent, more especially when the testator has pointed out the period of the age of twenty-one years as to sons and twenty-one or marriage as to daughters as the time when the shares were to be paid.

For these reasons, I think that the representatives of Frances Tribe are entitled to her share.

PARKER, V.C.
1851.
Dec. 19.
LORDS JUSTICES.
1852.
Feb. 12, 14, 17.

{ *In the matter of THE LONDON AND BIRMINGHAM EXTENSION AND NORTHAMPTON, DAVENTRY, LEAMINGTON AND WARWICK RAILWAY COMPANY, ex parte GAY.*

Company — Winding-up Act — Contributories — Call — Postponement of Payment.

A. signed a deed by which he and other parties agreed to pay all the expenses incurred and to be incurred, with the view to the formation of a projected railway company, such expenses to be assessed rateably on the sums subscribed. Some expenses were incurred, but the undertaking was aban-

done, and the company was ordered to be wound up under the Joint-Stock Companies Winding-up Act. The Master made a list of contributories, in which all the parties to the subscription contract were included. It appeared that a suit and an action were in prosecution by and against the official manager, and that the official manager had no assets in hand, and that it was necessary that some funds should be supplied. The Master made a call on all the subscribers to the subscription contract. This was resisted by some of the subscribers on the ground that the managing committee, who were included in the list of contributories, had received large sums which they had not accounted for, and that these sums ought in the first instance to be obtained and applied. In answer to this, evidence was given that the persons forming this committee were not in solvent circumstances :—Held, that, under all these circumstances, the Master had authority to make the call, and that he had properly exercised his discretion in making it.

The above-mentioned company was projected in 1845.

By an indenture, dated the 16th of August 1845, and made between certain persons of the first and second parts, and the subscribers to the undertaking of the third part, it was provided that certain persons should be appointed the managing committee, and that they should have the power of appointing bankers, engineers, surveyors, clerks, and other persons, and of paying them such salaries as they might deem right, and of entering into any contracts for making the necessary surveys and all other measures necessary to the application to parliament for carrying out the project. The deed then contained an agreement, that if the intended application to parliament should not be successful, the parties thereto should bear and pay all the costs and expenses which should have been incurred, whether before or after the execution thereof, with the view to the establishment or promotion of the said undertaking, or incidental or preparatory to the proposed undertaking; all such expenses, costs, and charges to be assessed rateably on the sum or sums respectively subscribed by the parties thereto.

This deed was executed by Mr. Gay.

The project was abandoned, and the company was ordered to be wound up under the Joint-Stock Companies Winding-up Act.

The Master charged with the winding-up of the company made out a list of contributories, dividing them into two classes—the first class comprising those who had executed the subscription contract, and the second, other persons who had not executed it.

On the 22nd of July the Master made a call of 1*l.* 13*s.* a share on the persons comprised in the first class.

This call was objected to on the part of some of the persons on whom the call was made, on the ground that the managing committee (who were comprised in the first class) had received large sums of money, for which they had never duly accounted, and which they ought to refund, and that these sums were, in the first place, applicable to the payment of expenses, and that, until that question was disposed of, no call ought to be made on the other contributories. A motion, having for its object the suspending of the call, was heard by K. Bruce, V.C., who discharged the order on the above ground on the 31st of July. In giving his judgment his Honour said, “that he could conceive a case in which there might be an urgent necessity for a call, and which might render it not unfit, for a time, to disregard the contention of those who opposed it.”

The question came again before the Master. It appeared that a surveyor and engineer had brought an action, which the official manager had been directed to defend, and which was still pending; and also that a suit had been instituted by the official manager against a canal company, to recover 10,000*l.* paid by the company, and which was also still pending. It appeared also that the official manager had no funds in hand, and that there was reason to believe that the managing committee, who were sought to be charged in the first instance, were unable to pay the sums which, it was alleged, they were liable to pay.

The Master thereupon, on the 3rd of December, made a call on all persons forming the first class of 1*l.* 13*s.* a share.

This was a motion to discharge the order

made by the Master, on the grounds before stated.

Mr. Daniel and Mr. Cole, for the motion, cited—

Hunter's case, 1 Sim. N.S. 435; s. c.

20 Law J. Rep. (N.S.) Chanc. 483.

Ex parte Preece, 15 Jur. 528.

Ex parte Gay, 17 Law Times, 240.

Mr. Malins and Mr. Swift, for the official manager.

Mr. Cooper and Mr. De Gex, for other parties, in support of the call.

PARKER, V.C.—I do not think that I can interfere with what the Master has done. The first question is, whether the Master has power to do what he has done. The facts are these: the Master has divided the contributories into two classes—those who have executed the subscription contract, and those who have not executed it, and has not made any subdivision of those who have executed the subscription contract. If any one is liable, if there is any liability at all, it must belong to that class who have executed the subscription contract. With regard to *Hunter's case*, before Lord Cranworth, I do not think that that will at all interfere with the view which the Court takes now, because that was the case of a person who belonged to a class of contributories, as to whom it was doubtful to what extent they were liable, if at all. The company there had not gone so far as this, and a person had agreed to take shares which were allotted to him; but, although he was on the list of contributories, it had not been ascertained what amount of liability that class had incurred. Lord Cranworth says, "Surely it is one ingredient in the exercise of that discretion that the Master should find that Mr. Hunter belongs to a class, the whole of which is liable together to a call of some given amount, be it 5*l.* or be it 5,000*l.* Surely the Master has not proper data on which to exercise his discretion, until he has ascertained those facts." It appears to me that the Master has got proper data here, because the class which is represented upon this application is the only class that can possibly be liable, and is the class which has made itself liable distinctly

by executing a deed of covenant to contribute towards the payments that have been made. Now, what are the costs that have been talked of here? They are costs which have been incurred for the common benefit; they are costs incurred in prosecuting a suit and defending an action, the object of the suit being to increase the assets, and the object of the action being to defend the assets, and, therefore, they must have been costs which have been incurred for the common benefit of all parties. Therefore it appears to me that this is as much a case in which the Master had power to act as the case of *Ex parte Preece*, referred to before Vice Chancellor Knight Bruce, where he thought the Master was right in making a call for costs in circumstances not very dissimilar from the present. Then, if the Master has power, it is a case within his discretion, and the Court cannot interfere with the discretion of the Master until it is satisfied that the Master has erred in the exercise of it. Now, what the Master has done is not final—what he has done is merely provisionally making an order for payment. The proportions in which the amount paid is to be borne, with regard to those who may be primarily or secondarily liable, is a thing that may be adjusted afterwards in the course of winding up the estate. Vice Chancellor Knight Bruce, in his judgment when this case was before him, says, "There may be a case of necessity rendering that temporary injustice unavoidable; the question still remains whether this is such a case," &c. and so on. What he means by temporary injustice is, that provisionally, parties may be called upon to pay money which they may eventually get back from persons liable to indemnify them.

It has been urged before the Court that the Master has on this occasion acted not in accordance with the view taken by the Court in the order of July last. As I understand it, when the Master made the call in July last he made that call to pay not costs only, but debts and costs, and, in coming to that conclusion, he does not appear to have had regard, or not to have had sufficient regard, to the circumstance that there was a question, which I am fully aware will eventually be a most important

question, that there is a certain class of these contributories who may be liable to bring forward a large sum in the way of accounting for money which they have already received. A portion of the assets of this company may hereafter be recovered, which will go in relief of the general body of contributories. It appears that the Master either had no regard to that circumstance, or had not sufficient regard to it, and the Court, under these circumstances, considered it right to discharge the former order of the Master. It is a thing particularly in the discretion of the Master what regard should be had to that; because he must not only have regard to the quantum to be recovered from these parties, but as to the time of getting it; because there may be a very clear liability on the part of these persons which may not be capable of being enforced until it is too late to get the money to meet the exigency for which the money is wanted.

It is said that the Master was not justified upon the evidence in going against certain of the members. Suppose there are fourteen, and seven can pay, and seven cannot pay, it is said that the Master must first go against the fourteen, each for his own contribution. After he is satisfied in the course of this proceeding that seven cannot pay, he is to go against the seven that can pay, and so on *toties quoties*. But it would be a long time before the amount could be obtained for paying these costs by those means. And it appears to me that the circumstances now before the Court differ in many most material points from the circumstances which were before the Court in July last. The Court, of course, is bound by what it did in July last, and I do not consider I am in any degree going against the view taken of this case by the Vice Chancellor Knight Bruce when it was before him. The matter has gone back to the Master, the Master has had regard, and has applied his discretion to, the circumstances which the Court thought he had erred in not sufficiently regarding before, and, having had regard to these circumstances, he now makes an order, which is something in the nature of a special report, by which he does not make this call now in respect of debts; he puts the debts on one side, and makes it only

in respect of costs. He says that it is a matter of absolute necessity that these costs should be provided for, and it is obvious that this must be so, because, if the company is attacked on one hand, and is to assert claims by means of litigation on the other, this cannot be done unless the official manager be in possession of funds to enable him to do what is necessary. The Master says, it is absolutely necessary that there should be funds put into the hands of the official manager for that purpose, and the Master comes to that conclusion, having had before him, what he had not sufficient regard to before, the probabilities and possibilities of the claims against the managing committee. It appears to me, therefore, as far as I understand the case, that this call must be paid, as a provisional payment to be adjusted afterwards; and that, if it turns out that you can eventually make the managing committee liable, there will be a portion of the assets recovered which may possibly go in relief of the other parties, and in relief of the party who makes this motion. Therefore, quite in accordance with the view taken by the Vice Chancellor Knight Bruce, I do not think it right to interfere with the discretion which the Master has exercised upon all the new circumstances brought before him. I do not think that I interfere with *Hunter's case*, or any other case, in coming to the conclusion that the Master has done what he had a power to do, and that he has exercised a sound discretion.

From this decision Mr. Gay appealed to the Lords Justices.

Upon the coming on of the case—

Mr. Bethell, *Mr. Malins*, and *Mr. Swift*, for the official manager, moved that an affidavit might be received by the Court, to the effect that the managing committee were not in sufficiently solvent circumstances for the official manager to expect to receive from them the sums of money received by them, and which it was alleged were improperly applied by them.

The Solicitor General, *Mr. Daniel*, and *Mr. Cole*, for Mr. Gay, objected that the affidavit could not be received as evidence, and that pursuant to the 99th section of the Winding-up Act, 1848, no evidence could be received which had not been al-

ready before the Court below; and further, that the act required the evidence to be either by depositions, or *visd voce*, unless parties did not object to affidavits. Such a class of evidence was, therefore, not receivable in any branch of the Court, if objected to, as it was objected to here.

LORD JUSTICE KNIGHT BRUCE said, that in a motion from one branch of the court to another, leave was always given to add to the evidence, and affidavits might be resorted to, if necessary. The rule applicable to ordinary appeals was equally applicable to appeals under the Winding-up Act. The Court always has it in its power to receive evidence which, although not tendered in the Court below, would put it more fully in possession of the merits of the case; and on that ground, as well as on the ground of their having expressed a desire to hear such evidence, they thought the affidavit ought to be received. The affidavit must be received, but counsel would say whether they wished to file any answer to it.

The Solicitor General declined.

The Solicitor General, Mr. Daniel, and Mr. Cole, for the appellants.

Mr. Bethell, Mr. Malins, and Mr. Swift, for the official manager.

LORD JUSTICE LORD CRANWORTH.—This was an order for a call made by the Master, on the 3rd of December 1851, and the object of the call is stated in the order to be to provide a fund for the payment of the costs of the winding-up. There was an appeal to the Vice Chancellor Parker, and he confirmed the order, and the motion before us to get rid of the call is made by one only of the contributories, namely, Mr. Gay.

All the contributories on the list to be affected by this order, including Mr. Gay, had executed the deed which in the argument before us was described as the subscribers' contract, and by that deed it was provided that the parties were to raise a fund by contribution amongst themselves (I think) to the extent of 1*l.* 7*s.* 6*d.* per share, which was in fact paid. The fund which was thus provided was to be applied in discharge of the expenses which were incurred, and to be incurred, in form-

ing the company, engineers, solicitors, and other matters of that sort. Then there was this proviso: "and the said several persons parties to these presents, for themselves severally and respectively, and for their several and respective heirs, executors, administrators and assigns, do hereby undertake and agree that in the event of the intended application to parliament not being successful, the said parties to these presents shall and will well and truly bear, pay, allow and discharge all the costs and expenses which shall have been incurred, whether previously or after the execution of these presents, in or about or with a view to the establishment or promotion of the said undertaking, whether in or about the making, obtaining or completing of any surveys or estimates for the said railway, branches, and works, or any of them, or on account of any solicitor's charges, counsel's fees, and also the costs of or incidental to the preparing, applying for, soliciting, or procuring any such act as aforesaid, travelling expenses, and all other costs and charges of every description incidental or preparatory to the proposed undertaking: all such expenses, costs and charges to be computed and assessed rateably on the sum or sums respectively subscribed by each of the said several persons parties to these presents." The company never was completely registered, the scheme having proved abortive; but the parties who subscribed the deed made deposits of 1*l.* 7*s.* 6*d.* per share, by means whereof a sum of 28,000*l.* and upwards came to the hands of the managing committee; and Mr. Gay contends, that if this sum had been duly applied, it would have been more than sufficient to satisfy all those who have demands on the managing committee in respect of the expenditure which they were authorized to make in or towards the formation of the company; and so he contends that he ought not to be called on for any further payment, until the 28,000*l.* has been duly accounted for. His engagement, he says, did not make him responsible to any creditor of the managing committee: all he contracted to do was, as he contends, rateably with the other subscribers to put the committee in funds to enable them to fulfil their engagements; and this, he says, was more than

done, by means of the deposits. Whether this is, or is not, the true effect of the deed, it is not necessary for us to decide; for the question here is, not a question with creditors, but a question as to how funds are to be procured for enabling the official manager to proceed in the discharge of his duties in winding up the affairs of this unformed company. Now, though this company never was completely formed, yet in considering who are the parties who ought to contribute to the costs of winding up its concerns, it cannot escape notice that the persons on whom the call was made, namely, those who have executed the deed, are precisely those who will be benefited by the winding up, and will be benefited in the exact proportion in which they are called on to contribute, subject to any equities hereafter to be enforced among themselves. So that for the purpose of this winding up, these contributories may be regarded as if they constituted a regularly formed company: and in such a case, the only reasonable course to be pursued is, that every partner or contributory should contribute rateably, according to the extent of his interest, to the cost of realizing outstanding assets, whether by suit or otherwise, and to the other costs of winding up the affairs: whether all or any part of these costs may eventually be thrown on any particular class or number of the contributories in exoneration of the rest is a question not at present ripe for decision. It is sufficient for us to say, that the Master being satisfied (and, as it would seem, very reasonably satisfied) that this sum must by some means be raised, in order to enable the official manager to do his duty, we think he had full power to make the call on the principle on which he has made it, namely, rateably on all those who have executed the deed. Though, however, he had this power, yet we agree to the argument addressed to us on behalf of Mr. Gay that, in the exercise of his discretion under the 103rd section of the Winding-up Act, the Master ought not to make any call for costs on the general body of the contributories, if it appears by the proceedings before him, that any of the contributories are indebted to the concern in sums which,

if paid, would render the call unnecessary, and the parties so indebted are in circumstances making it reasonably probable that such sums could be recovered. Now there is, undoubtedly, a very strong *prima facie* case for supposing that the managing committee, all of whom are contributories, are responsible for sums, far exceeding the amount now to be raised, for costs; but it was stated on behalf of the official manager, that any attempt to realize these sums would be useless by reason of the insolvency of the parties liable to pay them: on this point we gave leave to the official manager to file a further affidavit. This was accordingly done, and Mr. Gay's counsel not desiring time to answer it, we have considered its effect, and have come to the conclusion that it would be very unsafe to rely on any funds to be derived from the managing committee as a substitute for this call. The circumstances of the parties to be charged seemed to be so nearly desperate, that we think it was a reasonable and proper course for the Master to make the call in question, and Mr. Gay's motion must, therefore, be refused.

It is proper to add, that our decision does not conflict with *Hunter's case*. Here all the parties made liable to the call are interested in the affairs which are to be wound up, and in respect of which the costs are incurred, in exact proportion to the amount of the call; whereas in *Hunter's case* it was impossible to say whether he had any interest in the matters in respect of which the call for costs was made, or what was the relative liability of himself and the other contributories.

Neither does our present decision conflict with that of my learned Brother in July last, *Ex parte Gay*, when he, as Vice Chancellor, discharged an order for a call made by the Master for the purpose *inter alia* of raising money for the payment of creditors. The liability of the contributories toward creditors depends on principles very different from those which apply to the present case, where the sole object of the call is to obtain the funds necessary for winding up the concern. As we have proceeded in part on evidence not before the Master or the Vice Chancellor, we

shall not make Mr. Gay pay costs; this motion will simply be refused, and the official manager will have his costs out of the estate.

Mr. Bethell.—There was leave to file the affidavit. There was no regular motion.

LORD JUSTICE LORD CRANWORTH.—As some very little costs may have been incurred, he may have 40s. out of the estate.

M.R. }
March 10. } EDMONDS v. GOATER.

Promissory Note—Statute of Limitations, 9 Geo. 4. c. 14. s. 1.—Debt—Subsequent Acknowledgment.

Upon an application for payment of 450l. due upon two bills of exchange dated the 25th of March 1836, upon which interest had been paid up to the 25th of March, 1841, a letter was written by the creditor on the 13th of January 1846, stating, "I hope to be in H. very soon, when I trust everything will be arranged with Mrs. W. agreeable to her wishes."—Held, a promise to pay, which would take the debt out of the Statute of Limitations, and exceptions to the Master's report allowing the debt were overruled.

This was a creditors' suit, instituted by William Edmonds against Henry Goater, since deceased, the executor of Charles Lipscomb, deceased, to administer his estate.

A decree was made in the cause, dated the 1st of April 1847, by which the Master was directed to take an account of what was due to the plaintiff and the other creditors of Charles Lipscomb, and he was to compute interest on the several debts at the rate the same respectively carried.

Under the advertisements issued by the Master for creditors to come in and prove their debts, Grace Wells, of Braindean, in the county of Southampton, spinster, came in and claimed to prove a debt upon the two following promissory notes:—

"London, March 25, 1836.

"£150. — Three years after date I promise to pay to Mrs. Grace Wells or bearer one hundred and fifty pounds, with

interest at 5l. per cent., for value received by me,
Charles Lipscomb."

"London, March 25, 1836.

"£300. — Four years after date I promise to pay to Mrs. Grace Wells or bearer three hundred pounds, with interest at 5l. per cent., for value received by me,
Charles Lipscomb."

Interest was duly paid upon these notes up to the 25th of March 1841, in respect of which a balance of 2l. 10s. was then left due; and it did not appear that any subsequent payment of interest was made.

In January 1846 John Dunn, by the direction of Grace Wells, wrote to Charles Lipscomb, requiring payment or further security for the principal sum of 450l. and interest, due to Grace Wells upon the two several promissory notes; in answer to which he received the following letter:—

"Shenley, January 13, 1846.

"Dear Sir,—I hope to be in Hampshire very soon, when I trust everything will be arranged with Mrs. Wells agreeable to her wishes. I shall most likely want to consult you respecting my little property there, as I have an idea of parting with it, as I understand it has been very much neglected; being such a distance from me it is impossible to attend to it as I could wish. If anything happens to me, you may tell Mrs. Wells she is in good hands and will be protected.—I am, &c.

"Charles Lipscomb."

Upon these facts, the Master, by his report, dated the 6th of June 1851, certified that Grace Wells was a creditor for the sum of 450l. That there was a balance of 2l. 10s. for interest due the 25th of March 1841, from which time he had computed interest, which, to the 6th of June 1851, amounted to the sum of 229l. 10s., which, with 1l. 15s., the costs of establishing the debt, amounted to the sum of 683l. 15s.

To this report exceptions were taken by Elizabeth Goater, the administratrix of Henry Goater, deceased.

Mr. Glasse and Mr. Welford, in support of the exceptions.—This was a claim which originated in the Master's office, where the practice is that the party claiming shall support that claim by his affidavit; but if

the debt is contested no attention is to be given to the affidavit—*Fladong v. Winter* (1). If, therefore, the debt was barred by the Statute of Limitations, the creditor to take it out of the statute must, under the 9 Geo. 4. c. 14, shew an unqualified acknowledgment of the debt or a subsequent promise to pay. Now, the affidavit of Mr. Dunn was wholly ineffectual for that purpose, and the letter of the testator contained neither an acknowledgment nor promise to pay. This principle was clearly established in the case of *Tanner v. Smart* (2). A strict construction has been put upon promises of this kind, for where a letter was written saying, "I have been in daily expectation of being enabled to give a satisfactory reply respecting the demand. I propose being in Oxford to-morrow, when I will call upon you on the matter," it was held not to be an acknowledgment implying a promise to pay, but one reserving it for future consideration—*Morrell v. Frith* (3). So again, "I will not fail to meet Mr. Hart on fair terms, and have now a hope that before perhaps a week from this date I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance"—*Hart v. Prendergast* (4); this was held to be a mere expression of hope, and not any express promise or acknowledgment implying a promise to pay—*Spong v. Wright* (5), *Cripps v. Davis* (6), *Rouledge v. Ramsay* (7). A letter, also, saying, "I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechinon by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed when Mr. F. was in town," was held not to be sufficient to take the case

out of the Statute of Limitations—*Cawley v. Furnell* (8). In another case a party wrote, "I am ready to put it out of my power to take advantage of the Statute of Limitations, and will immediately give my note for what is due. To pay you now or within the year, I am unable." In the same letter he required that the amount due should be ascertained before giving his note. In this case the promise was held unconditional, not to depend on the ascertaining the sum due—*Gardner v. M'Mahon* (9). In the present state of the authorities it could not be said that any acknowledgment or promise had been made to pay the bills so as to take them out of the Statute of Limitations.

Mr. E. F. Smith, for Grace Wells, in support of the Master's report, was not heard.

THE MASTER OF THE ROLLS.—In this case the creditor caused a letter to be written to the debtor requiring payment of the debt or further security, and received an answer from the debtor, saying, in effect, "I shall soon be in Hampshire, when I trust everything will be arranged agreeable to the wishes" of his creditor. This was not like a contingent promise; the wish of the creditor was for payment; the answer, therefore, was consequent upon the application, and could only amount to a promise to do that which the creditor required, which was to pay, and that in the mean time the letter should operate as a further security. The exceptions, therefore, must be overruled.

M.R. }
March 6, 16. } **COURTOY v. VINCENT.**

Accountant General—Fund in Court—Annuity—Cheque—Seizure—Jurisdiction—1 & 2 Vict. c. 110. s. 14.—3 & 4 Vict. c. 82.

W. C., being in receipt of an annuity payable out of stock standing in the name of the Accountant General, became indebted to F. C., who brought an action against him and obtained a judgment, upon which a fieri

(8) 20 Law J. Rep. (n.s.) C.P. 197.

(9) 3 Q.B. Rep. 561; s. c. 11 Law J. Rep. (n.s.) Q.B. 297.

(1) 19 Ves. 196.

(2) 6 B. & C. 603; s. c. 5 Law J. Rep. K.B. 218.

(3) 3 Mee. & W. 402; s. c. 7 Law J. Rep. (n.s.) Exch. 172.

(4) 14 Mee. & W. 741; s. c. 15 Law J. Rep. (n.s.) Exch. 223.

(5) 9 Mee. & W. 629; s. c. 12 Law J. Rep. (n.s.) Exch. 144.

(6) 12 Mee. & W. 159; s. c. 13 Law J. Rep. (n.s.) Exch. 217.

(7) 8 Ad. & E. 221; s. c. 7 Law J. Rep. (n.s.) Q.B. 156.

facias was issued, but nothing was found upon which to execute it. Upon half a year's annuity falling due, F. C. obtained an order stopping the Accountant General from parting with the cheque; but upon a petition, the Court declined to make an order authorizing the sheriff to seize the cheque or to direct it to be dealt with as if it was standing in the name of a trustee, and the petition was dismissed.

This was the petition of Frederick Courtoy, one of the seven children of William Courtoy, praying that the Accountant General might be ordered not to pay to William Courtoy, or his solicitor, a cheque for 58*l.* 5*s.*, but that he might deliver it to the sheriff of Middlesex, or allow him to seize the same under a writ of *fiery facias*, in part satisfaction of a judgment at law; or that the cheque might be cancelled, and the money, together with all other sums which should accrue due upon an annuity of 120*l.* payable to William Courtoy during his life, might be paid to the petitioner until the judgment obtained by him should be satisfied.

John Courtoy, by his will, dated the 28th of May 1814, after directing payment of his debts, gave all the remainder of his property to George Narbonne, Vincent Robert Lovelace, Rowland Edward Williams, and Charles Drummond, their executors and administrators, upon trust to receive the interest and dividends, and therewith and with his property so given to them in the first place to pay to his son George Courtoy an annuity of 200*l.* a year by even half-yearly payments to be continued during his life; and he directed that in case his son George should sell or dispose of such annuity, then that the same should cease and become null and void; and on the decease of his son the testator directed that his executors and trustees should, out of the monies so given to them, cause the sum of 4,000*l.*, being as near as might be the principal requisite for the payment of such annuity, to be divided in equal shares amongst all and every the children of his son George, should there be any living at his decease, but if any or either of them should die under the age of twenty-one years without having been married, then the share of

him or her so dying should be equally divided among the survivors, but in case there should be no child of his son that should attain the age of twenty-one years or be married, then the testator directed that the 4,000*l.* should be paid to the children of his son William Courtoy upon and subject to the like contingencies, conditions and limitations as were before directed and described in respect of the children of his son George.

The testator also directed his executors and trustees to pay unto his son William Courtoy one annuity or clear yearly sum of 100*l.* (which upon the decease of M. A. Woolley he directed to be increased to 120*l.*) during his life, by two even and equal half-yearly payments, to begin on the first day of the month next after his decease; and upon the decease of his son (William), to cause the sum of 2,000*l.* to be divided in equal proportions among his children as they should arrive at the age of twenty-one years or be married, which should first happen, with benefit of survivorship among them. And the testator added, "In order the more effectually to prevent his (William's) defeating my intention in his favour, and to prevent his disposing of such annuity, or making it subject to his debts, I direct that the same shall become void and forfeited in case he shall sell or dispose of the same. And as my son William may depart this life leaving children or a child not of age to claim a part or the whole of such sum, then my will is that such annuity or yearly sum of 100*l.* shall be paid to his wife for the maintenance and support of such child or children until he, she or they should become of age to claim their proportions of such legacy; but in case there shall be no wife of my son William living at his decease, then it is my will that my executors and trustees shall apply such annual sum of 100*l.* in such way as they in their judgment shall think most for the benefit of such child or children until he, she or they shall attain the age of twenty-one years or become married, which shall first happen, and entitled to the whole or a proportion of the sum or sums."

The will was proved by all the executors on the 7th of January 1819.

A sum of 21,000*l.* consols was set apart in the name of the Accountant General to

an account entitled "The Annuitants Account," to answer, among others, these annuities, with liberty for any person interested to apply upon the decease of any or either of the annuitants.

In August 1848 George Courtoy died, without ever having had any child or children. The petitioner was one of the seven children of William Courtoy then living, all of whom had attained the age of twenty-one years.

On the 7th of May 1849, so much of the stock then standing to "The Annuitants Account" as would be sufficient to raise 4,000*l.* was directed to be sold, and the proceeds, with so much of the cash as would be equal to the dividends, was directed to be carried to "The Account of the children of William Courtoy, and the persons claiming under them," and it was ordered, amongst other things, that one equal seventh part thereof should be paid to the petitioner, Frederick Courtoy.

Under this order the sum of 589*l.* 6*s.* 6*d.* was received by William Courtoy, by virtue of a power of attorney executed by Frederick Courtoy, who was at that time with his regiment in India.

William Courtoy paid no more than 70*l.* of this sum to Frederick Courtoy, who brought an action against William Courtoy in the Court of Common Pleas for the balance, and on the 22nd of December 1851 obtained final judgment for 519*l.* 6*s.* 6*d.*, together with 9*l.* 5*s.* 5*d.* for costs.

A writ of *fi. fa.* was then issued, and the sheriff of Middlesex was directed to levy the debt and costs, but he had not been able to discover that William Courtoy had any property. Upon the half-year's annuity falling due in January last, the petitioner obtained an order restraining the Accountant General from parting with the cheque, and presented this petition.

Mr. Baggallay, in support of the petition, contended that by the 1 & 2 Vict. c. 110. s. 12. the sheriff was empowered to seize money, bank notes, cheques, bills of exchange, &c., and by the 3 & 4 Vict. c. 82. s. 1. the superior Courts of Westminster were authorized to make orders as to any stocks, funds, annuities, or shares in the name of the Accountant General of the Court of Chan-

cery, the same as if it had been standing in the name of a trustee of the judgment debtor. The act, therefore, gave the petitioner a security upon the fund, which this Court would enforce by making such an order as would enable the sheriff to make the cheque available for payment of the debt. This had been held in *Watts v. Jefferyes* (1), and the Court had decided that a party was entitled to a stop order to restrain a debtor from receiving dividends of stock, so as to prevent him from defeating or diminishing the security given by the act.

Mr. Fooks, contra, insisted that the sheriff might apply to the Accountant General for the cheque, who, however, had no power to part with it. The petitioner's father also was paralytic, and was quite incapable of giving any instructions to his solicitor respecting it. The cheque was drawn in favour of William Courtoy. Could the Court, therefore, proceed further with this application? It would be recollected that this was an annuity given to William Courtoy for life, with a provision declaring it void if he assigned or sold. If, therefore, the Court made any order, the annuity became void, as the gift was made upon a conditional limitation, which differed altogether in effect from a clause of forfeiture. It was, therefore, submitted that the Court would do no more than the annuitant was permitted to do by the will. In *Miles v. Presland* (2) it was held, that the Court had no jurisdiction under the 1 & 2 Vict. c. 110. s. 14, to order monies invested in the name of the Accountant General to stand charged with a debt upon a judgment recovered at law against the party entitled to the funds; and this Court had no jurisdiction to make any order which would divert the fund from the purpose to which it was applied by the testator—*Hulkes v. Day* (3).

Mr. Baggallay, in reply.

THE MASTER OF THE ROLLS.—I have considered this case, and doubt whether I have power to make any order. I cannot

(1) 3 Mac. & Gor. 373; s. c. 20 Law J. Rep. (n.s.) Chanc. 659.

(2) 2 Beav. 300; s. c. 4 Myl. & Cr. 431.

(3) 10 Sim. 41; s. c. 10 Law J. Rep. (n.s.) Chanc. 21.

authorize the sheriff to seize the cheque, neither do I think I can direct it to be dealt with as if it was standing in the name of a trustee. I consider, therefore, that I must dismiss the petition, that an opportunity may be given for an appeal.

Mr. Baggallay asked that the order restraining the Accountant General from parting with the cheque might be continued.

The MASTER OF THE ROLLS.—I think I may continue this order—*Robinson v. Wood* (4).

TURNER, V.C.	}	HARRISON v. RANDALL.
1851.		
July 16, 17, 18,		
19, 21, 22.		
1852.		
Jan. 19.		

Trustee—Breach of Trust—Liability of Trustee—Pleading.

When a trustee, having good reason to doubt the validity of an appointment of the trust funds, thinks proper to act upon it, he will be affected by all the consequences which follow upon the act.

The Court will not undo part only of one entire transaction. Therefore, where cestuis que trust sought to impeach an appointment under one deed, without seeking to impeach a subsequent appointment which was directly connected with the former, and by which they were benefited, the Court dismissed the bill with costs, but without prejudice to a new bill being filed.

The bill in this case was filed for the purpose of setting aside an appointment, made by a deed poll of the 3rd of October 1832, of the bonuses up to the year 1830 on two policies of insurance effected in the Equitable Life Insurance Office, on the life of Colonel Gwynne, and of having it declared that a surrender of the bonuses made to the office by the late Jonathan Brundrett was a breach of trust, and for the purpose

of charging his (J. Brundrett's) estate with the amount of the bonuses.

Colonel Gwynne appeared, by the pleadings to have been tenant for life of a considerable estate in Wales, with remainder to his eldest son in tail. He had a son and eight daughters by his first wife, Mary Ann Gwynne, and the policies of insurance in the Equitable Insurance Office and other policies of insurance which he effected on his life in the Pelican and Albion Insurance Offices were the provisions which he made for his daughters. By an indenture, dated the 12th of May 1803, he assigned a policy of insurance for 4,000*l.* which he had effected on his life in the Pelican Life Insurance Office, to Thomas Lowten, upon trust to receive the amount which should be payable upon it on his death, and to pay the same as his wife Mary Ann Gwynne should by deed or will appoint, and in default of appointment, to her if she should survive him, but if she should die in his lifetime to his children who should be living at her death, and to the issue of any of them who should be then dead, excepting an eldest or only son; the shares of the sons to be vested at twenty-one, and of the daughters at twenty-one or marriage, with the usual provisions for survivorship; and by this deed he demised some parts of the estate of which he was tenant for life to T. Lowten for a term of ninety-nine years, if he should so long live, upon trust, for securing the payment of the premiums upon this policy. By another indenture, dated the 13th of December 1811, Colonel Gwynne assigned another policy of insurance for 1,000*l.* which he had also effected on his life in the Pelican Insurance Office to T. Lowten upon trusts which, so far as the children were concerned, were similar to those declared by the former deed; and by this deed he also demised to T. Lowten other parts of the estates of which he (Colonel Gwynne) was tenant for life, upon trust, for securing the payment of the premiums upon this policy. Mary Ann Gwynne, the first wife, died in the year 1818, having by her will, dated in 1810, appointed the 4,000*l.* assured by the first policy, as to 100*l.* to the son, and as to the remaining 3,900*l.* to the younger children, the eight daughters, equally;

(4) 5 Beav. 388; s. c. 12 Law J. Rep. (N.S.) Chanc. 93.

but she made no appointment of the 1,000*l.* assured by the second policy, and upon her death, therefore, the eight daughters became entitled to the 1,000*l.* Pelican policy as in default of appointment, and, subject only to any claim of the son for the 100*l.*, to the 4,000*l.* Pelican policy under the appointment of Mrs. Gwynne.

In the month of August 1821, Sackville Frederick Gwynne, the eldest son of Colonel Gwynne, had attained the age of twenty-one years; and at this time Colonel Gwynne had, in addition to the Pelican policies above mentioned, effected four other policies of insurance on his life, two in the Equitable Life Insurance Office, one for the sum of 4,000*l.* and the other for the sum of 1,000*l.*, and two in the Albion Life Insurance Office for the sums of 4,000*l.* and 1,000*l.*; and he had mortgaged the 1,000*l.* Equitable policy for securing the payment of certain bills of exchange, and he had also mortgaged the 1,000*l.* Albion policy. Upon S. F. Gwynne, the son, attaining twenty-one, arrangements were come to between him and his father for suffering recoveries and re-settling the estates, and for making provision for the father's eight daughters, and a deed was executed for carrying into effect these arrangements. This deed bore date the 28th of August 1821, and was expressed to be made between Colonel Gwynne of the first part, S. F. Gwynne of the second part, John Michael Goodeve of the third part, and J. Brundrett of the fourth part. By this deed, after reciting the will by which the entail was created, and that the father was seised in fee of other estates, and that it had been agreed that a recovery should be suffered, and that in consideration of Colonel Gwynne agreeing to convey and assign the hereditaments whereof he was seised in fee to the uses, and subject to the powers, provisoes, agreements and declarations thereafter mentioned and contained, and also effectually to vest in a trustee, for the benefit of the daughters of Colonel Gwynne by his late wife deceased, in manner thereafter referred to, the six policies of insurance above mentioned, and also to make parts of the hereditaments whereof the said Colonel Gwynne was tenant for life, with remainder to S. F. Gwynne

in tail as aforesaid, as were thereafter appropriated for that purpose, liable to the payment to Colonel Gwynne and his trustees of an annuity or yearly rentcharge of 500*l.* during his life, with such powers and remedies, term of years, trusts and provisions for securing the payment thereof as were thereafter contained; and also to make such other parts of the hereditaments as were thereafter appropriated for the purpose liable and subject to trusts for keeping up the policies of insurance, and also of Colonel Gwynne agreeing to join with S. F. Gwynne in making a tenant to the precipe for suffering such recoveries as aforesaid, and to enter into the covenants thereafter on his part contained, S. F. Gwynne on his part agreed that all the hereditaments therein referred to, secured as aforesaid, should be settled, limited, and assured to the uses, upon the trusts, and subject to the powers, provisoes, declarations and agreements thereafter limited, expressed, and declared. This deed then recited the recovery deeds, and that in pursuance of the agreement and by two several indentures, bearing even date therewith (one of them being a deed purporting to be indorsed on the deed of 1803, and the other being a deed purporting to be indorsed on the deed of 1811), the said six several policies of insurance, and all the monies thereby recoverable, had been assigned to J. Brundrett, his executors, administrators and assigns, upon divers trusts therein referred to, being trusts for the benefit of the daughters of Colonel Gwynne and Mary Ann his wife; but that inasmuch as two of the policies were subject to certain charges and incumbrances thereafter mentioned, it had been agreed that Colonel Gwynne should enter into the covenants thereafter on his part contained, for effectually exonerating the same and causing them to be effectually assigned to J. Brundrett upon the trusts aforesaid. Colonel Gwynne then conveyed his estates, and it was agreed that the recoveries should enure as to certain parts of the estates to uses for securing an annuity to the son during the life of the father, and as to the same parts of the estates subject to the annuity, and as to other parts of the estates to the use of J. Brundrett for the term of 1,000 years upon the trusts thereafter

declared, and as to the parts of the estates comprised in the term subject to the annuity and to the term, and as to the remainder of the estates, to other uses not material to be stated. The trusts of the term of 1,000 years, as to the premises comprised therein, which were not charged with the annuity, were in this deed declared as follows:—That J. Brundrett, his executors, administrators, or assigns, should as therein mentioned raise and levy such sums of money as should be sufficient from time to time to satisfy and pay the several annual premiums payable or to become payable for or in respect of the said several policies of insurance, and all the costs, charges and expenses incident to or attending the execution of the trusts, and from time to time to reimburse himself and themselves the costs, charges and expenses of and attending the execution of the trusts; and in the next place, pay or cause to be paid the annual or other premiums upon the policies of insurance; or in the event of their being allowed to drop, then upon trust to raise and levy such sums as should be requisite for obtaining renewed policies for an equal amount; and in the mean time, and until it should appear to J. Brundrett, his executors, &c., necessary or expedient in his or their discretion, to raise or levy any sum or sums of money in respect of such policies of insurance, and also from time to time when and as often as all such premiums, costs, charges, and expenses, and the costs, charges, and expenses incident to the execution and performance of the said trusts lastly thereinbefore declared, should be fully raised, satisfied and paid, to permit and suffer the rents and profits to be received by the person who would be entitled to the hereditaments if that charge had not been made. By this deed there was also given power to Colonel Gwynne to charge the estates with 25,000*l.*, and Colonel Gwynne thereby covenanted with S. F. Gwynne to pay the premiums on the policies, and also to pay off the mortgages to which the 1,000*l.* policies in the Equitable and Albion Insurance Offices were subject.

This deed was not executed by J. Brundrett, nor were the deeds of even date, recited in it and by which the policies were purported to be assigned, executed by

any of the parties thereto; but by another indenture, dated the 1st of October 1821, and expressed to be made between Thomas Lowten of the first part, Colonel Gwynne of the second part, S. F. Gwynne of the third part, and J. Brundrett of the fourth part, after reciting the deed of the 12th of May 1803, and that Thomas Lowten, the party to the deed of October 1821, was the executor of Thomas Lowten, the trustee under the deed of May 1803, and was desirous of being discharged from the trusts, Colonel Gwynne purported to appoint J. Brundrett to be the trustee under the deed of 1803; and the premises comprised therein and the 4,000*l.* Pelican policy were purported to be assigned by T. Lowten to J. Brundrett upon the trusts of the deed of 1803, and of Mary Ann Gwynne's will.

By the deed of the 1st of October 1821, it was witnessed, that in pursuance of and for carrying into execution the agreement or arrangement between Colonel Gwynne and S. F. Gwynne for granting to Colonel Gwynne powers of charging with considerable sums of money the settled estates whereof he was tenant for life, with remainder to S. F. Gwynne in tail, and in consideration of the provision intended by such arrangement to be made for the benefit of Colonel Gwynne, they, Colonel Gwynne and S. F. Gwynne assigned, both the policies in the Equitable Insurance Office, and both the policies in the Albion Insurance Office to J. Brundrett, upon the same trusts as to placing out the same monies as were by the first-mentioned indenture of the 1st of October 1821 declared concerning the monies thereby assigned; and subject thereto, the monies to be recovered under and by virtue of the said four policies, and all interest thereof, were to be upon trust for all or any one or more of the daughters then living of Colonel Gwynne by Mary Ann his late wife, or of any one or more of the children or other issue of the said daughters, or any of them (such children and issue respectively to be born before any such appointment as thereafter mentioned should be made to or for him, her, or them), in such manner and form, and (if more than one) in such parts, shares and proportions, and for such times, with such limitations

over or substitutions in favour of any one or more of the others of the daughters or their children and issue respectively, and either by way of annuity, legacy, portion, remainder, present or remote interest or otherwise, and to vest and be payable and paid, transferred and assigned at such time or times, age or ages, and upon such contingencies and under and subject to such directions and regulations, &c. as Colonel Gwynne from time to time by deed or will should appoint. And in default of such appointment all the policies of insurance lastly thereby assigned, and the monies thereby recoverable, and all stocks, funds, and securities whatsoever upon which the same or any part thereof respectively should be invested, and all the interest, dividends, and income thereof were to be held upon and for the same intents and purposes, and with, under and subject to the same powers, provisos and declarations as were then or should for the time being be existing and capable of taking effect of and concerning the policy of 4,000*l.* under the deed of 1803, and the will of Mary Ann Gwynne.

By this deed, therefore, of the 1st of October 1821, the Equitable policies and the Albion policies, and all the bonuses upon them, became subject to Colonel Gwynne's appointment.

By another deed, also of the date of the 1st of October 1821, the Pelican policy for 1,000*l.* comprised in the deed of 1811 was purported to be assigned to J. Brundrett on the trusts of that deed. These deeds, however, of the 1st of October, were executed by Colonel Gwynne only, and were not executed either by T. Lowten, or by J. Brundrett.

J. Brundrett carried on the business of a solicitor in London, in partnership with other persons, and the firm appeared from the pleadings to have been in the habit of paying the premiums upon the policies of insurance belonging to their clients. They paid the premiums on the policies of insurance effected by Colonel Gwynne for many years, down to the time when J. Brundrett retired from the trusts, and it appeared that Colonel Gwynne was very irregular in making remittances to meet the payments of the premiums.

By a deed-poll, dated the 3rd of October 1832, (having reference to an immediate

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surrender of the bonuses on the Equitable policies) under the hand and seal of Colonel Gwynne, reciting the two Equitable policies and the first-mentioned deed of October 1821, and that the Equitable Insurance Company had at several times in and previous to the year 1830 resolved that bonuses should be declared upon and appropriated to the two policies of insurance, and that they had been duly declared and appropriated to be paid at the same time with the sums of 4,000*l.* and 1,000*l.* originally insured and secured by the two policies, Colonel Gwynne, in exercise of the power reserved by the said deed of the 1st of October 1821, appointed the bonuses to Catherine Maria Gwynne, Jane Mary Ann Gwynne, and Edmuntina Frances Gwynne (three of his daughters who were then of age) respectively in equal shares.

It was the appointment made by this deed which was impeached by the bill. After the execution of this deed and on the 24th of October 1832, Colonel Gwynne and C. M. Gwynne, J. M. A. Gwynne and E. F. Gwynne, the three appointees under the deed-poll of the 3rd of October 1832, signed an authority to Colonel Gwynne and J. Brundrett, empowering them to receive the bonuses, and to lay out and invest the same in the funds of Great Britain, to accumulate for the said appointees in the name of J. Brundrett, or any future trustee or trustees for them, to be named by them, with full liberty for him or any future trustee or trustees to be named by them to sell out of the funds any sum or sums of money necessary to pay the premiums on the policies, and any other premium or premiums of which J. Brundrett was trustee for them, until he could produce the same from the estates charged with the payment of the premiums; and Colonel Gwynne thereby agreed that any loss that might happen from selling out and repurchasing the funds should be made good out of the rents and profits of the estates charged with the payment of the premiums.

This authority, however, appeared never to have been acted upon, for on the 24th of November 1832 the same parties signed a further authority to Colonel Gwynne and J. Brundrett, which, after reciting the appointment of the bonuses, was in these terms:—"We do authorize and empower

Colonel Gwynne and J. Brundrett, Esq., to receive for us the bonuses amounting to the sum of 3,683*l.* 19*s.*, and to lay out and invest the sum of 1,600*l.* in the 3*l.* per cent. consolidated bank annuities or Exchequer bills in the name of J. Brundrett, Esq., or any future trustee or trustees to be named and appointed by us, with full liberty for him or any future trustee or trustees to be appointed by us to sell out of the 3*l.* per cent. consols, or Exchequer bills, any sum or sums of money which shall be necessary from time to time to pay the premiums on the policies effected with the Equitable Insurance Company, or any other premium or premiums of the different policies of insurance of which J. Brundrett and the representatives of the late T. Lowten are trustees. And we, the undersigned, do further authorize J. Brundrett to pay Mr. King 50*l.*"

This authority varied very considerably from the authority of the 24th of October 1832. In the instrument of the 24th of October 1832 the whole fund which was to arise from the bonuses was to be invested in the name of J. Brundrett, with power for him to resort to it for payment of the premiums. By the authority of the 24th of November 1832 only the sum of 1,600*l.* was to be so invested. And again, in the authority of October 1832, power was reserved to resort to the estates in distinct terms, and in the authority of the 24th of November 1832 there was no power to resort to the estates, or for the vested funds being re-couped out of the rents.

The terms of this latter authority appeared to have alarmed Mr. Brundrett, for he soon afterwards consulted counsel upon it; and the questions that were submitted to counsel on that subject, so far as they are material to the present case, were these:— "5th. Can Mr. Brundrett safely consent to the arrangement now proposed to be adopted, and is the above authority of the three Miss Gwynne's" (the authority of the 24th of November 1832; the case took no notice of the authority of the 24th of October 1832,) "a sufficient document to authorize his surrendering the bonuses and appropriating a portion of them as a fund to answer the payment of the premiums? Or, 6th. What other course would you advise Mr. Brundrett to pursue for

his own safety in relation to the trust concerns, keeping in view his desire of continuing to act in the trust in order to preserve the policies as a provision for the daughters, at the same time wishing to be relieved from the necessity of resorting to the estates for payment of the premiums?"

The answers were as follows:—"I am clearly of opinion that the proposed appointment is (in the language of a court of equity) a fraud upon the power, being in favour of ladies, the youngest, probably, just of age, and all under the parent's influence. It is not, in fact, an appointment to them, but of 1,600*l.* to the direct use of the father, and of the residue either for his own use, or if that go to the actual use of his appointees, it would be considered the price they received for selling the inchoate interests of their younger sisters. In moral justice, it is very singular that the extraordinary profits derived by the daughters from the bounty of their father should be applied to secure the direct subject of that bounty, particularly if the father has become less able to afford to effectuate his intentions, and as, in all probability, they indirectly participate in the income which would be relieved from that charge. But I cannot advise a trustee to incur so serious a liability to any of the younger children who may be disappointed by his concurrence. Indeed, I could not advise him to surrender the bonuses while any daughter is under age, for he has no right to anticipate any sum receivable in respect of the policies, which is not payable in ordinary course until Colonel Gwynne's death." "It is very difficult to find any mode of enabling Colonel Gwynne to relieve his income from this heavy charge with safety to Mr. Brundrett. The best which I can suggest are the following:—Either for Colonel Gwynne to make a general irrevocable appointment (if the deeds proposed to be indorsed upon the deeds of 1803 and 1811 warrant it) in favour of all his younger children, giving them all shares very nearly approaching equality, and in so much, at least, as to make it the manifest interest of the infants to elect to take under the father's appointment instead of that of the mother." "This appointment might fix the shares of the elder children upon the policies in the Equitable Assurance Company. This

would give the daughters who are of age an immediate right to deal with these policies, and relieve the transaction from fraud upon the youngest children. If it is clear that the daughters who are of age have the command of their own intentions. After informing them that they may put the proceeds of any surrender into their own pockets, and absolutely claim the benefit of the insurance after their father's death, and compel him to keep up the premiums during his life, Mr. Brundrett may with less risk surrender the bonuses at their request, and dispose of the proceeds according to their directions; but he should receive their directions from year to year before he applies such proceeds towards the premiums, and I should rather advise his taking a mortgage for the sums from time to time necessary upon the eventual proceeds of the policies, as tending to reduce his risk." The opinion then suggested another mode of operating the same result, through the medium of a mortgage to be made by Mr. Gwynne the younger, and concluded by stating that these appeared to be the least dangerous expedients, but that Mr. Brundrett could not be advised to resort to the former, and that Mr. Gwynne, jun. would probably decline to concur in the latter.

After the date of this opinion a further appointment was made by Colonel Gwynne by deed, dated the 14th of December 1832, by which, after reciting the Equitable policies and the deeds of August 1821 and October 1832, Colonel Gwynne appointed the principal of both the Equitable policies to his other four daughters, Charlotte Elizabeth Gwynne, Julia Arabella Gwynne, Emma Sophia Gwynne, and Georgiana Caroline Gwynne, who did not take under the appointment of the bonuses; with a proviso that, if Emma Sophia Gwynne and Georgiana Caroline Gwynne, then infants, should die under the age of twenty-one years without having been married, the share of her so dying in the 4,000*l.* and the 1,000*l.* should go and remain to C. M. Gwynne, C. E. Gwynne, J. M. A. Gwynne, J. A. Gwynne, and E. F. Gwynne, and the survivor of E. S. Gwynne, and G. C. Gwynne, in equal shares as tenants in common. And if both

the then infants should die under the age of twenty-one without being or having been married, then the whole of their shares, as well original as accrued, should remain to C. M., C. E., J. M. A., J. A., and E. F., in equal shares.

The bonuses which had been declared upon the Equitable policies up to 1830, and which were appointed by the deed-poll of the 3rd of October 1832, amounted to 6,570*l.*, and the office was at that time willing to give for these bonuses the sum of 3,683*l.* 19*s.*; and on comparing this amount with the amount of the principal on the Equitable policies, and allowing for the differences of the number of the appointees under the two deed-polls, it was (as the Vice Chancellor remarked in his judgment) perfectly clear that the deed-poll of the 14th of December 1832 proceeded upon the principle of putting the seven daughters, who were the appointees under the deed-polls, upon as nearly as possible the same footing, and there was a paper of calculations proved in the cause shewing this to have been the case. This paper of calculations first took the shares of the children who were appointees of the principal of the policies, who were four in number, and shewed that they would take 1,250*l.* each. It then took the shares of the children who were appointees of the bonuses in the sum of 3,683*l.* 19*s.*, and there being three of those children, it brought out their shares at 1,227*l.* 19*s.* 8*d.*, making a difference in that respect only of about 23*l.* between those two shares. It then took the supposition of one of the two infant children dying under twenty-one, and in that case, adopting the limitation over contained in the deed of appointment, it brought out the share of the four children who were the appointees of the principal at 1,458*l.*, and the share of the three children who were the appointees of the bonuses at 1,436*l.*, making a still less difference between the amounts. It then took the event also contemplated by the deed appointing the principal sum, and calculated what the shares of the appointees under that deed and of the appointees of the bonuses would be, taking into account the limitation over upon the death of both the infants, and it then brought out the shares of the appointees of the principal

under the deed of the 14th of December 1832 at 1,541*l.* 13*s.* 4*d.*, and the shares of the appointees of the bonuses at 1,519*l.* 13*s.*

There was proved in the cause an agreement between the appointees under the deed of the 3rd of October 1832 and Colonel Gwynne, which appeared to have been prepared under Mr. Brundrett's directions, and was intended to be signed by the appointees, but which did not appear to have been executed. It recited fully all the transactions, and provided for the application of the 1,600*l.* to the payment of the premiums on the policies, and for the residue of the monies to arise from the surrender being handed over to the three appointees. Amongst other recitals, it contained the following :—" And whereas the hereditaments by the recited indentures conveyed upon trust to secure the annual premiums payable in respect of the six policies consist principally of the mansion and house of Glanbrane, in which Colonel Gwynne and all his unmarried daughters now reside, and the deer park and certain other lands adjacent thereto, and now in the occupation of Colonel Gwynne; and the rents and profits of the remainder of such hereditaments are wholly insufficient to provide for the payment of the annual premiums; and whereas Colonel Gwynne hath lately upon several occasions failed to provide for the payment of certain of the annual premiums as they became due, and J. Brundrett hath advanced and disbursed the same out of his own money, amounting to the sum of 229*l.* 14*s.* 2*d.*, to prevent a forfeiture of the policies in respect whereof such premiums were payable, and J. Brundrett hath lately intimated his intention to enter upon the demised mansion-house, deer park, and other adjacent lands, and by leasing the same to raise as well the sum of 229*l.* 14*s.* 2*d.* so advanced by him, as also such sums of money as may be necessary to secure the future payments of the premiums, unless Colonel Gwynne will provide for the same by some other means, which it is not convenient for him at present to do. And whereas Colonel Gwynne, C. M. Gwynne, J. M. A. Gwynne, and E. F. Gwynne (the appointees of the bonuses) are very desirous to continue to reside in the mansion-house of Glan-

brane, and that Colonel Gwynne should continue also in the occupation of the deer park and lands adjacent, and for that purpose the three appointees have concurred in an application of Colonel Gwynne to lend and advance him out of the sum of 3,683*l.* 19*s.* (the money to be received for the surrender of the bonuses) so remaining to their joint credit in the hands of J. Brundrett, the sum of 279*l.* 14*s.* 2*d.*, to repay to him as well the sum of 229*l.* 14*s.* 2*d.* already advanced by him, as also the further sum of 50*l.* (a sum paid for redeeming one of the policies which he had advanced and paid on account of Colonel Gwynne), and also from time to time to lend and advance to him out of the said sum of 3,683*l.* 19*s.* such further sums of money, not exceeding the sum of 1,600*l.*, as shall be necessary for the purpose of satisfying the premiums which shall have grown due in respect of the six policies, until such notice shall be given and have expired as hereinafter mentioned, upon the security of his covenant; and Colonel Gwynne and also the three appointees have applied to and requested J. Brundrett to abstain from entering upon the demised mansion-house and hereditaments, or the receipt of the rents and profits thereof, until after the expiration of such notice as hereinafter mentioned, with which application he hath consented to comply."

Immediately after the execution of the deed of the 14th of December 1832, and on the 15th of December 1832, the three appointees under the deed of the 3rd of October 1832, gave a power of attorney to J. Brundrett to receive the sum of 3,683*l.* 19*s.* from the Equitable Office, and thereupon to surrender the appointed bonuses; and soon afterwards, and on the 19th of December 1832, J. Brundrett surrendered the policies to the office, and received the sum of 3,683*l.* 19*s.*, for which he signed a receipt as for himself, and also as attorney for the appointees. Some short time afterwards, and in January 1833, Colonel Gwynne attorned tenant to J. Brundrett as trustee for the 1,000 years term.

Pending these proceedings, T. Lowten (the nephew) had instituted a suit to be discharged from the trusts of the deeds of 1803 and 1811, which were then vested in him as representative of his uncle T. Lowten,

deceased. J. Brundrett had joined in this suit to be discharged from the trusts reposed in him; but on the arrangement being made for the surrender of the policies, and for the receipt and investment of the 3,683*l.* 19*s.*, he agreed to continue in the trusts. When, however, the appointees refused to allow more than the 1,600*l.* to be retained, he again determined to retire, and thereupon a supplemental bill was filed in the cause for the purpose of effecting his retirement. This supplemental bill stated the deeds of the 3rd of October and the 14th of December 1832, and the receipt by J. Brundrett of the 3,683*l.* 19*s.*, but it contained no statement of any of the circumstances under which the deeds were executed.

By a decree made in those causes, dated the 11th of February 1833, it was referred to the Master to appoint proper persons to be trustees of the six several policies of insurance, and the monies to be received in respect thereof, and of the messuages, tenements, and hereditaments comprised in the several terms of ninety-nine years, (the term formerly vested in T. Lowten the uncle) and 1,000 years, and of the residue of such terms respectively under the several indentures of 1803, 1811, and 1821, and the several other indentures, instead of T. Lowten the uncle, and his executor, and J. Brundrett. Directions were also given for the taxation of the costs as between solicitor and client, to be paid by J. Brundrett out of the said sum of 3,683*l.* 19*s.*, and the residue thereof to be paid by him to C. M. Gwynne, J. M. A. Gwynne, and E. F. Gwynne; all proper parties to join in conveying and assigning the trust premises to the new trustees. The decree, therefore, directed the payment over by J. Brundrett to the three appointees of the bonuses of the amount which had been received from the insurance office for the surrender of those bonuses.

In pursuance of this decree H. L. Harries and W. Rice were appointed to be trustees in the place of Lowten and Brundrett, and by deed of the 30th of May 1833, the policies and the several trust premises were assigned to them on the trusts to which they were subject. In May and June 1833, J. Brundrett paid the taxed

costs under the decree, and paid over the balance of the 3,683*l.* 19*s.* to the appointees under the deed of the 3rd of October 1832, deducting, however, the sum of 423*l.* 15*s.* 6*d.* which he had paid for premiums on the policies of insurance.

The transactions with J. Brundrett were thus closed. But afterwards by a deed-poll, dated the 6th of June 1833, after reciting that Colonel Gwynne had duly appointed the 4,000*l.* and 1,000*l.* assured by the policies and the bonuses declared thereon by the Equitable Insurance Company up to and prior to the year 1830, between the daughters named in the deeds of appointment, and reciting the Pelican policies and the Albion policies, Colonel Gwynne, by virtue and in pursuance of the power and authority given to him, appointed the future bonuses to be declared by the Equitable Insurance Company on the Equitable policies to all his eight daughters by his late wife, M. A. Gwynne, in equal shares; and appointed the policy in the Albion office for 4,000*l.* to his three daughters, C. M. Gwynne, J. M. A. Gwynne and E. F. Gwynne, in equal shares, and the policy in the Albion office for 1,000*l.* to his daughter Harriet Augusta, the wife of Edward Leopold Gibert.

Under this deed, therefore, the additional bonuses on the Equitable policies went equally among all the daughters; some of the other policies were appointed to the three appointees under the deed of October 1832; and a separate appointment was made in favour of another of the daughters (Mrs. Gibert).

The three appointees under the deed-poll of the 3rd of October 1832 subsequently lent and advanced to Colonel Gwynne the sum of 1,624*l.*, part of the monies which had been received from the surrender of the bonuses, upon a mortgage of his life estate, subject to some prior mortgages thereon. This mortgage was made by a deed, dated the 13th of June 1833. It was not till some time in that month that they had received those monies from J. Brundrett, and it was clear, therefore, (in the opinion of the Vice Chancellor) that the money which was the fruit of the appointment of the bonuses passed almost immediately into the hands of the father

upon a security which (his Honour remarked) none could doubt was scarcely of any value.

Then came a deed of the 24th of August 1836, (described by the Vice Chancellor to be a very singular one) made between C. M. Gwynne, J. M. A. Gwynne, and E. F. Gwynne (the three appointees of the bonuses, and also of some of the policies under the deed of June 1833) of the one part, and Charlotte Elizabeth Gwynne, Harriet Augusta Gibert, Julia Arabella Gwynne, Emma Sophia Gwynne, and Georgiana Caroline Gwynne, the five other daughters, of the other part. It recited the appointment of the 6th of June 1833; that at the time of the execution of such appointment it was arranged and intended that the appointment of the Albion policy for 4,000*l.* should have been for the equal benefit of all the daughters of Colonel Gwynne by his first wife, share and share alike, but that by some mistake or error the same was appointed equally among three daughters only, as on reference to the deed of appointment would appear; that the five other daughters had severally applied to and requested the three other daughters to correct such mistake and error, to secure the same to be divided as originally intended, namely, among themselves and their sisters, in equal shares and proportions, and which the three sisters had consented and agreed to do by executing the covenant or declaration thereafter contained. It was then witnessed that in pursuance of the agreement and in consideration of natural love and affection, and for a nominal consideration, the three daughters covenanted, declared and agreed with the five daughters, that the five daughters should thenceforth stand and be possessed of and interested in the Albion policy of insurance for 4,000*l.* and the monies thereby insured equally with the three daughters share and share alike, so that each of the parties thereto of the first and second parts might receive one equal eighth part or share of the sum of 4,000*l.*, and all benefit and advantage arising therefrom when the same should become payable under or by virtue of the policy of insurance.

Colonel Gwynne died on the 6th of September 1836, insolvent. Walter Rice

afterwards desired to retire from the trusts vested in him by the deed of the 30th of May 1833, and thereupon, by another deed, dated the 12th of April 1837, to which all the eight daughters were parties, and which fully recited every deed and every instrument which had been executed upon the subject of these several policies, except the appointment of the bonuses, and except the distribution of the sum which had been received for the surrender of the bonuses, and which it was not material to recite, Edmund Herbert was appointed to be a trustee.

The recitals in this deed are material to be attended to, as they stated the titles of the parties to the several funds. It recited that S. F. Gwynne (the son), at the time of the execution of the deed of 1821, agreed to relinquish the sum of 100*l.* appointed to him by the will of his mother; that the eight daughters were then, by reason of the renunciation of S. F. Gwynne's interest under the will of their mother, entitled to the sum of 4,000*l.* assured by the Pelican policy, and were then, under the recited indentures, entitled also to the sum of 1,000*l.*, secured by the other Pelican policy; that C. E. Gwynne, J. A. Gwynne, E. S. Gwynne and G. C. Gwynne were then entitled to the sums of 4,000*l.* and 1,000*l.* assured by policies granted by the Equitable Insurance Company; that the eight daughters were then entitled to the 4,000*l.* assured by the Albion policy; and that Harriet Augusta was alone entitled to the 1,000*l.* assured by the Albion policy. Then there was a distinct recital of the rights of all the parties, and then the funds were transferred to Mr. Herbert, the new trustee, to hold them upon the trust to which they were subject.

Edmund Herbert did not long continue in this trust, for on the 17th of that same month of April Mr. Thomas France, the solicitor of the plaintiffs in the present suit, was appointed a trustee in his place, about five days afterwards. Mr. Harries and Mr. France, having thus become trustees, received the monies due on the policies on the death of Colonel Gwynne, and distributed them according to the trusts of the deed. On the 8th of September 1837, Mr. France, as solicitor for the plaintiffs in the

present suit, addressed the following letter to Mr. Brundrett:—"Sir,—I am instructed by Miss Emma and Miss Caroline Gwynne to make a respectful application to you on the subject of their proportions of certain bonuses declared by the Equitable Insurance Company, London, upon two policies of insurance in that office, one for 4,000*l.* and another for 1,000*l.* on the life of their father lately deceased, and which bonuses you, as their trustee, improperly, as they are advised, paid over to the father, to their prejudice and contrary to your duty as such, whereby they have sustained a considerable loss, and having no means of reimbursing themselves but by an application, if necessary, to a court of equity, I am, with the hope of avoiding such a proceeding, requested to open a communication with you upon the subject, to ascertain, if possible, whether you are disposed to meet their claim in an amicable manner, in which case I am instructed and personally desirous to do all I can to save you unnecessary trouble or expense. An early answer will oblige." Mr. Brundrett was not disposed to open any communication whatever on the subject, or to treat the claim in an amicable manner, and he returned a very angry and indignant answer in the month of September 1837. No further proceedings were taken on this claim during the life of Mr. Brundrett, who died in May 1841. This bill was filed on the 3rd of November 1842, five years after the claim had been made.

The plaintiffs were Emma Sophia, the wife of George Harrison, and her husband, and Georgiana Caroline Gwynne, afterwards the wife of Morgan Pryce Lloyd, the two youngest daughters of Colonel Gwynne. They were both infants at the time when the appointment impeached by the bill was made, but the plaintiff, Emma Sophia, attained twenty-one on the 9th of July 1833, and did not marry the plaintiff, G. Harrison, till November 1838, and the plaintiff Georgiana Caroline attained twenty-one on the 23rd of January 1837, and was then unmarried. The defendants to the bill were the representatives of J. Brundrett, Harries and France, the trustees, and the other daughters and the parties who represented them. The bill stated all the deeds and alleged

the impeached appointment to be fraudulent; that Brundrett accepted and acted in the trusts of the deeds of August 1821 and October 1821; that the two Equitable policies were deposited and remained with him as trustee; that at the date of the deed of August 1821, he, as trustee, paid the premiums on the policies, and thereby kept up the policies, and Colonel Gwynne was permitted by him to remain in possession of the estates, but that he did not punctually pay the premiums on the policies; that in October 1832, a large sum was due to J. Brundrett from Colonel Gwynne on account of the premiums on the policies; that in the year 1832, Colonel Gwynne was in want of money, and was desirous of being relieved from the payment of the premiums payable on the policies, and of paying the sum due from time to time to J. Brundrett as aforesaid, and J. Brundrett was desirous of obtaining payment thereof, and it was proposed by Colonel Gwynne and J. Brundrett, or proposed by the one and assented to by the other of them, and was agreed and arranged between them, that Colonel Gwynne, by virtue and in exercise of the power given to him by the indenture of the 1st of October 1821, should execute an appointment of the bonuses in favour of such of his daughters as should be willing to concur in such arrangement, and that J. Brundrett, with the concurrence of such appointees, should then surrender such bonuses and appropriate part of the money to be received upon such surrender as a fund to answer the future payment of the premiums so as to relieve Colonel Gwynne therefrom, and to apply part thereof in payment of the sum due from Colonel Gwynne to J. Brundrett as aforesaid, and otherwise for the benefit of Colonel Gwynne; that of the daughters, those three to whom the appointments were made while of full age were residing with their father; that Mrs. Gibert, another of them, was married and residing abroad, and two of the others (the present plaintiffs) were then infants; that before October 1832, both Colonel Gwynne and J. Brundrett applied to the three daughters and requested them to concur in the arrangement, and that they agreed to do so, but that Charlotte Elizabeth, another of the daughters, refused to con-

cur therein, and in consequence of this refusal the appointment was made to the three, and not to the four as was intended. The bill then alleged that J. Brundrett obtained 423*l.* out of the monies arising from the surrender of the bonuses for his own use; that the appointment made by the deed-poll was made in consideration of and for giving effect to the arrangement and bargain before mentioned between Colonel Gwynne and the appointees, and for the benefit and relief of Colonel Gwynne; that it was void in equity; that Brundrett was a party to and well acquainted with all the circumstances connected with such arrangement and bargain, and the appointment being void the authority given to him was invalid as against the plaintiffs, the infants, and the other daughters, except the appointees, and the surrender of the bonuses was, as regarded the other daughter and the plaintiffs, a breach of trust; that by the surrender they were respectively deprived of their shares in such bonuses, which they would otherwise have been entitled to receive upon the decease of Colonel Gwynne; and the bill charged that the validity of the appointment was not in any manner brought in question in the suit and proceedings above mentioned, and that the facts were not put in issue, and that the appointment throughout the proceedings was assumed to be a valid appointment; that these proceedings were irregular in respect of the infancy of the present plaintiffs; that the estates charged with the premiums of the policies were of ample value to answer the premiums, and that J. Brundrett, under the trusts of the term, might, from time to time, have raised the money necessary to provide for the payment of the same.

The defendants, the executors of J. Brundrett, by their answer stated that J. Brundrett and his partners, from the year 1812 to 1833, paid such of the premiums from time to time payable upon and kept up the policies so effected with the Equitable, Albion, and Pelican companies as were not paid by Thomas Lowten the uncle and Thomas Lowten the nephew, and Colonel Gwynne personally, out of monies belonging to himself and his partners; that Jonathan Brundrett did not execute the deeds of August and October

1821, and their belief that he was not aware of the existence of the deed of October 1821 until the 26th of October 1832, or of the assignment of the policies mentioned in the deed of August 1821 having been made, and that he being thus ignorant of the imperfectly executed deed of the 1st of October 1821, never accepted or acted in the trusts of the indentures or either of them, and that he was not aware of or had forgotten the existence of the powers vested in him under the deed of the 28th of August 1821 until the 17th of November 1831, when they said he was informed of them in the particular manner mentioned in the answer. [The answer then set forth a very long correspondence between J. Brundrett and Colonel Gwynne, and various other circumstances which, in the view the Court took of this case, it is not necessary to state]; that the appointment of the 14th of December 1832, of the money secured by the two Equitable policies in favour of the plaintiffs Emma Sophia Harrison and Georgiana Caroline Gwynne, and of Charlotte Elizabeth Gwynne, and Julia Arabella Gwynne, was made in consideration of the appointment of the 3rd of October 1832, and in compensation for the shares in the bonuses to which the plaintiffs E. S. Harrison and G. C. Gwynne and C. E. Gwynne and J. A. Gwynne, or any or either of them, were or might become entitled, and that they had had and taken the benefit of the appointment of the 14th of December 1832, and were therefore bound to give effect if necessary to, or to make compensation for the failure of, the appointment of the 3rd of October 1832; that the suit in this court having been adopted and acted upon by the plaintiffs and the trustees appointed under the decree, it was no longer competent for the plaintiffs to bring the same in question; or if competent to the plaintiffs to question such proceedings, that the present suit was not properly constituted for that purpose; that the plaintiffs E. S. Harrison and G. C. Gwynne had, with full knowledge or means of knowing the facts, adopted the benefit of and connected with the appointments of the 3rd of October and the 14th of December 1832.

The only material evidence in the cause consisted of the deeds, documents, and letters.

Mr. Swanston, Mr. J. Parker, (now Sir James Parker, V.C.) and Mr. Haddan appeared for the plaintiffs.

Mr. Bethell, Mr. Willcock, and Mr. Prendergast, for the representatives of J. Brundrett.

Mr. Chandless and Mr. Peachy, for the other defendants.

Jan. 19, 1852. — TURNER, V.C., after stating as above the facts of the case, said — This case may, I think, conveniently be considered in three points of view: first, whether J. Brundrett ever became liable to the plaintiffs in respect of the matters in question in this suit; secondly, if he did become so liable, whether this suit is properly constituted for enforcing such liability; and, thirdly, if it be not properly constituted whether the bill should be dismissed without reservation; and if it be properly constituted whether there should be an absolute decree against the defendants, or what directions should be given for the purpose of working out the justice of the case.

Upon the first point, the original liability of Mr. Brundrett, I am of opinion that he was liable to the plaintiffs in respect of these matters. I think it clear that he accepted the trusts of these policies, and equally clear that the appointment of the 3rd of October 1832 was a fraud upon the power. And I think that Jonathan Brundrett must be taken to have known it to be so at the time when he surrendered the policies, and paid over the monies which he received upon the surrender. After the cases which have been decided upon the subject of fraudulent appointments, it is hardly necessary, I think, to say anything on the subject of this appointment being a fraud upon the power; but it may be observed that its immediate object was to relieve the father, and that its necessary consequence would be to relax the diligence of the trustee in enforcing the rights of the children against him. And it may be useful further to observe that, where a trustee, having good reason to doubt the validity of an appointment, thinks proper to act upon it, he must, in my opinion, be affected by the consequences which follow upon the act; and in the present case we have the monies

which were paid over to the appointees immediately lent to the father upon a mortgage of his life interest only. That Jonathan Brundrett knew the appointment to be fraudulent I think sufficiently appears from the advice which he received. The transaction was attempted to be justified upon the ground of the necessity of the case, but I cannot hold it to be justified upon that ground. I take the rule of the Court upon that point to be perfectly clear. A trustee is not in all cases to be made liable upon the mere ground of his having deviated from the strict letter of his trust. The deviation may be necessary or may be beneficial, but when a trustee ventures to deviate from the letter of his trust, he does so under the obligation, and at the peril, of afterwards satisfying the Court that the deviation was necessary or beneficial. The defendants have given no evidence to satisfy me that it was either necessary or beneficial that this appointment should be made.

If such a transaction as the present has been excused in any case, I think it would not have been excused in this. There was a suit actually pending in this Court at the time when the transaction took place, and in that suit the very appointment in question was brought forward, and yet the facts connected with the appointment were not put upon the record, but a decree was taken for paying over the fund to the appointees, the Court being kept in ignorance of those facts. If, therefore, the case depended upon the first point, the original liability of Mr. Brundrett, I should have no hesitation in making a decree in favour of the plaintiffs.

But upon the second point, my opinion is that this suit is not properly constituted to enforce the liability. Looking at the deeds of October and December 1832, the calculation made with reference to the deed of December 1832, and the letters which passed about that period, I am of opinion that the deed of the 14th of December 1832 is directly and immediately connected with the deed of the 3rd of October 1832, and that the former deed is in truth no more than a cover for the latter deed, and never would have existed at all if the latter had not been executed; and yet this bill is strictly confined to

the bonuses appointed by the deed of October, and does not bring the deed of December within the power of the Court. What the plaintiffs are in effect seeking by this bill is to undo part of one entire transaction, and I think it is neither consistent with the practice of the Court or the justice of the case so to deal with the transaction. The practice of the Court is not to undo transactions in part: and that it is not consistent with the justice of the present case to do so is obvious; for the effect, if not in some manner corrected, would be to leave each of the daughters who are plaintiffs in this suit in possession of 1,250*l.* received under the appointment of December, part of the fraudulent appointment, and at the same time to give them their shares of the bonuses for default of appointment by reason of the same fraud. It may be said that this might be set right by compelling the plaintiffs to account for the 1,250*l.* already received. But supposing it to be so, which I doubt, still justice could not be done; for the other daughters who took under the appointment of December, could not, I think, be compelled upon this bill to refund what they have received. I think that upon this objection being pointed out, as it was though not very clearly, by the answer, it was incumbent on the plaintiffs to have amended, and put the whole transaction under the power of the Court, and that they having neglected to do so, this suit is irregularly constituted, and the bill must therefore be dismissed.

The question then to be considered is, whether it should be dismissed without reservation, and I am of opinion that it should not, but that it should be dismissed without prejudice to a new bill, for I think that the plaintiffs have shewn that they had a right against Brundrett, and I think that something might possibly have been coming to them if their case had been properly framed. I desire, however, most distinctly not to be understood to give the least encouragement to the filing of a new bill, for I do not think that under any circumstances I could have made a decree in this case without directing very stringent inquiries as to the extent of the knowledge of the plaintiffs at the time when they received the monies which were

actually appointed to them, and I have a strong suspicion what the result of those inquiries would have been; for although it may well be, as was put by the plaintiffs in argument, that on an appointment to A. and B. by one instrument, and *à fortiori* by different instruments, the appointment to A. may be good and the appointment to B. bad, it may equally well be that A. and B. may agree between themselves that the bad appointment shall not be disturbed, and I have not much doubt what the effect of such an agreement would be if it were afterwards sought to charge the trustee. It is not necessary, however, to decide anything on that point. I dismiss the bill upon the ground that under the circumstances of this case the appointments of October and December 1832 must stand or fall together, and that this bill does not enable them so to be dealt with.

As to the costs, I am of opinion that they must be paid by the plaintiffs. I see no ground for saddling the estate of Brundrett with costs which arise, as I think, from the mistake of the plaintiffs. I shall, therefore, dismiss the bill with costs, adding the clause without prejudice to filing a new bill.

KINDERSLEY, V.C. }
Jan. 14. } CLEMENTS v. BOWES.

*Public Company—Bill for an Account—
Demurrer—Parties—Financial Committee.*

The plaintiff filed a bill on behalf of himself and the other shareholders in a company against the persons forming the financial committee, praying that an account might be taken of all monies received by the defendants in respect of deposits upon shares, and an account of the costs and expenses incurred by them, and that the amount due to the plaintiff and the other shareholders, after giving credit for the monies paid by them, might be distributed rateably amongst the shareholders:—Held, upon demurrer to the bill, that the fact of the defendants having already rendered an account did not preclude the plaintiff from having an account taken under the authority of the Court: and that the remedy provided for these cases by the Wind-

ing-up Acts did not take away the plaintiff's right to file a bill for a similar purpose.

Held, also, on the demurrer as to parties, that as all the shareholders had a common interest the plaintiff might without their consent file a bill on behalf of all, and that as the financial committee were the only persons alleged by the bill to have had power over the funds of the company, it was not necessary to make any other persons who might have acted as directors parties to the suit.

This bill was filed by Benjamin Clements, on behalf of himself and all other the shareholders in a projected company formed, in the year 1845, for making a railway from the town of Hull to the city of Lincoln, to be called the Hull and Lincoln Direct Railway Company, and the defendants were certain shareholders in the company who were appointed the finance committee.

The bill stated that the projected railway or scheme was provisionally registered; that the plaintiff made a formal application for an allotment of 500 shares in the said railway company, and paid 1,050*l.*, being the amount of deposit on such share at 2*l.* 2*s.* per share; that the plaintiff, instead of having an allotment of such shares in the company, received scrip certificates for the said 500 shares; that he subsequently purchased through his broker 115 additional shares; that an act of parliament was applied for, and the sum of 26,250*l.* was, on the 4th of February 1846, deposited with the Accountant General, in conformity with the standing orders of the House of Commons, and leave was given to bring in a bill for incorporating the said company, but that the bill was thrown out in the Committee, and the projected scheme thereupon fell to the ground; that the five defendants J. Bowes, H. S. Bright, J. Hall, J. Eggington, and W. G. Todd were appointed the finance committee of the said proposed company, and all the deposits which were made in respect of shares were placed under the exclusive controul and at the disposal of the defendants, who accepted, and acted in the controul and disposition thereof; and they, the said defendants, were authorized and empowered to make out and settle and adjust the accounts thereof, they being answerable and accountable to the shareholders of the said company, and the said

defendants became and were liable and accountable to all the shareholders for all receipts and payments made to or by or in the name of the said company; that an advertisement was issued by the defendants offering to the plaintiff and the other shareholders a return of 17*s.* 6*d.* per share in respect of the balance of deposit; that the plaintiff declined to accept the proposed payment of 17*s.* 6*d.* per share; that at the request of the plaintiff an account of the receipts and expenditure of the finance committee was furnished to him by their secretary; that such account being very vague and unsatisfactory the plaintiff considered himself justified in demanding a return of the whole of the deposit paid upon his shares, but finding that he was unable to obtain such repayment he commenced an action at law in November 1846 against the defendant W. G. Todd, who had been one of the most active members of the finance committee; that the plaintiff was unsuccessful in such action, but he had reason to believe that the account rendered to him by the finance committee was erroneous and insufficient.

The bill also stated that some time after the plaintiff had become possessed of the said scrip certificates, being in want of a temporary loan he had pledged 340 of such certificates with two persons for the purpose of raising money thereon, and that the persons with whom they were pledged had accepted the 17*s.* 6*d.* per share upon their certificates, and that by this means the defendants became possessed of 340 of the plaintiff's certificates. The plaintiff charged that, under the circumstances, he was entitled to receive from the defendants the difference between the amount paid by them in respect of the said 340 shares, and the sum paid by the plaintiffs in respect of the deposit thereon. The bill prayed that an account might be taken by and under the direction of the Court of all monies which had been received by or come under the controul and disposition of the defendants, or any or either of them, in respect of deposits paid upon shares applied for or agreed to be taken in the said projected company, and an account of the capital of the said company, and also an account of the payments, costs and expenses properly made and incurred or

sustained by the defendants in the management of the affairs of the said projected company, and of the residue or surplus remaining after allowing such payments, costs, charges and expenses; and that such balance or surplus might be apportioned to the shares in respect of which the deposits were so paid; and that the amount due to the plaintiff and all other the shareholders on behalf of whom the plaintiff sued respectively, after giving credit for the amounts already received by them respectively (including the sum of 398*l.* 2*s.* 6*d.* for which the plaintiff thereby consented to give credit) might be paid to the plaintiff and such other shareholders as aforesaid by the defendants; and that for the purposes aforesaid all proper accounts might be taken, and all proper directions given; and that the other shareholders on whose behalf the plaintiff sued might be ascertained.

To this bill a demurrer was put in for want of equity and for want of parties.

Mr. Malins and *Mr. Miller*, in support of the demurrer, contended that a sufficient account had already been rendered to the plaintiff of the receipts and payments by the financial committee: that the plaintiff ought to have proceeded under the Winding-up Act; and that the legislature having provided an express remedy for obtaining an account of the affairs of a joint-stock company, the plaintiff could not be allowed to file a bill for the same object. The case of *Parbury v. Chadwick* (1) was cited in support of this argument. It was also contended that all the shareholders who had received back any portion of the money paid by them upon their shares ought to have been made parties, and that the directors of the company ought to have been made parties.

The following cases were cited :—

Hichens v. Congreve, 4 Russ. 562; s. c. 6 Law J. Rep. Chanc. 167.

Walburn v. Ingilby, 1 Myl. & K. 61.

Mare v. Malachy, 1 Myl. & Cr. 559; s. c. 5 Law J. Rep. (N.S.) Chanc. 345.

Taylor v. Salmon, 4 Myl. & Cr. 134.

(1) 12 Beav. 614; s. c. 19 Law J. Rep. (N.S.) Chanc. 562.

Mr. Willcock and *Mr. White*, for the bill, contended that the fact of an account having been given by the defendants did not preclude the plaintiff from coming to this Court, for the purpose of having the accounts taken by means of the machinery of a court of equity; that there was nothing contained in the Winding-up Acts to prevent a plaintiff from coming to this Court by a bill to obtain redress, if he considered that such a proceeding was the best calculated to secure his rights; and that the bill was properly framed as regarded parties. It was well established that a plaintiff might file a bill on behalf of himself and all the other shareholders when they were too numerous to be all made parties, and the persons here suggested as being necessary parties were interested as much as the plaintiff in having the accounts properly taken. It was also submitted that as no other body of persons than the financial committee were alleged by the bill to have had the disposal of the funds of the company, it was not necessary to make any other directors (in case there were any) parties to this bill.

The following cases were cited :—

Evans v. Stokes, 1 Keen, 24; s. c. 5 Law J. Rep. (N.S.) Chanc. 129.

Bainbridge v. Burton, 2 Beav. 539.

Lund v. Blanshard, 4 Hare, 9; s. c. 14 Law J. Rep. (N.S.) Chanc. 332.

Richardson v. Hastings, 7 Beav. 301; s. c. 13 Law J. Rep. (N.S.) Chanc. 129, 142.

Lovell v. Andrew, 15 Sim. 581.

KINDERSLEY, V.C.—I think this demurrer must be overruled. The demurrer is for want of equity generally, and also for want of parties. The bill is filed by Benjamin Clements on behalf of himself and all the shareholders other than and except the defendants, and the defendants are certain shareholders in the company who appear to have been appointed a finance committee. The bill states the projection of the company, and states the various circumstances antecedent to an application to parliament, and then it states that an act was applied for on behalf of the projected company, and a sum of 26,250*l.* was deposited with the Accountant

General, in conformity with the standing orders, and leave was given to bring in the bill. That the bill was afterwards thrown out in the House of Commons, and the scheme fell to the ground. Then it states that the defendants were appointed the finance committee of the proposed company, and all the deposits which were made in respect of shares were placed under the exclusive controul and at the disposal of the defendants, who accepted and acted in the controul and disposition thereof; and they were authorized and empowered to make out and settle and adjust the accounts thereof, they being answerable and accountable to the shareholders of the said company, and the said defendants became and are liable and accountable to all the shareholders for all receipts and payments made to or by or in the name of the said company. That is a distinct allegation that all the deposits of the shareholders were placed under the exclusive controul of the defendants. Then the bill states the plaintiff's demand for a return of his whole deposit, and a correspondence is set out in which the defendants offer to return the sum of 17s. 6d. per share; and it states that an account was rendered to him to shew in what way the finance committee had dealt with the money placed in their hands. It also states that an action was brought by the plaintiff against the defendant W. G. Todd, and it contains various other charges and prays—not a dissolution and winding up of a partnership, and that the accounts might be taken—but it prays—[His Honour here read the prayer of the bill set forth above].

Now, the bill merely asks that the defendants, who are allowed to have received all the deposits in respect of the shares, may account for what they have received, and that, after applying such monies in satisfaction of all payments, costs, and expenses, the surplus may be divided not among any given class of the shareholders, but generally among them all, including not only those who have received their 17s. 6d., but the rest also.

The plaintiff states that in respect of some of his shares the 17s. 6d. had been received by those in whose hands the shares were, but as to the other shares he had refused to receive the money.

The demurrer is argued on these grounds: first, that a sufficient account has been already rendered, and that the plaintiff ought not to be allowed to sue the defendants solely in respect of that matter. Now, whether the account was satisfactory or not, the rendering of the account could not prevent a person from filing a bill to have an account taken under the authority of the Court. It is not sufficient that an account should be rendered upon the representation of the defendants, but the plaintiff has a right to have an account taken under the machinery which this Court provides: therefore rendering an account is not sufficient.

The second ground of demurrer is, that the plaintiff ought to proceed under the Winding-up Act, and that the legislature having provided the method of winding up, and dealing with the affairs of an inchoate railway company of this kind, as well as others, this Court ought to refuse to a party the right of coming here to have the account taken. The case of *Parbury v. Chadwick* was cited, in which the late Master of the Rolls stayed proceedings in a suit on motion where a bill had been filed after an order made for winding up a company, and where, if I apprehend rightly the nature of the suit, it sought relief of the same nature as that provided by the Winding up Act; at all events, the bill in that case was filed after the order for winding-up had been obtained. Without stating whether, if there had been an existing order to wind up, and then this bill had been filed, I should have considered that a sufficient ground for allowing the demurrer, it appears to me that it cannot be a good ground of demurrer to say, "You shall not have your remedy by bill, because you may apply for a winding-up order, and it may be the Court will grant it." I am far from taking it for granted that the Court would, in this case, make such an order. I am not satisfied about that, though I do not say it would not grant it. I express no opinion upon that; but from my experience in these matters I have been led to this conclusion, that great as is the difficulty in proceeding under a suit for this sort of purpose, the mischief of applying the Winding-up Act

to such a case is greater; but the real question is, whether the legislature, in providing a remedy under this act, has excluded the remedy under a bill for making certain individuals who have received money in respect of a number of shares, account for the money, after allowing for all costs, charges, and expenses, and for distributing such surplus amongst all the shareholders, *pro rata*, according to the number of their shares. To oust the jurisdiction of the Court of Chancery in such a case, the legislature should have so declared it. It is plain where the court of equity has jurisdiction in such a case, an act giving further relief does not by that oust the title of the court of equity, without express terms being used to put an end to the jurisdiction, which is inherent in the Court. It appears to me, therefore, that the second ground of demurrer is not sustainable.

As to the demurrer for want of parties, the demurrer itself represents two difficulties as existing on the bill with respect to parties, and is framed in this way: "and for further cause of demurrer, the defendants say that it appears by the plaintiff's own shewing that the scrip or share holders in the bill mentioned, who had not received the sum of 17s. 6d. per share on their respective shares on scrip in the said bill mentioned, and also the said several share or scrip holders of the said projected company, and the persons who entered into a subscription for the purpose of forming the said company, other than these defendants, are necessary parties to the said bill, and yet the plaintiff hath not made such several persons, or any or either of them, parties to the bill." Now, the persons here represented as necessary parties are, first, those shareholders who had not received back the 17s. 6d. per share (the plaintiff being one who has not received back that sum in respect of some of his shares, though he did with respect of others which he had pledged); and secondly, those who had received back that sum. The demurrer was, in fact, intended to include all the shareholders. As to those who did not receive that sum, the question comes to this, because the principle is clear. The question is, whether that class of share-

holders who did not receive the money have a different interest from those who did receive back the amount; that is, the same interest in the relief asked by the bill. Now the relief is for the common interest of all (if for any); I am far from thinking this bill is for the interest of these parties; but if the plaintiff chooses to enter into such a speculation as the filing of this bill, he has a right to do so. The relief asked is, to make five individuals who are alleged to have received all the monies paid by way of deposit, account for what they have received, and that whatever balance is found to be in their possession after payment of the proper expenses may be divided not amongst any class, but amongst all *pro rata*, that is, the 17s. 6d. to those who have not received it, and then dividing the rest among them all. I cannot see that there is any difference of interest between the one class or the other as far as the relief sought by the bill, which is the real question. If a person files a bill for himself and others, there may be some who would not like the bill to be filed, but if, on the face of the transaction, it be for the common interest of all, it is no more for the interest of one than the other. It is clearly for the interest of all that the relief here asked should be granted. It appears to me there is no ground for saying any particular class should be represented by the members of that particular class. Then, the other class mentioned is the whole of the shareholders. The answer to that is, the bill states, and it is, therefore, admitted by the demurrer, that the whole of the shareholders being upwards of two hundred are so numerous, that it is impossible to make them all parties; and as to that point in the case, it is clear upon the authorities that the plaintiff is not obliged to make them all parties.

Now, these are the classes of shareholders who, on the face of the demurrer itself, are said to be necessary parties; but it is also argued at the bar, that there is another class of persons not suggested by the demurrer who ought to be made parties, namely, those who stood in the position of managers and carried on the affairs of the concern before the finance committee were appointed; but on the face of the bill there is nothing to shew when they were ap-

pointed or why they were appointed the finance committee, and with one single exception in the bill, there is no allusion to any other body of directors. No doubt it may be supposed there were other directors, but the bill being silent as to such other directors, and no mention being made of any other body of directors than the finance committee, how am I to say that there were other persons acting as directors? The exception I allude to is the expression contained in a letter which was addressed to the plaintiff, and in which mention is made that the directors would do so and so; but that is not an allegation of the fact that there were other directors. The bill does not allege that there were; but this gentleman in writing an answer says that the directors may do so and so. Can I then say, without any further evidence, and taking the bill as I must do to be true, that there was a body of directors different from the finance committee? Might not the writer of that letter have meant the finance committee when he used the term directors? No doubt advantage may be taken of this fact in another mode, but I cannot assume that there was a body of directors who ought to have been made parties to the suit. But suppose there was such a body of directors, what interest have they different from the other shareholders in respect of what is asked by this bill? If the bill sought to impeach the management of the directors in imputing to them any improper conduct, and to have the whole dealing and transactions of the concern wound up, then it might be necessary to have them parties; but that is not so, and I must assume all that is stated here to be true, whether the truth has been cut out of the bill by the amendments as suggested by counsel or not; and as regards the relief asked here, there is nothing to shew that there is any ground for supposing such directors must have a different interest from the shareholders generally.

I have now considered all the different grounds raised in support of the demurrer, and my opinion is that the demurrer must be overruled. It is unnecessary to say that I do not express any opinion about the amendments to the bill. That is not my concern.

PARKER, V.C. }
Feb. 18. } POPPLE v. HENSON.

Heir—Costs—Re-sale of Estate agreed to be sold.

A. contracted to sell an estate to B. Before the completion of the purchase B. died intestate. A bill was filed by A. against the heir and administrator of B, praying for a re-sale of the estate and for the application of the purchase-money to the payment of A.'s expenses and the sum agreed to be paid by B :—Held, that A. was bound to pay the costs of the heir, with liberty to add them to his own.

Mr. Henson contracted to buy an estate of Mr. Popple, and paid him a deposit of 100*l*. Before the sale was completed Mr. Henson died intestate, leaving an infant heir, and administration was taken out to his estate by his widow.

This was a claim filed by Mr. Popple against the heir and administratrix of Mr. Henson. The relief prayed was that the estate might be re-sold, and that the money produced by such re-sale, together with the deposit, might be applied in payment to the plaintiff of the purchase-money, and interest, and his expenses.

Mr. Cairns, for the plaintiff, referred to *The Duke of Beaufort v. Phillips* (1).

Mr. D. Chambers, for the administratrix.

Mr. Briggs, for the heir, asked for his costs.

Mr. Cairns, for the plaintiff, contended that the plaintiff was not bound to pay the heir his costs.

PARKER, V.C. said, that the infant heir was a necessary party to the suit, and had no means of getting his costs from the administratrix, and that the plaintiff must pay him his costs, with liberty to add them to his own. The decree would be for a re-sale, and that the money arising thereby and the deposit should be applied to the payment of the plaintiff's purchase-money, interest, costs, and the expenses of the sale, and that the surplus, if any, should go to the heir.

KINDERSLEY, }
 V.C. } SILVER v. STEIN.
 Jan. 17. }

Claim—Parties—Executors in the Mauritius.

A testator dying in the Mauritius appointed executors in that country, and left the residue of his property to his mother in England. The executors in the Mauritius transmitted the residue to England, but the mother of the testator having died, the amount was paid to her executors, who paid all her debts exceeding the amount to which she became entitled from the testator's estate. The plaintiff was a creditor of the testator, and filed a claim to obtain payment of his debt, or to have the testator's estate administered:—Held, that the Mauritius executors were improperly made parties to this claim, and that the plaintiff could not have relief against the executors of the testator's mother without having a legal personal representative of the testator constituted in this country, a party to the suit.

This was a claim filed by Edwin and James Silver, and it stated that W. H. Lovewell, late of Whittey, in the county of Berks, but who died at Port Louis in the Mauritius, captain in the merchant service, was at the time of his death, and that his estate still was, indebted to the plaintiffs in the sum of 81*l.* 10*s.* 10*d.* for goods. That the said W. H. Lovewell died in the year 1848, and the defendants Robert Stein and William Dick, who resided in the Mauritius, were his executors, and the said debt had not been paid to the plaintiffs. That the said W. H. Lovewell, by his will, gave all his personal estate and effects to his mother Catherine Lovewell, deceased, and the defendants got in and converted into money all such personal estate and effects, and paid some of the debts of the said W. H. Lovewell in full, and remitted the sum of 74*l.* 15*s.*, being the balance of that estate, to Messrs. Scott, Bell & Co., merchants of London, in order that the same might be paid by them to Catherine Lovewell, and that the defendants R. Stein and W. Dick did not retain in their hands any assets of W. H. Lovewell to answer the debt of the plaintiffs. That the said Catherine Lovewell died in

January 1849, before the sum of 74*l.* 15*s.* arrived in England; and the defendant George Arnold was the duly constituted legal personal representative of Catherine Lovewell, and that Messrs. Scott, Bell & Co. handed over the said sum of 74*l.* 15*s.* to George Arnold as such personal representative. The plaintiffs, therefore, claimed to be paid the said debt of 81*l.* 10*s.* 10*d.* with their costs of this suit, and in default thereof they claimed to have the personal estate of W. H. Lovewell administered in this court on behalf of themselves and all other the unsatisfied creditors of W. H. Lovewell, and to have the said sum of 74*l.* 15*s.* refunded by the said George Arnold; and for these purposes that all proper directions might be given and accounts taken.

It appeared from the affidavits filed in support of the claim, that upon the death of W. H. Lovewell, his estate was wound up by the defendants, his executors in the Mauritius, under the superintendence of the Curator of intestates' effects, acting on behalf of absent interested parties. The debts of which Captain Lovewell gave notice were paid, and the balance of 74*l.* 15*s.* was sent to England for Mrs. Lovewell, Captain Lovewell's mother, as his sole legatee. It also appeared that the defendants, Messrs. Stein & Dick, were still residing in the Mauritius, and that Arnold upon receiving the 74*l.* 15*s.* had discharged all claims upon the estate of Mrs. Lovewell, and exceeding the said sum of 74*l.* 15*s.*

A motion was made in February 1851 on behalf of the plaintiffs, that they might be at liberty to serve a writ of summons for the defendants, Stein and Dick, to appear and shew cause against this claim. An order was accordingly made, and Messrs. Stein & Dick now appeared by counsel.

Mr. Nalder appeared in support of the claim.

Mr. Haig, for the defendants, Stein and Dick, submitted that the claim as against them ought to be dismissed with costs. These defendants were executors, constituted according to the law of the Mauritius, and had administered the estate in that country. They could not be sued in this

country, nor could the plaintiffs proceed with their claim in England without having a legal personal representative of Captain Lovewell constituted in this country.

The following cases were cited—

Tyler v. Bell, 1 Keen, 826; s. c. 2 Myl. & Cr. 89; 6 Law J. Rep. (n.s.) Chanc. 169.

Story's Conflict of Laws, s. 513.

Bond v. Graham, 1 Hare, 482; s. c. 11 Law J. Rep. (n.s.) Chanc. 306.

Cleland v. Cleland, Prec. in Ch. 63.

Mr. Nevins appeared for another defendant.

KINDERSLEY, V.C.—It is clear in my opinion that there must be a legal personal representative properly constituted in England in order to administer this estate. That appears from what was done in some of the cases cited. Then, independently of any authority, I should be of opinion that to administer the estate in England of a person dying in the Mauritius and to whose property administration was taken out in that country, there must be a legal personal representative in this country. It is true that an administrator *de son tort* may be made to account in some cases; but being of opinion that it is necessary to have a legal personal representative constituted in England, the plaintiffs ask for leave to amend the claim. To this request two parties object: the legal personal representatives of the testator constituted at the Mauritius, and Dr. Arnold, who is in this country, and received the money remitted by the Mauritius executors to the residuary legatee, but who died before the fund was paid. In support of the objection, the case of *Tyler v. Bell* was referred to. There it was a demurrer for want of equity and parties. The Court, without determining the question upon the demurrer for want of equity, allowed the demurrer for want of parties, and then decided that the plaintiff should not have leave to amend, because he could in no case have relief against the demurring parties.

The question, therefore, is if there was before the Court a legal personal

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representative constituted in this country, could the plaintiffs have any relief against those persons who are on the record? As to the relief against the parties you must look at the prayer of the claim. It asks payment of the debt alleged to be due to the plaintiffs with the costs, or, in the alternative, it claims to have the personal estate of the testator administered and to have the 74*l.* refunded by Dr. Arnold. So what is asked is administration of the estate for the benefit of all the creditors, and a refunding by Dr. Arnold of the 74*l.*, not asking that the Mauritius executors should refund, but that Dr. Arnold should refund. The question then is, whether the plaintiffs, creditors in this country of the testator, could either with or without a legal personal representative in England seeking to administer the estate against such a person make foreign executors parties to that suit. I think not. They are not the persons against whom the estate is to be administered, and I think the claim ought to be dismissed as against them. The case is, however, different with respect to Dr. Arnold. Part of the relief asked is, that he may refund the money he has received. If there were here a legal personal representative constituted in this country, Dr. Arnold might be a proper party, because part of the assets have come into his hands on the supposition that it was a clear residue belonging to the legatee. I think the order I should make should be to dismiss the claim as against the Mauritius executors, and the plaintiffs to have leave to amend their claim to bring before the Court a legal personal representative constituted in this country. In making this order, I am quite certain that I am doing what is most for the benefit of the plaintiffs themselves, and that it will save them considerable expense.

PARKER, V.C. }
Jan. 27. } FARRANCE v. VILEY.

*Infants—Shares under 20*l.**

*Shares of infants in a testator's estate under 20*l.* each, ordered to be paid at once to the persons maintaining them.*

This was a suit for the administration of the estate of a testator.

Mr. Surrage stated that he appeared for some infant defendants whose father was dead and who were maintained by an uncle, and that the share of each of them was between 10*l.* and 20*l.*, and asked that these sums might be paid at once to the uncle, he undertaking to apply them for their maintenance.

Mr. Walford and *Mr. Nevinson*, for other parties.

PARKER, V.C. directed that the shares of the infants not exceeding 20*l.* each should be paid to the person maintaining them.

LORDS JUSTICES. }

1852.

Jan. 31.

In re SPENCER.

Payment of Money out of Court—Administration, whether Diocesan or Prerogative—Trustees Relief Act.

A. was entitled to a share of the produce of certain chattels and of no other property. She was domiciled in the diocese of L, and the chattels were in the same diocese. A. died intestate. The chattels were sold by the trustee, and A.'s share of the money was paid into court under the provisions of the statute 10 & 11 Vict. c. 96. After this, letters of administration to A.'s estate were taken out in the diocese of L, and on an application for the payment of this fund out of court to the administrator, the same was ordered, the Court holding that a prerogative administration was not necessary.

This was a petition for the payment of a sum of money out of court, which had been paid in under the provisions of the Trustees Relief Act, 10 & 11 Vict. c. 96. It appeared that Robert Raine by his will, dated in 1828, bequeathed his tenant right in and to his farm and lands situate at Elmsthorpe, in Leicestershire, and all his personal estate of what kind soever, to trustees named Oldacres and Singleton, upon trust during the minority of his children, or so long as they should think fit, with the consent of his landlady, to occupy and manage the said farm for their

benefit, and when his youngest child should attain the age of twenty-one years, or at the determination of his then present tenancy, convert his personal estate into money, and invest the money arising therefrom and apply the dividends and interest thereof for the maintenance, education and support of his children, and then upon trust to divide the capital among his six children therein named, giving to each of his sons 50*l.* more than his daughters. The testator appointed the same persons executors of his will. He died in 1829, and subsequently his daughter Elizabeth married W. Spencer. She died in March 1845, leaving her husband surviving. In 1845 W. Spencer died, having by his will appointed John S. Spencer and others his executors. J. S. Spencer alone proved the will in the Archdeaconry Court of Leicester. On the 21st of May 1848 the youngest child of the testator, R. Raine, attained the age of twenty-one, whereupon the proceeds of the personal property of the testator, which had been sold since the deaths of Mr. and Mrs. Spencer, were divided among his children by Mr. Singleton, who was the surviving trustee and executor, excepting the share of Mrs. Elizabeth Spencer, amounting to 396*l.*, which as there was then no personal representative of her who could receive and give a receipt for the same, he paid into court under the before-mentioned statute. After the money was so paid in, J. S. Spencer obtained letters of administration of the estate and effects of Mrs. Elizabeth Spencer from the Archdeaconry Court of Leicester. This petition was then presented, which, after stating the foregoing circumstances, prayed the payment out of court of the 396*l.* to him as her administrator and legal personal representative.

Mr. Bird, in support of the application, read affidavits shewing that Mrs. E. Spencer and her husband were at the respective times of their deaths domiciled within the limits of the Archdeaconry of Leicester, and that neither Mrs. Spencer nor her husband in her right were or was possessed of any property, except her interest in the chattels and stock existing at the time of their respective deaths *in specie* upon the testator's farm at Elmsthorpe. The learned counsel stated that upon the petition

coming on to be heard before Vice Chancellor Turner he declined to make an order upon the Archdeaconry letters of administration, but required a prerogative representation to be produced. His Honour observed that the practice had prevailed of requiring the production of a prerogative representation before paying a fund out of court, and that to change such practice might give rise to an expensive contest in each case upon the question whether there were *bona notabilia* or not. His Honour requested that, as a similar question had lately been under the consideration of this Court, in the case of *In re Knowles* (1), the petition might be brought under their Lordships' consideration. It was submitted that the order asked should be made, as upon the facts appearing upon the petition there could be no doubt that the Archdeaconry letters would have formed a sufficient title to the fund at the death of Mrs. Spencer, when the property was existing *in specie* on the farm at Elmsthorpe within the Archdeaconry. That being so, the fact that the property had afterwards been realized and removed into another diocese could make no difference. Wherever a prerogative probate had been held to be necessary, there at the time of the death part of the assets had been situate in the diocese, and part invested in the bank—*Scarth v. the Bishop of London* (2).

[LORD JUSTICE LORD CRANWORTH (3).—That does not require the support of authority. You cannot act upon a diocesan probate where a prerogative representation is necessary. To determine the proper court of administration, you must look at the circumstances at the time of the death of the intestate. The title of the Ordinary is complete at the death of the party in the diocese. Suppose after the death of a party in the diocese, having no goods out of it, some stranger were to remove those goods into another diocese,

could not an action be brought and maintained on a diocesan probate? I do not think it would be found that a prerogative probate would be rendered necessary because somebody had rightfully or wrongfully removed the goods out of the diocese after the death of the intestate. In ancient times the question as to the right of the Ordinary depended upon whether, at the death of the intestate, there were or not *bona notabilia* out of the diocese. Following up that principle, if part of his assets, 10,000*l.*, or any other sum, be carried out of the diocese and brought into the Bank of England, in an action for that money, I think a Court would be bound to say that the diocesan letters were correct. All principle seems to me to favour the present application, and I confess I never have been able to account for the rule requiring prerogative letters or prerogative probate. It is said this has been required for security; but if a diocesan probate be proper, why should a party be put to the expense of a prerogative probate, which, if not void, is always voidable? It seems to me inconsistent to put a party to the expense of a voidable instrument.

LORD JUSTICE KNIGHT BRUCE. — My impression is, that in the case of *In re Knowles*, Lord Cranworth intimated that his opinion would have extended to a case like this. It is my inclination of opinion also. A change of place of the goods after the death can make no difference as to the power and right of the Ordinary. It seems to me, and I may say to my learned Brother, that, carrying the matter back to its first principles, the grant in this case ought to be held to be sufficient, unless, indeed, there has been an inveterate practice the other way.]

Mr. Bird.—The case of *Druce v. Denison* (4), first heard before the late Vice Chancellor of England, who declined to make an order, which subsequently the Lord Chancellor Lord Cottenham made, is importantly in point; for the reason assigned by Sir Lancelot Shadwell was, that it was the practice of the Court not to order stock to be transferred to a personal representa-

(1) *Ante*, p. 142.

(2) 1 Hagg. Ecc. Rep. 625, 636.

(3) The present case was mentioned to the Court rather for the purpose of eliciting the opinions of the learned Judges than for their determination. Their Lordships' observations were made in disconnected sentences during Mr. Bird's statement; but they have been thrown together in the above report for convenience and saving of space.

(4) 15 Sim. 356; s. c. 17 Law J. Rep. (N.S.) Chanc. 149.

tive of a testator or intestate, unless he had been invested with that character by the Prerogative Court. The Lord Chancellor, however, directed the Accountant General to act upon the diocesan letters of administration, and the fund was accordingly transferred.

[LORD JUSTICE LORD CRANWORTH.—If I remember rightly, what Lord Cottenham decided there was, that as a consistorial probate is not necessarily had, the Court presumes it to be proper until the contrary is shewn.]

Mr. Bird.—He so decided after consultation with Sir J. Nichol, the Judge of the Ecclesiastical Court.

LORD JUSTICE KNIGHT BRUCE.—Does that attach to the particular case of 3*l.* per cents. or does it apply to all personalty? I take the question in *Druce v. Denison* to have been a question of the place of the property as between the diocese of London and the province of Canterbury. The Bank of England and the seat of Government are both within the diocese of London, and necessarily within the province of Canterbury; and if stock in the funds have a place (if, indeed, it can be said to have any place) within the diocese of London, and there be no other property of the party, probate would as properly belong to the diocese of London as to the province of Canterbury. That seems to have been the point in *Druce v. Denison*, but that does not touch the question of any other diocesan probate than a London probate. Nobody, for instance, could say the 3*l.* per cent. consols are within the diocese of Carlisle. The decision in *Druce v. Denison* appears to have been this:—If a testator domiciled in London die possessed of stock standing at the Bank in his name, and a London probate is taken out, that will do in the absence of proof that there are goods also of the deceased in another diocese, inasmuch as stock (so far as it can be said to have a locality) may be said to be situate in the diocese of London. That is what seems to have been decided in *Druce v. Denison*. It also decided what perhaps scarcely needed a decision, that it is not necessary to inquire, as a matter of

course, whether a man dies possessed of goods in two dioceses.

LORD JUSTICE LORD CRANWORTH.—You have our authority, *Mr. Bird*, to state to the Vice Chancellor Turner that we have given the subject our attention upon your statement of the facts, and that having also had occasion to consider a similar question in the late case of *In re Knowles*, we have come to the conclusion that the Archdeaconry letters were proper at the time of the death of *Mrs. Spencer*, and that being so, they remain proper for all time, notwithstanding any subsequent change in the locality of the assets (5).

LORDS JUSTICES.

1851.

Nov. 24.

} *In re BODEN'S ESTATE.*

Trustee Act, 1850, Section 19.—Mortgage—"Re-conveyance."

A mortgagee in fee died intestate as to the mortgaged premises, but appointed an executor. His heir-at-law could not be found or was unknown. The mortgage money was still due, and was not intended to be paid off, but the executor, wishing to make a transfer of the mortgage, petitioned, under the 19th section of the 13 & 14 Vict. c. 60, the Trustee Act, 1850, for an order vesting the mortgaged premises in him:—Held, that the Court has jurisdiction upon such a petition to make the order, and that the legislature did not mean to confine its authority to the case of a simple "re-conveyance."

This was a petition, presented under the Trustee Act 1850, 13 & 14 Vict. c. 60, by the executor of a mortgagee in fee, praying an order vesting the mortgaged estate. In the petition it was stated that the mortgage in fee was made, in 1842, of certain lands to *Mr. Wm. Boden*, deceased, the testator of the petitioner; that the mortgagee made his will, appointing the petitioner his executor, but made no devise or bequest of his mortgage or trust estates; that the mortgagee, who was since dead,

(5) This opinion was communicated to the Vice Chancellor, and the order was made for payment of the money out of court, without prerogative letters of administration being taken out.

had never been in possession of the mortgaged estate or in receipt of the rents and profits during his life, nor had the petitioner or any other person claiming under him since his death; that the mortgagee had no child, but had an only brother, Joseph Boden, who left England in 1832, and had never since been heard of; that Joseph Boden was heir-at-law of William Boden, the mortgagee, and if alive the legal estate in the mortgaged premises was vested in him, but if he were dead it was not known who was the heir-at-law of the mortgagee; that it was desired that a transfer of the mortgage should be made, but the same could not be effected without the aid of the Court. It was therefore prayed that an order might be made, vesting the mortgaged premises, subject to the equity of redemption, in the petitioner and his heirs and assigns, as the person entitled to receive the mortgage money.

By the Trustee Act, 1850, 13 & 14 Vict. c. 60. s. 19. it is enacted: "That when any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the *reconveyance* of such lands, then in any of the following cases it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct: that is to say, When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found: When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorized agent of such last-mentioned person: When it shall be uncertain

was the survivor: When it shall be uncertain, as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead: When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee: And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate."

Mr. E. Webster, in support of the petition.—This application is made by way of appeal from a decision of Sir George Turner, who has declined to make the order prayed by the petition, on the ground that as the mortgage money has not been paid and a re-conveyance is not sought, the case does not come within the 19th section of the Trustee Act, 1850. His Honour, in declining to act, recognized the view he took in *Re Meyrick* (1), where he considered the Court had no jurisdiction to make an order vesting the mortgaged estate in the representative of the mortgagee. It is true that in words this case is not one of those enumerated in the 19th section; yet the only reasonable doubt seems to be, whether the words "last-mentioned person" are sufficient to authorize that person himself to apply to the Court, he being spoken of as a party upon whose consent the order may be made. If the construction put upon the clause by the Vice Chancellor be that which is to prevail, the present case will be one in which the petitioner is without a remedy. If the money were paid off, the order could be made for vesting the estate as on a re-conveyance. What possible difference can it make that as the money is not to be paid off, but only a transfer to be effected, an order should be made having the effect of a conveyance of the estate?

LORD JUSTICE KNIGHT BRUCE.—The word used in this section is "re-conveyance;" to meet such a case it should have

(1) 9 Hare, 116; n.c. 20 Law J. Rep. (n.s.) Chanc. 336.

been "conveyance." The question before us is, whether the former has so strict and inflexible a meaning as to prevent us from acting upon the spirit. Can we not, acting on the spirit of the statute in question, hold that a conveyance from the heir of the mortgagee to the executor or administrator of the mortgagee of the mortgaged premises, may fall within the meaning of the term "re-conveyance"? I think we can. I think to hold the contrary would be to act on the words and contrary to the spirit of this statute. I cannot attribute to the legislature an intention to leave a person in such a situation as the petitioner would be left in, by a literal construction of the clause. I think that there ought to be, and is, a jurisdiction, not exceeding a proper judicial jurisdiction, of putting a liberal construction upon a statute involving such a question as this.

LORD JUSTICE LORD CRANWORTH.—I can see upon the face of this clause a ground for holding that the legislature did not mean to confine our jurisdiction to a mere case of a simple "re-conveyance." The section in question provides that in the cases enumerated the Court may make an order "vesting the lands in such person or persons, in such manner and for such estate as the Court shall direct." But this is not all, for it further goes on to enact "that such order shall have the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands, in the same manner and for the same estate;" thus providing for the case of a conveyance generally, and not confining it to the simple case of a re-conveyance. I think we may properly direct a reference to the Master, but all the words of the section should be inserted in the reference, so that the title may not hereafter be endangered.

Their Lordships ultimately directed the reference in the following form:

Refer it to the Master to inquire and state to the Court whether William Boden, deceased, in the petition named, was under any and what deed mortgagee in fee of the hereditaments in the petition mentioned; and whether he was ever and when in possession or in receipt of the rents and profits of the said mortgaged estate; and whether

he died seised in fee of the said estate, and whether he died intestate as to the said estate, and whether he left any and what person his heir-at-law; and whether the legal estate in the said mortgaged premises is now vested in any and what person as the heir-at-law of the said William Boden, or in whom such legal estate is now vested; and whether the heir-at-law or the person in whom such legal estate is now vested is out of the jurisdiction of the Court; and whether the heir-at-law or such person as aforesaid was ever in possession or in receipt of the rents and profits of the said estate; and whether such heir-at-law or such person as aforesaid is living or dead, or whether it is uncertain whether he is living or dead, or whether he can be found.

TURNER, V.C. }

1851.

Dec. 18.

1852.

Jan. 13.

OSBORN v. MORGAN.

Baron and Feme—Feme Covert—Equity to Settlement—Reversionary Chose in Action.

A wife's equity to a settlement does not depend upon her right of property, but only attaches to and arises upon her husband's legal right to the present possession of the property. Therefore a settlement cannot be claimed in respect of a reversionary interest in property so long as such interest continues reversionary.

This was a suit on behalf of the wife and children of a bankrupt, for a settlement out of certain property bequeathed to the wife, partly in possession and partly in reversion. The bill was filed against the trustees of the testator's will, under which the property was derived, and the bankrupt, and his assignees in bankruptcy; and stated to the effect that Julian Dibben, by his will, gave an annuity of 50*l.* a-year to George Partington for life, and also a life interest in certain other property, which, after his death, the testator directed to be sold and one-fourth of the proceeds paid absolutely to the plaintiff, Mrs. Osborn, then Miss Ann Dibben; and the testator gave all the residue of his property equally

to Mrs. Osborn and three other persons. George Partington was still living, and a sum of 1616*l.* had been invested and set apart by the executors and trustees to secure his annuity. There was not any settlement on the marriage of Mrs. Osborn. The bill prayed a settlement out of all the property bequeathed to Mrs. Osborn.

Mr. Rolé and *Mr. Rodwell* appeared for the plaintiffs.

Mr. Bacon and *Mr. Faber*, for the bankruptcy assignees of Mr. Osborn.

Mr. Prior, for the executors and trustees of Mr. Dibben's will; and

Mr. Nalder for Mr. Osborn.

Jan. 13.—TURNER, V.C.—The question which stood over for judgment in this case was, whether a married woman could compel assignees or trustees to make a settlement upon her out of her reversionary *chose in action* to which she is entitled in equity. It was admitted in argument that no reported case could be found in which such settlement has been decreed; and I am of opinion that such settlement cannot be compelled. The absence of authority would alone have been sufficient to determine the question; but in my opinion it is clear, on principle as well as on authority, that such settlement cannot be compelled. Marriage is a gift by the wife to the husband of all her personal property to which she is entitled in possession, and of all to which she may become entitled at any time during the coverture, subject only to the condition of his reducing it into possession during the coverture.

I am not aware of any difference in this respect, whether the property be of a legal or an equitable nature. In principle there cannot be any such distinction; the rule resting upon this, that the husband and wife are considered as one person in law,—a rule which prevails as much in equity as at law. The wife's equity to a settlement does not depend upon any right of property in the wife. This is more clear when we consider to what limitations it is subject. In the first place, the amount and proportion which shall be included in the settlement is always in the discretion of the Court; and in the next place, the wife cannot claim this equity for herself alone,

but must claim it for herself and her children; two circumstances which are quite incompatible with the notion that this equity is based on any right or supposed right of property in the wife.

The right, therefore, being independent of the property, there seems to be no question that there is not any other ground on which it can rest but the controul which Courts of equity exercise over property falling within their dominion. It is, in truth, the mere creation of Courts of equity, one of the rules of which is, that he who comes into equity must do equity, a rule which was subsequently extended to suits to which husbands and their wives were parties, in matters of trust, and matters in which there was a necessity to administer the trusts.

We must also consider when this obligation of doing equity is enforced by the Court. It is not upon the bill being filed; for it may afterwards be dismissed. It is not upon the decree being made when the plaintiff's interest is in reversion; for then the Court is only dealing with interests in possession. But it is when the property comes to be distributed, and it is then, and not until then, that the right to a settlement attaches. This right is an obligation which the Court fastens, not on the property, but on the right to receive it.

Again, it is clear from this consideration of the subject that if the right attaches, it must attach with all its incidents. One of the incidents is, that the wife may waive it by consent in court; but her consent, it is now settled, cannot be taken to part with her reversionary interest. Upon the whole, therefore, my opinion is, that this plaintiff's claim to a settlement out of a reversionary interest, whilst it continues reversionary, cannot be supported.

But, if authority were required to confirm the view I have taken, I may mention that in *Woollands v. Crowcher* (1) Sir William Grant (speaking of the common case for taking the consent of a married woman) says, "The ordinary occasion for that is, where the husband applies to have paid to him money that belongs presently and immediately to his wife; her equity is, not to prevent his receipt of

(1) 12 Ves. 174, 177.

it (for it belongs to him), but to have a settlement; and the Court requires her consent to the payment to him without a settlement." And in *Pickard v. Roberts* (2), Sir John Leach says, "My opinion is, that a wife by her consent in a court of equity can only depart with that interest which is the creature of a court of equity, the right which she has in a court of equity to claim a provision by way of settlement on herself and children out of that property which the husband at law would take in possession in her right. Her equity arises upon his legal right to present possession. This principle has no application to a remainder or reversion; when the remainder or reversion falls into possession, then the equity arises." I think, therefore, that I cannot accede to so much of the prayer of the bill as prays a declaration of the wife's right to have a settlement of the reversionary interests. As to the rest, there will be a reference in the usual way.

Decree accordingly.

KINDERSLEY,
V.C.
Jan. 15. }

HAMBROOK v. SMITH.

Discovery—Form of Exceptions—Interrogatory—Forfeiture.

The bill alleged that an estate was devised under a power to the defendant for life or until he should alienate by forfeiture or otherwise; that the execution of the power was invalid, and that the plaintiff was entitled to the estate in default of appointment. One of the interrogatories to the bill was, whether the defendant had not in his possession the title deeds of the estate, and if not in whose possession were they? The bill also asked that the defendant might set forth a schedule to the deeds in his possession, and that he might state in whose possession those deeds were which he had parted with. The defendant admitted that some of the deeds were in his possession, and set forth a schedule of them, and he stated that he had had other deeds, but refused to answer in whose possession they now were, as it might subject

him to a forfeiture of the estate. Held, that an exception which comprised the answer to the whole of the interrogatory was good, although part of it had been answered.

Held, also, that as in one event the documents might assist the plaintiff at the hearing he was entitled to production.

Held, further, that the estate having been given to the defendant until alienation, he could not protect himself from discovery on the ground of forfeiture.

This case came on upon exceptions to an answer relating to the possession of documents.

The bill alleged that the defendant, Samuel Smith, by a voluntary settlement, dated in November 1832, conveyed certain real estates to trustees upon trust for the benefit of his wife Elizabeth Smith, for her separate use for life, and after her decease to such uses as she should by will appoint, and, in default of appointment, in trust for Mary Hambrook, who was the mother of the plaintiff, her heirs and assigns for ever; that Elizabeth Smith, by her will, dated in 1848, and purporting to be made in execution of the power contained in the settlement of 1832, appointed the said real estate comprised in the settlement to the use of her husband for life, or until he should be found or declared a bankrupt, or should take the benefit of the Insolvent Act, or until he should convey, assign, or encumber his said life estate by way of anticipation, and after the decease of the said Samuel Smith, or other sooner determination of his estate, then to other persons named in the will; that Elizabeth Smith died in the year 1848. The defendant Samuel Smith had obtained a re-conveyance of the legal estate from the trustees to himself in fee; and that upon the death of his wife the said Samuel Smith obtained possession of the settlement of 1832 and the other title deeds to the said premises which he still retained in his possession. The bill stated that Mary Hambrook died in the year 1846, leaving the plaintiff Samuel Smith Hambrook her heir, and it alleged that the will of Elizabeth Smith was invalid by reason of her having been in an unsound state of mind at the period of its execution, and because it was not duly executed and attested as

by law required, and that the plaintiff as the heir of Mary Hambrook was therefore entitled to the said estate under the voluntary settlement of 1832.

The bill prayed that the estate might be conveyed to the plaintiff and that the deeds and muniments of title relating thereto might be delivered up into his possession.

One of the interrogatories to the bill was in the following terms:—"Whether the said Samuel Smith did not at the time of the death of his said wife, or at some other time, and when, obtain possession of the said indenture of settlement of November 1832, and the other title deeds hereinbefore in that behalf mentioned, or of some, and which of the same respectively, and whether he does not now retain such possession either by himself or by his solicitors or agents, or some or one of them, or otherwise, or in whose possession are the same now and in what right."

Another interrogatory was to the following effect:—"That the said Samuel Smith may set forth a list and schedule of the title deeds and muniments of title relating to the hereditaments the subject of the said settlement of 1832, and if he shall allege himself to have parted with the possession of the same or any of them, then that he may state what hath become of such of the same, the possession of which he shall have parted with, and in whose possession, custody, or power the same now are and under what title respectively."

The defendant, by his answer, admitted that he had obtained possession of the indenture of November 1832, shortly after the death of his wife, and he set forth a schedule of the deeds in his possession, and stated, that at one time he had in his possession other title deeds and muniments of title relating to the said hereditaments, but that he had parted with them before the institution of this suit. The defendant submitted that he ought not to be compelled to state what had become of the same or in whose possession they now were, inasmuch as he had been advised that having regard to the trusts in his favour contained in the will of Elizabeth Smith, such discovery would or might subject him to forfeiture and loss of his interest in the said hereditaments.

Two exceptions were taken by the

plaintiff to the answer of the defendant; the first exception was, that the defendant Samuel Smith had not answered the following interrogatory—"whether the said Samuel Smith did not at the time of the death of his wife, or at some other time and when, obtain possession of the said indenture of settlement of November 1832 and the other title deeds hereinbefore in that behalf mentioned, or of some and which of the same respectively, and whether he does not now retain such possession either by himself or by his solicitors or agents, or some or one of them or otherwise, or in whose possession are the same now and in what right." The second exception was, "that the said Samuel Smith had not set forth a list and schedule of the title deeds and muniments of title relating to the hereditaments the subject of the said settlement of November 1832, and though the defendant alleges himself to have parted with the possession of the same or some of them, he hath not stated what hath become of such of the same, the possession of which he shall have parted with, and in whose possession, custody or power the same now are, and under what title respectively."

Mr. Goodeve, in support of the exceptions, contended that the defendant ought to have stated in whose possession the documents were, and that the interrogatories were not fully answered. The defendant admitted that he had obtained possession of the deeds, and he could not protect himself by setting up a forfeiture under the will, since the plaintiff claimed independently of the will.

Mr. Chandless and *Mr. Surragé* contended that the exceptions were bad in form, on the ground that they embraced more than one interrogatory, and that as each of the exceptions extended to two interrogatories, one of which had been fully answered, they could not be sustained; that if the plaintiff obtained the discovery sought, it would not assist him in obtaining a decree at the hearing, and if the defendant were to give the discovery it might render him liable to a forfeiture of his estate, because the deeds might tend to shew that he had done an act upon the doing of which his estate was to terminate.

Mr. Goodeve, in reply.

The following cases were cited as to the form of the exceptions:—

Ovey v. Leighton, 2 Sim. & S. 234.

Duncombe v. Davis, 1 Hare, 184; s. c. 11 Law J. Rep. (N.S.) Chanc. 17.

And as to the right of the defendant to protect himself from a discovery—

Wrottesley v. Bendish, 3 P. Wms. 235.

Lucas v. Evans, 3 Atk. 260.

Adams v. Fisher, 3 Myl. & Cr. 526; s. c. 7 Law J. Rep. (N.S.) Chanc. 289.

The Attorney General v. Thompson, 8 Hare, 106.

The Attorney General v. Strutt, 3 Beav. 396; s. c. 10 Law J. Rep. (N.S.) Chanc. 24.

The Marquis of Bute v. the Glamorgan-shire Canal Company, 1 Ph. 681; s. c. 15 Law J. Rep. (N.S.) Chanc. 60.

Glover v. Hall, 2 Phill. 484; s. c. 17 Law J. Rep. (N.S.) Chanc. 249.

Stainton v. Chadwick, 15 Jur. 1139.

Monnins v. Monnins, 2 Chanc. Rep. 68.

Chauncey v. Tahourden, 2 Atk. 392.

KINDERSLEY, V.C.—The first question raised upon these exceptions is, whether they are good in form. It is contended, on the part of the defendant, that they are bad in form in this respect:—that such exceptions embrace more than one interrogatory, and inasmuch as one of the interrogatories embraced in the exception has been sufficiently answered, even if the other has not been sufficiently answered, the exceptions ought to be altogether overruled. Now, as to the effect of such exception embracing more than one interrogatory. The first exception is—[His Honour here read the exception as given above]. Now, it is said, that embraces two interrogatories: one is, whether he did not at the time of the death of his wife obtain possession of the deeds; and the other is, in whose possession are they? In one sense these are two questions, but they are properly embraced in one interrogatory, because it is all one interrogatory, whether the documents did not come into his pos-

session at the death of his wife, and if they are not in his possession, in whose possession are they? It appears to me that there is no impropriety in embracing the whole of that in one interrogatory, and no impropriety in embracing it in one exception, though a portion has been answered. The same observation applies to the second exception, and therefore there is no valid objection in form.

The next question is this: the defendant insists that having the discovery sought here would not in any way assist the plaintiff in obtaining a decree when the cause comes on for hearing, and for that reason besides the other, the plaintiff ought not to be allowed to compel the defendant to answer. Now, the question has been argued as if the discovery sought was what the deeds were. But the discovery is not what the deeds were, nor the setting out a schedule, because the defendant has set out a schedule; but the discovery sought is, in whose possession are these documents now, and in what title? It is said, and said very truly, that inasmuch as the defendant is entitled to this property if the will of his wife is a valid will, therefore if the question be decided against the plaintiff he will have no relief whatever at the hearing. But I need not say whether that question will be determined at the hearing in favour of the plaintiff or not. But suppose it should be determined in favour of the plaintiff, that the will is invalid, then is there not relief asked, to which the discovery here sought is, or may be, material? The plaintiff asks that the estate may be given up to him, and that the deeds may be delivered to him. In order to found a claim to that relief the facts stated are these: that the defendant made a voluntary settlement of certain real estate, by which he conveyed that real estate to a trustee named Davies in trust for the separate use of the settlor's wife for life, with a power of appointment by will, and in default of appointment to the mother of the plaintiff in fee. The plaintiff is her son and heir, and therefore entitled to such estate as she, if living, would have been entitled to. It appears that the wife of the defendant, purporting to exercise the power of appointing the property by will under the

settlement, made a will by which she appointed the estate to the defendant Smith during his life, or until he should alien the estate by bankruptcy, or otherwise, and on the determination of that estate, to the other defendants, the brothers and sisters of the plaintiff. And it appears that on the death of the defendant's wife he, by virtue of that testamentary appointment, entered into possession, and he procured Davies, the trustee, to deliver up the deeds to him. Now, when the cause comes on to be heard, the Court will first have to determine the question as to the validity of the appointment. If it determines that it is valid the plaintiff's bill must be dismissed, but if the will is held to be invalid what will the Court have to determine? Why the Court must then decree a conveyance of the estate and delivery of the deeds of the estate to the plaintiff. Now, upon the exceptions, it is no protection against answering to say, that in one event of the decision of the Court you will be entitled to no discovery at all. If a discovery may be useful for obtaining any relief which the plaintiff may obtain, I apprehend in that case the plaintiff is entitled to a discovery, and here it may be most material to the plaintiff to have a discovery of the hands in which the deeds now are. It may be material even before the cause comes to a hearing, because it may be necessary to make the person in whose hands are the deeds a party, in order to get a decree for that party to give up the deeds; and if it were not for the question that arises as to forfeiture, I should have considered it a clear case, and that the defendant was bound to answer in whose custody the deeds now are. These deeds are, in fact, the foundation of the title of both parties, and I apprehend there would be no doubt, subject to the question of forfeiture, but that the defendant would be bound to set out all the deeds remaining in his possession, and that the plaintiff would be entitled to production. The defendant, indeed, has set out a schedule of the deeds now in his possession, and if he, having got the deeds, has parted with them to a third party, then is he not compelled to state to whom he has parted with such deeds? All the cases cited by the defendant are cases on motion for production,

except the case of *Stainton v. Chadwick*. Now, the principle on which the Court proceeds as to production is this. If the plaintiff's title is positively disputed by the defendant, and the documents in question could not in any way assist the plaintiff in any relief he is to ask for at the hearing, the Court may not only not compel production, but may not compel a schedule of them. But if the documents may assist the plaintiff in obtaining any portion of the relief which in any one event he may become entitled to, then the party is entitled to discovery by having the deeds set out, and also to production, subject only to this, that if the Court sees upon motion for production that there is a point to be determined upon which the title of the plaintiff depends, and which the documents will not help, then the Court may say, in this stage of the cause the Court will not compel production. Now, as to that case cited from the *Jurist*, I conceive that the dictum of the Lord Chancellor must have reference to documents which would be necessary in case the plaintiff obtains a decree, in order that upon some consequential proceeding he may work out the relief he asks. I am of opinion that really if there were not this question arising as to forfeiture or loss which the defendant may sustain in giving the discovery, there would not be a reasonable doubt as to the right of the plaintiff to have production, and that brings me to the question as to the forfeiture.

Now, that stands thus. The defendant says, this will of the wife, which he has a right to assume for this purpose will be, or at least may be, a valid testamentary appointment, has made the defendant's life estate dependent upon his not alienating, that is to say, has made his estate cease upon alienation, and go over to other persons; and he says, "if I disclose to the plaintiff the hands in which I have placed these deeds I shall forfeit this estate, because it may shew or tend to shew that I have done an act, on the doing of which my estate was to determine." Now the case of *Monnins v. Monnins*, no doubt, seems to have decided this, that where an estate is given to a woman *durante viduitate*, and where it was only to endure so long as she remained a widow,

she might protect herself from answering as to the fact of whether she had contracted a new marriage. On the other hand, there are other cases referred to, the case before Lord Talbot, cited in *Chauncey v. Tahourden*, and other cases, which go to shew distinctly this:—that the Court draws a distinction between the two classes of cases: the one where a certain estate is given to an individual, but with a condition annexed, that upon the happening of a certain event there shall be a forfeiture of the estate so given; the other, where an estate is so limited as only to endure till a certain event occurs, and then to go over. No doubt, in many cases that is so, and the distinction is fine, but well established, not only as to discovery, but as to many other questions. The latter is called a conditional limitation. I doubt the correctness of that term; but I understand it to mean that the estate is limited to endure till a certain event happens, and then to go over: that appears to me to be the meaning of the term. Now, in this case, according to the terms of the will of Mrs. Smith, the estate is given to him not absolutely for life, but to endure only until the happening of the event of alienation, and then given over to other persons. Now, it would be very difficult in a court of equity to maintain the proposition that a man has a right to say, "Although I am in possession of an estate which was only to endure till the happening of a certain event, and then to go over, I can in equity and moral justice refuse to disclose whether that event has happened, upon the happening of which my estate is to determine." If there had been no decision upon the point I should not have been satisfied that he could have protected himself from giving such discovery when the refusal in effect is saying this, "Although my estate has determined in consequence of the act, I have a right to refuse the disclosure whether my estate has determined." I should find it extremely difficult to hold this; but I think the decisions clearly establish that this is not a case of forfeiture to which the rule applies. Now the cases which have been cited, except that of *Monnins v. Monnins*, which appears to be overruled by subsequent cases, seem to have determined that there is a distinction between

cases of estates to endure for life, but to go over in case of a particular act being done, and cases of estates to endure until the happening of a certain event. I am clearly of opinion, therefore, that the objection to the discovery on the ground that it might subject the defendant to what he calls forfeiture, but which is only the discovery of the happening of the event on which the estate, would determine, is not tenable. I must consequently allow the exceptions.

M.R. }
Jan. 28, 29; } EDWARDS v. EDWARDS.
Feb. 5. }

Will — Construction — Vested Interest — Divesting.

A testator at his decease left a widow and three children, all of whom attained twenty-one and survived the wife. By his will he gave real and personal estate to trustees "to transfer to each of his children their share after the death of his wife, or as soon as they arrived to twenty-one years, but if one of the three children should die leaving no children, his or her share should be equally divided between the other two, and their heirs for ever." One of the testator's children married, and died, leaving no children, but leaving his wife surviving:—Held, that he took a vested interest in his share of the testator's property not liable to be defeated upon his afterwards dying without leaving a child surviving.

This was a special case under the 13 & 14 Vict. c. 35.

William Edwards, by his will, dated the 10th of November 1840, gave, devised, and bequeathed all his freehold and leasehold messuages, tenements, lands and hereditaments, unto Henry Griffith and John Powell, their executors, administrators and assigns, upon trust to pay unto the testator's wife (since deceased) the rents, issues and profits to become due from his freehold and leasehold estate (subject as to part thereof to an annuity charged thereon) to be paid to his wife during her natural life so long as she should remain his widow, but if she should marry again the testator directed that an annuity should be paid to her in manner

therein mentioned. The testator then proceeded:—"I give and bequeath to my eldest son John all that my leasehold messuage or public-house called Penllergace Arms and the malt-house, and all other buildings and premises belonging to or situated in the village of Llangefelach. And also all that my freehold property called Tyrpenyrhlwl. And also that messuage or public-house called Welcome Inn, and all buildings and land belonging to it situate near Mynyddbach, in the parish of Llangefelach, for him and his heirs for ever, to possess immediately after his mother's death, or after his mother's marriage." And the testator then made similar devises and bequests of freehold and leasehold property, which he particularly described, to his daughter Mary and his son William. And the testator further continued his will:—"If my dear wife shall remain my widow, then my said trustees or the survivor of them shall assign and transfer to each of my children their shares immediately after her death, and as soon as they arrive to twenty-one years of age, and they, my three children, shall pay to their mother as above mentioned. Further, my will and meaning is, that if one of my three children shall die leaving no children born in wedlock, his or her share shall be equally divided between the other two, and for their heirs for ever, and if two of my children shall die, and leaving no children born in wedlock, their shares shall go to the surviving one, and his or her heirs for ever." And, lastly, the testator appointed Henry Griffith and Powell (since deceased), and the testator's wife Mary executors of his will.

The testator died on the 15th of July 1841, and his will was proved by H. Griffith and Mary Edwards on the 27th of April 1842. The testator also left his wife and three children surviving.

On the 3rd of October 1845 the testator's wife died, without having married again.

On the 7th of June 1848 John Edwards attained twenty-one, and married Rebecca Edwards on the 3rd of October 1848.

On the 26th of April 1850 John Edwards made his will, and gave and devised all and every his freehold and leasehold estate whatsoever and wheresoever, whether in possession or reversion, remainder or expectancy, over which he had a disposing

power unto his wife Rebecca for the term of her natural life, and from and after her decease for the benefit of her children as therein specified. But in the event (as it happened) of there being no child of the testator by his said wife living at the time of his decease, or in case his said wife should marry again, then he gave and devised all and every his freehold and leasehold estates unto and between his sister Mary Edwards, and his brother William Edwards absolutely in equal shares as tenants in common, upon condition of paying his wife an annuity as therein mentioned, and the testator appointed Henry Griffith, the defendant, his executor.

On the 5th of May 1850 John Edwards died leaving his wife surviving, but without having had any child or children.

On the 7th of June 1850 the will was proved.

Mary and William Edwards had both attained twenty-one years of age, and the legal estate in the freeholds and leaseholds was vested in H. Griffith, who was the executor under both the wills.

The questions now raised were: first, whether John Edwards took a fee in the freeholds and an absolute estate in the leaseholds, so as to be capable himself of devising and bequeathing the same; secondly, if he did not take such fee and absolute interest, whether his widow was entitled to dower out of the freeholds; thirdly, whether, in the events which had happened, the plaintiffs were entitled to an absolute conveyance and assignment to them, their heirs, executors and administrators, of the freehold and leasehold estates and premises.

Mr. Giffard, for Mary and William Edwards.—The question is, whether John Edwards had, under the will of his father, an equitable estate in fee in the freeholds, and whether it was vested or determinable by his dying without leaving any child, and whether he had an absolute estate in the leaseholds; and assuming he had a fee, it being only an equitable interest, whether his widow was entitled to dower of the freeholds under the 3 & 4 Will. 4. c. 105. ss. 2, 3. The plaintiffs contended that there was a good executory devise, and that they were entitled to the estate upon

the decease of John without children. It must be considered whether the gift over took effect on death *simpliciter*, which must happen at all events, and also whether it was connected with an event which might or might not happen, and which might happen as well before as after the death of the testator, or other event on which the gift was to vest absolutely. The language used by the testator referred not merely to death; it expressed a contingency, which death was not. The event referred to was death leaving no children. There was nothing which could affect the words or prevent them from having operation, and though the trustees were directed to transfer the shares of the children, they must be read in connexion with the ulterior parts of the gift, and were qualified by their subsequent limitation of dying, leaving no children—*Farthing v. Allen* (1), *Child v. Giblett* (2). Where, however, there were two concurrent or alternative gifts preceded by some other partial interest, whether for life or otherwise, under which the enjoyment might be postponed, the words in question had been applied to the event of the death occurring before the interest vested in possession, and the Court had considered the original legatee surviving that period as absolutely entitled—*Da Costa v. Keir* (3), *Galland v. Leonard* (4), *Home v. Pillans* (5), 2 *Jar. on Wills*, 659, 670, 687. This case, however, varied from those. The testator has expressed his meaning, and the testator's son John took no more than a life estate in the property. But, assuming that he took an equitable fee which was liable to be determined whether by express limitation or condition, then the husband could not be entitled by the curtesy; neither, as they must be considered as regulated by the same rules, could the wife be entitled to dower—*Barker v. Barker* (6), *Moody v. King* (7), 2 *Rep. Husband and Wife*, 2nd ed. Addenda, 2, 502.

(1) 2 Madd. 310.

(2) 3 Myl. & K. 71; a. c. 3 Law J. Rep. (N.S.) Chanc. 124.

(3) 3 Russ. 360; a. c. 5 Law J. Rep. Chanc. 161.

(4) 1 Swanst. 161.

(5) 2 Myl. & K. 15; a. c. 4 Law J. Rep. (N.S.) Chanc. 2.

(6) 2 Sim. 249.

(7) 2 Bing. 447.

Mr. Shebbeare, for Rebecca Edwards, the widow of John Edwards.—The words of contingency must be read as exclusively happening previous to the event upon which the gift was to take effect, since, if alternative limitations were not so restricted it would give rise to a repugnancy which would in effect reduce a prior devise in fee to a life interest—*Clayton v. Lowe* (8), *Barker v. Cocks* (9).

Mr. Giffard, in reply.—*Cripps v. Wolcott* (10), *Wordsworth v. Wood* (11).

Feb. 5.—The MASTER OF THE ROLLS.—The testator gave all his real estates to trustees, in trust for his widow for life, or during her widowhood, subject as to part to a certain annuity. His will then proceeds:—"If my dear wife shall remain my widow, then my said trustees or the survivor of them shall assign and transfer to each of my children their shares immediately after her death, and as soon as they arrive to twenty-one years of age, and they, my three children, shall pay to their mother as above mentioned. Further, my will and meaning is, that if one of my said three children shall die leaving no children born in wedlock, his or her share shall be equally divided between the other two, and for their heirs for ever, and if two of my children shall die, and leaving no children born in wedlock, their shares shall go to the surviving one and his or her heirs for ever." The testator, at his decease, left his widow and three children, two sons and a daughter, surviving him. The children all attained the age of twenty-one years, and survived the wife, after which one son died without issue; and the question is under these words, whether, on attaining his age of twenty-one years he took an absolute interest in the lands devised, or whether, on his afterwards dying without leaving a child, his share went to his sister and brother. The principles which apply to cases of this description are well established. I have not before me a full copy of the will, and the passage which is set out in the special case appears to relate to real estate only. I am of opinion, how-

(8) 5 B. & Ald. 636.

(9) 6 Beav. 82.

(10) 4 Madd. 15.

(11) 1 H.L. Cas. 129.

ever, that in the present case, and upon the words here occurring, the construction must be the same in the case of real estate as if the subject-matter were the bequest of a legacy.

There are four classes of cases in which questions of this description have arisen, to each of which it will be necessary to refer to make my decision clear and intelligible. The first case may be described as that of a single gift to A, and if he shall die, then to B. The second, as that of a gift to A, and if he shall die without leaving a child then to B. The third and fourth classes of cases are where gifts of this description to A. and B. are preceded by a life estate, or some other interest of partial duration, and may be described as a gift to one for life, and after his decease to A, and if A. shall die then to B. And fourthly, a gift to one for life, and after his decease to A, and if A. shall die without leaving a child, then to B. It is obvious that in the first class, the gift to A. takes effect, if at all, immediately on the death of the testator. The applying to the gift over must either be confined to the death of the testator or must extend to any period of time. In the first of these supposed cases, as the testator speaks of death—the most certain of all things—as a contingency, it can only be made contingent by reference to its taking place before a particular period, and as no period of time is mentioned in the will, it is necessarily presumed that the period of time, to which the testator refers, is the period of possession or payment; that is, his own death, when the legacy to A. will take effect; and the subsequent limitation is introduced to prevent a lapse of the legacy in case A. did not survive the testator. In such cases, therefore, the rule may be considered to be settled, that the bequest must be read somewhat to this effect, that is to say, a bequest to A, but if A. shall die before the bequest becomes vested in him, then to B; and the consequence is, if A. survives the testator, he takes an absolute vested interest in the legacy, and not a life interest to A. with remainder to B. This is clearly settled by the authorities referred to in *Home v. Pillans*. It can scarcely be necessary to observe, that the rule of law, which does not enable a

legatee to compel payment of his legacy for a year, does not affect the question which I am now considering, although, for the convenience of administration, the executor is not compelled to assent to the legacy before he has ascertained what the assets are, and convenience has fixed that period at twelve months, and the legatee is entitled to it immediately upon the death of the testator.

In the second of the supposed cases there is a manifest distinction. There the event spoken of on which the legacy is to go over is not a certain, but a contingent event. It is not in case of the death of A, but in case of his death without issue, or without leaving a child; and here it would be importing a meaning and adding words to the will, if it were to be construed as a condition to entitle B. to take upon the death of A. without issue, if it was to happen at some particular period. In these cases it has always been held, if at any time, whether before or after the death of the testator, A. died without leaving a child, the gift over takes effect, and the legacy vests in B; this is best established by the case of *Farthing v. Allen*. All those cases are of course liable to be varied by the force of the particular expressions which the testator may have made use of in his will, importing a different intention; but they do not affect the rule—on the contrary, they must be held tacitly to admit the application of it, inasmuch as they are treated as exceptions to an existing rule.

In the third class of cases, where a life estate is given, the rule applicable to the first class applies equally to this, but the application fixes a different period of time. In the first case the rule is, if A. dies before the period of possession or payment, that is, before the death of the testator, the legacy goes to B. In the class of cases I am now considering, the rule is, I think, the same, namely, that if A. dies before the period of possession or payment, that is, before the death of the tenant for life of the legacy, the legacy goes to B. There is the case of *Hervey v. M'Laughlin* (12), which is referred to in *Salisbury v. Petty* (13), and it may further be observed, that

(12) 1 Price, 264.

(13) 3 Hare, 86, 92.

the propriety of giving effect to the testator's will, making a contingent event by referring that event to the period when the legacy is vested in possession rather than to the death of the testator where those periods are not identical, (which they often or usually are), was the ground on which the House of Lords reversed the decision of Lord Cowper, in *Lord Bindon v. the Earl of Suffolk* (14), although the principle of that decision was to be recognized, and has always since been maintained. In the case of *Lord Bindon v. the Earl of Suffolk*, the testator gave an interest in a debt, which was to be got in, and gave no legacy in fact until the legacy was got in; and the House of Lords, though approving the principle of Lord Cowper's decision, yet held that the death before the debt was got in made the gift over take effect.

The case before me comes within the last class of cases, where a life estate is given to one of the subjects of the gift, and on the determination of that estate, the subject of it is given to A, with a direction that if he shall die leaving no child, his share shall go to the survivor. In this class of cases it is obvious that the event of death without leaving a child may be applied either to the period of distribution, or to any period of time, either before or after that period whenever it may occur; nor if it were *res integra* would it be easy, in the absence of any indication of intention to be collected from the rest of the will, to determine which of those constructions ought to prevail. I consider it, however, settled, both by principle and authority, that in the absence of any words indicating a contrary intention the rule is, that the words indicating death without leaving a child, unless the gift over is to take effect, must be considered to refer to that event occurring before the period of distribution. The principle which regulates such cases is to be found in the often expressed desire of the Court to avoid a case so inconvenient, as one which must suspend the absolute vesting of the subject of the gift during the whole life of the legatee or devisee,—a principle which seems materially to have influenced the decision in *Home v. Pillans*.

Decided authorities, however, concur with

the principle in this case, and the very point in question has arisen. It was determined in the cases of *Da Costa v. Keir* and *Galland v. Leonard*. In both these cases a previous life estate had been given, after which the legacy was given to one with a gift over, in case that person should die leaving a child, to that child, and if none, then to a third person. In both cases the Court determined that the legatee, having survived the tenant for life, was entitled to the fund absolutely. Neither does the case of *Home v. Pillans* present to my mind the difficulties which appear to have suggested themselves to Mr. Jarman in his comment upon that case. That was a case where a legacy was given to two persons, "when and if they should attain their ages of twenty-one years," and in case of the death of either of them leaving a child, then the share of the legatee so dying was to go to that child. There was no gift, therefore, unless the legatee attained twenty-one, and this period was not identical with that of the death of the testator; consequently, if the dying without leaving a child could, upon principle and authority, as I believe it to be, fairly and properly be considered to have reference to the period of distribution, where that period is not the death of the testator, then it is in accordance with the principle laid down in *Home v. Pillans*, that the dying without leaving a child had reference to that event occurring upon that period of distribution, in like manner as if that period had been appointed to take effect after a life estate or after any other partial interest. What is there observed is, that "it may be stated as a general proposition, that where the bequest over is in case of the legatee's death, and no other reference can be made, the period taken is the life of the testator; but where another can be found, that will be preferred, to avoid the supposition of the testator's having contemplated and provided against a lapse. A preceding gift for life, or other interest less than the absolute property, will furnish this reference."

For all these reasons I am of opinion that the son, who survived his mother, as tenant for life, took an absolute vested interest in the share of the testator's property not liable to be defeated upon his

(14) 1 P. Wms. 96.

afterwards dying without leaving a child surviving him.

If I am right in the view which I take of the principle of these cases, the effect, as it appears to me, is that the rule of the Court is, that the contingency, or the event which the testator speaks of as a contingency, is always referable to the period of payment or distribution, except in the single case where there is a single gift to A, and if he shall die without leaving issue, then to B, in which case it cannot be referred to any period of distribution, but must be a general contingency to go over.

KINDERSLEY, V.C. }

1851. }

Dec. 12, 13. }

1852. }

Feb. 10. }

PLOWDEN v. HYDE.

Will—Revocation—Election—Heir-at-Law.

A testator mortgaged an estate in fee; he afterwards paid off the mortgage-money, and the estate was re-conveyed to him to uses to bar dower. Shortly afterwards, in April 1811, the testator again mortgaged this estate, and the proviso upon redemption was, that the estate should be re-conveyed to the testator, his heirs, appointees or assigns, or to such other person or persons, to such uses and in such manner as he or they should direct. In the May following the testator made his will, and devised all his messuages, lands, tenements and hereditaments, and all other his real estate whatsoever, or which he had contracted to purchase, or to which he or any person in trust for him was seised or entitled for any estate of freehold and inheritance, or of freehold only, in possession, reversion, remainder or expectancy, or which he had power to dispose of by his will to a trustee to certain uses and upon certain trusts therein mentioned. In December 1813, the testator paid off the mortgage, and took a re-conveyance of the estate to the common uses to bar dower. Previously to the date of the will, the testator had contracted to purchase another estate, which was subsequently conveyed to him to uses to bar dower:—Held, that the will was revoked as to the

mortgaged estate, and the estate contracted to be purchased before the date of the will, by the re-conveyance of the mortgaged estate and the conveyance of the purchased estate to uses to bar dower.

Held, also, that the testator's heir, who claimed these estates by descent, was not put to his election.

This case came on upon a petition, in which it was stated that Henry Chicheley Plowden, having in 1809 mortgaged an estate in fee, afterwards paid off the mortgage, and by indentures of lease and release, dated the 22nd and 23rd of April 1811, the estate was re-conveyed to him to the common uses to bar dower, that is to say, to the use of such persons and for such estates as he should, by deed or will, appoint, and, in default of appointment, to the use of the testator and his assigns for his life, and, after the determination of that estate by any means in his lifetime, to the use of John Dyneley, his executors, administrators and assigns, during the testator's life, upon trust for the only benefit of the testator, to the intent that any wife of the testator might be excluded from dower; and after the determination of the estate so limited to Dyneley, to the use of the testator, his heirs and assigns. That shortly afterwards the testator borrowed 3,000*l.* of William Newton on mortgage of this estate, and, by indentures of lease and release, dated respectively the 30th of April and the 1st of May 1811, after reciting the indentures of lease and release of the 22nd and 23rd of April 1811, the testator, in consideration of the 3,000*l.* advanced by Newton, appointed and conveyed the estate to Newton in fee, subject to a proviso for redemption, by which it was declared and agreed that if the said H. C. Plowden, his heirs, appointees, executors, administrators or assigns, should pay, or cause to be paid, to the said W. Newton, his executors, administrators or assigns the sum of 3,000*l.*, with interest at the rate of 5*l.* per cent. per annum, on the 1st of November then next ensuing, then the said W. Newton, his heirs and assigns, and all persons claiming under him or them, should and would, upon the request and at the costs and charges of the said H. C. Plowden, his heirs, appointees or

assigns, re-convey and re-assure the premises unto the said H. C. Plowden, his heirs, appointees or assigns, or to such other person or persons, to such uses and in such manner as he or they should direct, free from incumbrances.

On the 15th of May 1811 the testator made his will of that date, whereby he devised to J. Dyneley, his heirs and assigns "all and every my messuages, lands, tenements and hereditaments, and all other my real estate whatsoever, or which I have contracted to purchase, situate in or near the parishes of Boldre and South Baddesley, in the county of Southampton, or elsewhere in England, of or to which I, or any person or persons in trust for me, am, is, or are seised or entitled for any estate of freehold and inheritance, or of freehold only, in possession, reversion, remainder or expectancy, or which I have power to dispose of or appoint by this my will, with their rights, members and appurtenances," upon certain trusts. His heir-at-law took certain benefits under the will.

In December 1813 the testator paid off the mortgage, and took a re-conveyance of the estate by indentures of lease and release, dated respectively the 6th and 7th of December 1813, whereby, after reciting the mortgage to Newton, with the proviso for redemption, Newton, in consideration of the 3,000*l.* then re-paid to him by the testator, conveyed the estate to the testator, his heirs and assigns, to the use of such persons and for such estates as the testator should, by deed or will, appoint; and, in default of appointment, to the use of the testator and his assigns for his life, and, after the determination of that estate by any means in his lifetime, to the use of Dyneley, his executors, administrators and assigns, during the testator's life, upon trust, for the benefit of the testator, to the intent that any wife of the testator might be excluded from dower, and, after the determination of the estate so limited to Dyneley, to the use of the testator, his heirs and assigns.

The testator died on the 12th of January 1821, without republishing his will.

With respect to the second portion of the testator's real estate now in question, the following were the facts stated: That in 1809, certain lands at South Baddesley

having been put up for sale by auction by the then owners, the testator bid for and became the purchaser of lot 1, at the price of 1,800*l.* This lot 1. comprised the freehold land now under consideration, and also certain leaseholds. No written contract for the purchase was forthcoming, nor was there any evidence of the terms of the contract, except so far as anything could be collected from the language of the conveyance.

Before any conveyance was executed to the testator, he made his will, dated the 15th of May 1811, to the effect before stated. After the date of the will, the freehold part of the lands comprised in lot 1. was conveyed to the testator by indentures of lease and release, dated respectively the 8th and 9th of November 1811, whereby, after reciting the sale by auction in 1809, and that the testator had bid 1,800*l.* for lot 1, comprising those freehold lands and certain leaseholds, and that he was allowed and declared to be the highest bidder for and purchaser of all the lands comprised in that lot, at the said price of 1,800*l.*, and reciting that it had been agreed that 400*l.* should be the apportioned part of the 1,800*l.* to be paid as the purchase and consideration money for the lands thereafter expressed to be thereby conveyed (being the freehold part of the lands); it was witnessed that, in pursuance of the said agreement, and in consideration of 400*l.* paid to the vendors by the testator, the lands in question were conveyed to the testator, to the common uses to bar dower, Dyneley being the trustee, as he was in the conveyance of the mortgaged property before mentioned.

The petition prayed that it might be declared that the deed of re-conveyance, dated the 7th of December 1813, did not as to the hereditaments comprised therein, operate as a revocation of the will of Henry C. Plowden, and that the legal estate therein descended upon the death of the testator to his heir-at-law as a trustee for the devisees of the equity of redemption, and that the hereditaments comprised in the deed of conveyance, dated the 9th of November 1811, and which the testator had contracted to purchase before the date of his will, might be declared to have been devised by the will; and that if

the Court should decide that the devise of the estates so contracted to be purchased was revoked by the conveyance, then, that it might be declared that the defendant J. C. Plowden, the son of the testator's heir, was bound to elect between the last-mentioned hereditaments, and the monies to which he would be entitled under the will by virtue of the bequest therein contained, and that if he should elect to confirm the will, then that he might be declared a trustee for the devisees under the will.

Mr. Willcock and *Mr. Jessel* appeared in support of the petition, and said there were two propositions in this case. As to the first portion of the property in respect of which the petition was presented, the testator mortgaged it, reserving the equity of redemption to himself, his appointees or assigns, or as he or they should appoint. Then, by his will, he devised all his estates to trustees on certain trusts therein specified. After this he took a re-conveyance to uses to bar dower. In 1809, the testator had contracted for the purchase of an estate, and after the execution of his will that estate was conveyed to the testator to uses to bar dower. The question as to these two estates was whether the uses to bar dower were a modification of the equitable interest under the contract so as to revoke the will. As to this latter property, it was also a question, in case it should be held that the will was revoked, whether it did not operate to put the heir to his election. It was contended that the testator at the time of making his will had, in fact, the same interest in the two estates as that which was subsequently conveyed to him. In the mortgage, the proviso for redemption was that on payment of the mortgage money, the estate should be re-conveyed to the testator, his heirs, appointees or assigns, or to such other person or persons, and to such uses, and in such manner as he or they should direct. These words were the common terms used when it was intended that an estate should be conveyed to uses to bar dower. The uses to which the testator directed the estate to be conveyed were the uses to bar dower, and consequently there was no change in the nature of the estate which the testator had, and there could be no revocation of

the will by the subsequent re-conveyance of the estate to him in this form. This view was confirmed by the fact that in the mortgage deed, there was a recital of a previous mortgage of the same estate by the testator when it was re-conveyed to him to uses to bar dower. It was, therefore, evidently the intention that the mortgagee on the second mortgage should upon payment of the money re-convey to uses to bar dower, as had been the case with respect to the first mortgage. As to the property contracted to be purchased by the testator before the date of his will, and subsequently conveyed to him, there was no evidence to shew that the testator had not contracted that the estate should be conveyed to him to uses to bar dower. But suppose the Court should consider that the will was revoked, then it was contended that the heir must be put to his election. The testator clearly intended to devise this property by his will, even if the rules of law should prevent it from passing. The heir of the testator by asserting his right to the estate was defeating the intention of the testator, and could not be allowed to take that as well as what was actually given to him by the will.

In support of the argument as to revocation, the following cases were cited—

Tickner v. Tickner, cited in *Parsons v. Freeman*, 3 Atk. 742.

Watts v. Fullarton, cited in *Doe v. Pott*, 2 Dougl. 718.

Rawlins v. Burgis, 2 Ves. & B. 382.

Ward v. Moore, 4 Mad. 368.

Brain v. Brain, 6 Ibid. 221.

Bullin v. Fletcher, 2 Myl. & Cr. 432; s. c. 6 Law J. Rep. (n.s.) Chanc. 140.

Sugden's Vendors and Purchasers, 11th edit. 198.

On the question as to election, the following cases were cited—

Theellusson v. Woodford, 13 Ves. 209.

Jarman on Wills, vol. 1, p. 135.

Goodtitle v. Otway, 2 H. Black. 516.

Churchman v. Ireland, 1 Russ. & M. 250.

Mr. J. Russell and *Mr. Lewin* opposed the petition, and cited *Innes v. Jackson* (1)

(1) 16 Ves. 356; 1 Bli. 104.

and *Anson v. Lee* (2).—It was contended that the interest which the testator had in both these estates at the time of making his will was different from that which he subsequently acquired, and, therefore, according to the acknowledged rule of law the devise in the will was revoked. As to the mortgaged property, the testator had a fee simple when he made his will, but by the re-conveyance after the date of his will he had a life estate and a remainder in fee, with an intermediate estate limited to a trustee. As regarded the purchased property the estate was purchased at an auction, and there never could have been any contract that it should be specially conveyed to him to uses to bar dower. There could be no doubt that the testator by having the estate conveyed in this manner did acquire a different species of interest from that which he had at the date of the will. It was contended that the heir ought to be put to his election if the devise was held to be revoked, but there could be no reason why that principle should be adopted. The testator had not devised the purchased estate; he had included only an estate which he had contracted to purchase at a particular place, but there was nothing to shew that he meant to include this property; at any rate he did not devise an estate which had been conveyed to him to uses to bar dower.

Mr. Malins, Mr. Erskine, and Mr. Hetherington appeared for parties in the same interest as the petitioner.

Mr. Stevens and *Mr. Wood*, for two defendants.

Mr. Willcock replied.

Judgment reserved.

Feb. 10. — *KINDERSLEY, V. C.* — Two questions are raised in this case: first, whether certain acts done by the testator in the cause, after making his will, with respect to certain real estates of which he was the owner in equity at the date of his will, and which, but for those acts, would have passed by his will, have had the effect of revoking the devise of those estates? And, secondly, if such revocation has resulted from those acts, whether the testa-

tor's heir, claiming those estates by descent, ought to be put to his election? These questions arise with respect to two different portions of the real estates of the testator, under somewhat different circumstances.

With respect to the first portion, which, for convenience, I will call the mortgaged property, the following are the facts.—[His Honour here stated the facts above set forth as to the mortgaged property, and then the facts relating to the purchased property.]

—The question as to the purchased property is, whether, by reason of the conveyance of November 1811 the will was revoked so far as it operated to devise that property. With respect to this question of revocation, as applicable both to the mortgaged and purchased property, several cases have been cited in the argument, and many others are to be found in the books. In some of those cases the testator, at the date of his will, had the legal estate in the lands, and in others he had only an equitable estate or interest. In the case now before me, the estate or interest which the testator, at the date of his will, had in each of the two portions of property in question, was an equitable estate or interest; and therefore it is to the cases comprised in the latter class that more especial reference must be had, in order to deduce the established doctrine on the subject, as applicable to the case now under consideration.

The general rule of law to be deduced from this latter class of cases may be thus stated: that if, after the date of the will, the land is so conveyed to the testator that the legal estate therein, which becomes vested in him by the conveyance, is the same, in quality, as the equitable estate which he had at the date of the will, the conveyance does not revoke the devise. And so, in the case where the testator's interest in the land at the date of the will consists in a contract which he had entered into for the purchase of the land, if the land is afterwards conveyed to him by the vendor, in accordance with the terms of the contract between them, the conveyance does not revoke the devise. But, on the other hand, if the legal estate which the testator acquires by the conveyance differs, in quality, from the equitable estate which he had at the date of the will, the conveyance revokes the devise. And so, in

the case of a contract for purchase, if the legal estate which the testator acquires by the conveyance differs from that which, by the terms of the contract, the vendor agreed to convey to him, the conveyance revokes the devise. And this revocation equally takes place, even though the testator, after the conveyance, has as absolute a power of disposing of the property as he had before. And the revocation takes place without regard to the testator's intention, and even in direct contravention of his intention. Eminent Judges have heretofore expressed, in strong terms, their disapprobation of the principle of this rule of revocation, and their regret that it should have been established, or, at least, that it should have been carried so far as it has been carried; but they have felt themselves constrained to follow it. While I fully participate in that disapprobation and that regret, I am equally obliged to recognize it as the long-established rule of the Courts, and, if the occasion requires, to act upon it.

Now, with respect to the mortgaged property, if we are to inquire what estate the testator had in the equity of redemption at the date of his will, I think it would be very difficult to say that he had any other than an estate in fee simple. And, if I were compelled to confine myself to this view of the matter, it would follow that a subsequent conveyance of the legal estate to the testator, in any other form than in fee, would be a revocation of the devise. But the devisee has a right to refer to the particular terms of the proviso for redemption in the mortgage deed, as shewing an agreement between the mortgagor and the mortgagee that, upon re-payment of the mortgage money, the premises should be re-conveyed, not simply to the mortgagor in fee, but in some other special form; and if the legal estate was, in fact, re-conveyed in the form in which, by the terms of the proviso, it was agreed to be re-conveyed, the re-conveyance does not operate as a revocation of the devise. What, then, are the terms of the proviso for redemption as to the re-conveyance of the premises on payment of the mortgage money? They are to be re-conveyed unto the said H. C. Plowden, his heirs, appointees or assigns, or to such other person or persons, to such

uses and in such manner as he or they shall direct. A question here arises, whether the words "unto the said H. C. Plowden, his heirs, appointees, or assigns," are to be construed as designating the person or persons to whom the premises were to be re-conveyed, or the form in which the re-conveyance was to be made. The language of the proviso throughout seems to favour two constructions, for it imports that the appointees of Plowden (as well as Plowden himself, or his heirs or assigns) may pay off the mortgage debt, that the re-conveyance is to be made upon the request and at the costs and charges of Plowden, or of his heirs or of his appointees or assigns, and that not only Plowden himself, or his heirs or assigns, but his appointees also, should have the right to direct to what persons, and to what uses, and in what manner the estate should be re-conveyed. The word "appointees," which is used several times in the proviso, seems in every instance to be used to designate some person or persons to whom Plowden might appoint the estate previously to its being re-conveyed. If this is the construction which ought to be put upon the words "unto the said H. C. Plowden, his heirs, appointees or assigns," that is, if the parties agreed by this proviso that the premises were to be re-conveyed to Plowden or to his heirs, or to his assigns, or to his appointees in the alternative, that could only mean to one or other of those persons in fee, and then it is clear upon the authorities that the re-conveyance which was made to Plowden, not in fee, but to the common uses to bar dower, would be a revocation of the devise. And the addition of the words "or to such person or persons, &c. as he or they may direct," would not have any effect to prevent the revocation. But let us now take the other supposition, and assume that the words "unto the said H. C. Plowden, his heirs, appointees or assigns," are to be construed as designating the form in which the premises were to be re-conveyed to Plowden, which is the view most favourable to the devise; upon that assumption I think that the word "appointees" would be sufficient to justify the introduction into the re-conveyance of a power of appointment, and that if the re-conveyance had been made to the

use of such persons and for such estates as Plowden should by deed or will appoint, and in default of appointment to the use of Plowden, his heirs and assigns, such re-conveyance would have been in conformity with the proviso, and would not have worked a revocation. If so, the question is reduced to this: do the other words "unto the said H. C. Plowden, his heirs or assigns" justify the re-conveyance to the use of Plowden for life, and after the determination of that estate by any means in his lifetime to the use of a trustee during his life, with remainder to the use of Plowden in fee; or (to put the same question in another form) if by the proviso for redemption it had merely been agreed that on repayment of the money the estate should be re-conveyed to Plowden, his heirs or assigns, and the re-conveyance had been made to the use of Plowden for his life, and then to the use of a trustee during his life, and then to Plowden, his heirs and assigns; would this have been a re-conveyance in conformity to the terms of the proviso, so that the devise would have remained unrevoked? It appears to me that if I were so to decide, I should be acting in direct opposition to the principle of all the decided cases. An estate to a man for his life with an estate in fee simple by way of remainder, the union of the two estates being prevented by an intermediate limitation to a trustee during his life, is a very different estate from an estate in fee simple in possession. If the testator's estate previous to the conveyance had been an equitable estate in fee, his taking a re-conveyance of the legal estate for his life with a legal fee by way of remainder, the two estates being kept from uniting by the interposition of a limitation to a trustee, is not (in the language used in some of the cases) simply taking the estate home, but it is creating a new and different limitation of it. And, according to all authority, if the effect of the re-conveyance is to create a new limitation of the estate different from the equitable estate which the testator had at the date of his will, or different from that which would be created by pursuing strictly the terms of the contract for the re-conveyance, the effect is a revocation of the devise.

It has indeed been argued before me that the words "unto A. B. his heirs, ap-

pointees or assigns," constitute an apt and appropriate formula for expressing briefly all the limitations ordinarily contained in a conveyance to the common uses to bar dower, including not only the general power of appointment, but also the limitation for life to the party in whose favour the conveyance is made, and the remainder to him in fee, with the intermediate limitation to the trustee to prevent the union of the life estate and the remainder in fee. And it was contended that the formula in question is often used for that purpose, and that in the present case, because the indenture of mortgage to Newton recites the indenture of April 1811 by which the estate had been conveyed to the testator to the common uses to bar dower, that therefore in effect the proviso for redemption ought to be read as if it had stipulated that on payment of the mortgage money the premises should be re-conveyed to the same uses to which they had been limited by the indenture of April 1811.

I should have been well pleased if I could have acceded to this argument, but I look in vain to the language of the proviso for redemption for finding any reference to the indenture of April 1811; in fact, it does not contain the slightest trace of any such reference. If it had been intended that upon the repayment of the mortgage money the premises should be re-conveyed to the same uses to which they had stood limited by the indenture of April 1811, it would have been easy to have so worded the proviso for redemption as to have expressed that intention. The recital of that indenture in the mortgage deed cannot in my opinion be considered as introduced for the purpose of shewing that the parties intended the re-conveyance to be made to the same uses as were expressed in that indenture; in fact, such recital was introduced for another purpose, viz. that as the conveyance to the mortgagee must be by an exercise of the power of appointment as well as by lease and release, it was necessary to recite the indenture creating the power, and that recital would have been equally introduced whatever might have been the intention of the parties as to the form of reconveyance when the mortgage debt should be paid off. And with regard to the sug-

gestion that the words "unto A. B. his heirs, appointees or assigns" are often used as a formula for expressing all the limitations ordinarily contained in a conveyance to the common uses to bar dower, I answer that they are so used only in loose parlance, and not in the formal and appropriate language of a deed, and that such use of them is inapt and inaccurate. For granting that those words sufficiently indicate a power of appointment, and that they would constitute an apt and appropriate formula for expressing a limitation to the use of such persons, and for such estates as A. shall appoint, and in default of appointment to the use of A. in fee, how do they indicate the dividing and parcelling out of the fee into a life estate, and a remainder in fee, with an intermediate limitation to the use of a trustee during the life of the tenant for life? I cannot decide that a contract to convey to A, his heirs, appointees and assigns, does import that the conveyance is to be made in the special form of limitations to the use of such persons, and for such estates as A. shall appoint, and in default of appointment to the use of A. for life, and after the determination of that estate in his lifetime, to the use of a trustee during his life, and after the determination of the estate so limited to the trustee, to the use of A, his heirs and assigns. I may refer to the judgment of Lord Langdale in *Bullin v. Fletcher* (3) as a clear and (as I think) unimpeachable authority on this part of the case. I am, therefore, constrained to conclude with respect to the mortgage property, that by the re-conveyance from Newton to the testator of the 7th of December 1813, the devise of that property was revoked.

With respect to the purchased property, the case is even still more clear. Indeed, the only argument that could be offered as a ground for holding the conveyance from the vendors by the indenture of the 9th of November 1811 did not revoke the devise was this:—that as that indenture expressed that the conveyance was made in pursuance of the agreement for the purchase, it is to be inferred that

there was a special contract between the testator and the vendors, that the purchased lands should be conveyed to the testator, not in fee, but to the common uses to bar dower. Even if the fact were, as assumed by this argument, that the conveyance was expressed to be made in pursuance, I could not have concurred in the conclusion. The purchaser of a fee simple estate has a right to have the estate conveyed to any uses or in any manner he may please to direct: and to whatever uses or in whatever manner the estate may be conveyed by the purchaser's direction, the conveyance might with equal propriety be expressed to be made in pursuance of the agreement for the purchase, although there was no special proviso in the contract as to the particular uses to which the estate was to be conveyed by the vendors. But further, the very foundation of the argument fails, for upon examination of the language of the indenture of the 9th of November 1811, it will be found that the conveyance is not expressed to be made in pursuance of the agreement for the purchase. It will be remembered that lot 1, for which the testator had bid 1,800*l.* at the sale, comprised the freehold in question, and certain leaseholds. The indenture of the 9th of November 1811, which only conveys the freeholds, recites that Plowden was allowed and declared to be the highest bidder for, and purchaser of, the premises comprised in lot 1, at the price of 1,800*l.*, and that it had been ascertained that the hereditaments intended to be thereby conveyed which formed the freehold part of the said lot 1. were of the value of 400*l.*, and that it had been agreed that the said 400*l.* should be the apportioned part of the said sum of 1,800*l.* to be paid in respect of, and as the purchase and consideration money for, the hereditaments thereafter expressed to be thereby conveyed; and the indenture witnesseth that in pursuance of the said agreement and in consideration of 400*l.* paid to the vendors by Plowden, the vendors convey the freehold hereditaments in question to Plowden to uses to bar dower. So that the words "in pursuance of the said agreement" refer not to an agreement for the purchase of the land, for no such agreement

(3) 1 Keen, 376.

is specified, but to the agreement which is specially mentioned as to the 400*l.* being the apportioned part of the whole purchase-money which was to be paid in respect of the freeholds. With respect, then, to the purchased property, I am of opinion that by the conveyance of the 9th of November 1811 the devise of the property was revoked.

The only question which remains for consideration is this, whether the testator's heir claiming these lands by descent, and claiming also certain benefits under the will, ought to be put to his election as regards either the mortgaged or the purchased property. It is to be observed that the mortgaged property is not specially mentioned in the will, but the will does specially mention, amongst the real estates devised, the lands which the testator had contracted to purchase, situate in or near the parishes of Boldre or South Baddesley. I will assume in favour of the devise (although the fact is not clearly ascertained), that the purchased property now in controversy is part of the hereditaments thus specially mentioned and devised by the will. And in considering the proposition that the heir ought to be put to his election, I will have regard more particularly to the lands specially mentioned and devised, because if the proposition cannot be maintained as to those lands (as in my opinion it cannot) *à fortiori*, it cannot be maintained as to those lands which are not specially mentioned and devised.

The argument on the behalf of the devisee is this:—that the effect of the testator acquiring by the subsequent conveyance a different estate from that which he had at the date of his will, is not (properly speaking) a revocation but ademption, that the estate or interest which he had when he made his will, is indeed gone from him, and therefore the devise cannot operate upon it; but the words of the devise are not expunged from the will; that they are still capable of expressing and do express the testator's intention to devise the lands there specially mentioned, so that at the testator's death, when the will comes into operation, the devise of the particular lands still stands part of the will, and the testator died seised of those very lands; and al-

though by the rule of law the devise cannot actually pass the estate which the testator acquired by the subsequent conveyance, yet as the heir, by asserting his right to take the estate by descent, would defeat or disturb the express disposition of that estate by the will, he ought, according to the plain principle of election, to give up his right to take the estate by descent or abandon the benefit intended for him by the will. Now, it may be admitted that if his heir, by asserting his right to take the estate by descent, would defeat or disturb an express disposition made by the will of that estate, which he thus claims by descent, he ought to be put to his election according to the decisions in *Thellusson v. Woodford* and *Churchman v. Ireland*; and therefore the only question is, whether the testator, by his will, made an express disposition of that estate, which the heir claims by descent. What is the estate which the heir claims by descent? It is that estate in fee simple in remainder (expectant on the determination of the estate limited to the trustee during the testator's life) which became vested in the testator by the conveyance made to him after the date of his will. Has, then, the testator, by his will, made an express disposition of the estate which became vested in him by that subsequent conveyance? The devise in the will is, of "all and every my messuages, lands, tenements, and hereditaments, and all other my real estate whatsoever, or which I have contracted to purchase, situate in or near the parishes of Boldre or South Baddesley, in the said county of Southampton, or elsewhere in England, of or to which I, or any person or persons in trust for me, am, is or are seised or entitled for any estate of freehold and inheritance, or of freehold only, in possession, reversion, remainder or expectancy, or which I have power to dispose of or appoint by this my will." In this language there is nothing which points to any estate or interest which the testator might have at a future time; on the contrary, the terms of the devise refer exclusively to such estate or interest as he then had at the time when he framed the devise. He had an estate or interest to which the language was properly appli-

cable, and which, but for the subsequent conveyance, would have passed by the devise. What is there which indicates the slightest intention to devise another estate and interest which was not then vested in him, but which he might thereafter acquire? It is a rule which ought to be strictly adhered to that puts the heir to his election. The testator's intention to devise or dispose of such estate or interest as he might thereafter acquire, must be expressly and unequivocally manifested by the will; and in this will there is not the slightest trace of any such intention. To shew that the language here used by the testator must be held to refer exclusively to the estate or interest which he had at the date of his will—I may refer to the cases of *Rudstone v. Anderson* (4) and *Hone v. Medcraft* (5), and the judgment of Lord Eldon in *James v. Dean* (6). It is true these were cases of leaseholds, but that is immaterial with respect to the question whether the words of the devise are to be construed as pointing only to the testator's present estate or interest, or to such estate or interest as he might thereafter acquire. Being then of opinion that the testator has expressed his intention to devise only the estate or interest which he had in the lands at the date of his will, and not such other estate or interest as he might thereafter acquire, I am brought to the conclusion that the heir does not, by claiming these lands by descent, defeat or disturb any disposition made, or intended to be made by the will, of that estate which has descended upon him, and that, therefore, he ought not to be put to his election. In truth, the disposition which the testator had made by his will with regard to these lands, has been defeated in his lifetime by his own act in taking such a conveyance as put an end to the estate or interest which he then had, and which was alone intended to be disposed of by his will, and vested in him a new and different estate which the will does not manifest any intention to dispose of. Upon the whole of the case, I am of opinion that the devise in the testator's will, so far as relates to the lands comprised in the indentures of the

7th of December 1813 and the 9th of November 1811 respectively, was revoked by those respective conveyances, and that those lands did not pass by the will, but descended on the testator's heir-at-law, and that the heir ought not to be put to his election. I must, therefore, dismiss the petition.

LOARDS JUSTICES. } WEBB v. THE DIRECT LON-
1852. } DON AND PORTSMOUTH
Mar. 5, 6, 25. } RAILWAY COMPANY.

Railway—Landowner—Abandonment—Specific Performance.

An agreement was entered into on behalf of, and was confirmed by a railway company, in consideration of a landowner's opposition to the bill being withdrawn, to pay him 4,500l. as the purchase-money of land not exceeding eight acres to be taken by the company for the formation of their railway, and for consequential damages to the landowner's property. The railway was abandoned, and the landowner filed a claim for specific performance, and the same was decreed by the Court below; but on appeal,—Held, that the plaintiff had means of complete redress at law, and that the claim must be dismissed.

By an agreement, dated the 23rd of July 1845, signed by and made between Mr. Crowley, Mr. Baines and Mr. Laurie, three of the promoters of an act of parliament for making a railway from the Croydon and Epsom Railway, at Epsom, to the town of Portsmouth, to be called "The Direct London and Portsmouth Railway," on behalf of themselves and all other the promoters of the said act of the one part, and Mr. Philip Barker Webb of the other part, it was agreed as follows:—"First, that the company to be incorporated under the said act of parliament, when passed, shall, &c. (build a bridge and make a road, and keep the bridge in repair as specified) between points A. and B. mentioned in the plan annexed thereto. Secondly, to deviate from their proposed line as delineated in the said plan so far to the eastward thereof as to avoid a particular meadow of Mr. Webb.

(4) 2 Ves. sen. 418.

(5) 1 Bro. C.C. 261.

(6) 15 Ves. 238.

Thirdly, that if the company shall be empowered to buy a piece of land mentioned from the Dean and Chapter of Salisbury, lying between the deviated line and the meadow aforesaid, they shall convey it for a nominal consideration to Mr. Webb. Fourthly, the company shall build an archway (described), and keep the same in repair. Fifthly, that they shall allow Mr. Webb a crossing over the line on a level at a stated point, and keep gates there. Sixthly, that they shall plant evergreens at a particular spot. Seventhly, that they shall only erect invisible fences at particular places. Eighthly, that they shall not erect any station visible from the mansion house. Ninthly, they shall not deposit waste or spare earth, &c. on any of the lands of Mr. Webb, except those taken by them, without his consent in writing. Tenthly and lastly, that the said company shall pay to the said Philip Barker Webb the sum of 4,500*l.*, together with his costs, charges and expenses incurred up to the day of the date of this agreement, by reason of the intended formation of the said railway, not exceeding the sum of 150*l.*, before the company shall enter on any of the lands of the said P. B. Webb for the purpose of making the said railway; and that all timber and other trees on the lands to be taken by the said company shall be the property of the said P. B. Webb. And it is hereby declared that the said sum of 4,500*l.* is to be the purchase-money for the said lands so to be taken by the said company as aforesaid for the formation of their railway, not exceeding 8 acres, according to such deviated line as aforesaid across the property of the said P. B. Webb, described in the said plan, and for the consequential damage to such property." At the foot of the agreement, and bearing even date with it, the following memorandum was written, and it was signed by the agent of Mr. Webb :—"It is understood and agreed by and between the parties above named, that in the event of the act of parliament referred to in the foregoing agreement not being obtained, the agreement for the purchase hereinbefore contained shall be null and void.—C. J. Woods."

The act of parliament (9 & 10 Vict. c. lxxxiii.) was passed on the 26th of June

1846, and on the 5th of April 1847 a deed under the common seal of the company was executed, whereby, after reciting various matters relating to the proposed line, the opposition of Mr. Webb and his subsequent withdrawal therefrom, and the agreement of 1845, it was witnessed that in consideration of the withdrawal of the opposition of the said P. B. Webb to the said bill, the said company did ratify and confirm the agreement made on their behalf by Mr. Crowley, Mr. Baines and Mr. Laurie, and covenanted with Mr. Webb to perform, fulfil and keep all the covenants and agreements entered into by them in that instrument. And in consideration of that covenant Mr. Webb released those three gentlemen from all the covenants entered into by them in the agreement and from all liability in respect of the same, and also covenanted that he had full power to execute such release.

The company entered on the lands of Mr. Webb for the purpose of survey and taking levels, &c., and in so doing, or otherwise, felled at least one timber tree, but, as on the part of Mr. Webb was alleged, many trees. The line was ultimately abandoned, and after a negotiation which led to no practical result, the company having declined to pay the 4,500*l.*, Mr. Webb filed a claim, in which he alleged the ground of the agreement to have been his withdrawing his opposition to the bill in parliament, and which is recited in the deed of 1847, and that he had before the agreement of 1845 incurred costs by reason of the intended railway amounting to more than 150*l.*, and after offering specifically to perform the agreement of 1845 on his part, prayed the specific performance of it by the company. On the hearing, before Vice Chancellor Turner, His Honour made a decree for the plaintiff, 20 *Law J. Rep.* (n.s.) Chanc. 566, and from that decree the company now appealed.

Sir W. P. Wood and Mr. Moxon, for the plaintiff.—This agreement is a binding unconditional agreement for the taking of the land, not exceeding 8 acres, at a stated price, and the consideration for its being entered into by the company was the withdrawal of opposition, which by the legis-

lature itself is considered a proper subject of bargain—*Lands Clauses Consolidation Act*, 8 Vict. c. 18. But the company by their acts have shewn the agreement to be binding, for they have entered on the lands, which by the instrument it was stipulated they should not do until the price was paid. But there is authority to shew that they are bound to complete notwithstanding the railway has been abandoned. In *Bland v. Crowley* (1) this was expressly decided, and there the landowner obtained 8,000*l.* That case related to the same line of railway as the present. In *Shirley v. Davis* (2) a purchaser was compelled to take land by the possession of which he became a churchwarden of Greenwich when he wanted to be a freeholder of Essex, and the reason was because he should have inquired. In this case the company made their bargain, and they are bound to complete their contract. Even Mr. Webb himself cannot say the actual amount of loss, setting out of view all question of inconvenience, he has sustained by reason of his property being tied up, and for which he believed and still believes he has a right to receive the 4,500*l.* In the case of *Preston v. the Liverpool, Manchester and Newcastle-upon-Tyne Junction Railway Company* (3) the Court was of opinion that as the plaintiff had withdrawn his opposition to the bill in parliament, the company, according to the true construction of the agreement, were bound to pay the sum agreed to be paid to him, although they had not taken possession of any part of his estate. The case, it is true, as to the right of action was sent for the opinion of a court of law, but of the construction of the agreement one of your Lordships seemed to entertain no doubt. In the judgment are contained the following remarkably apposite remarks, "There was, therefore, nothing anomalous in stipulating for a fixed sum to be paid for the benefit of that assent, including also what was matter of lesser moment, namely, the price of the land through which the railway would pass, whether for that purpose more or less might be required."

Mr. Bethell, Mr. Malins and Mr. W. J. Bovill, for the company.—This agreement is

wholly conditional, and was entered into on the supposition that the railway would be made through the lands of Mr. Webb, and consequently that the 8 acres would be required. The price of 4,500*l.* was not intended as the value of the land, but, as is most expressly stated in the agreement itself, is the price for the consequential damage for severance,—a severance which has never taken place. Then the parliamentary powers conferred by the act have expired, and if the company were to buy this property they are not permitted to hold it. To compel a specific performance, even if the Court can see its way to specific performance at all, would be the greatest injustice to the company, as the question is one simply of damages, and one which, as is shewn by the case cited for the plaintiff of *Bland v. Crowley*, is most fitly and most conveniently tried at law. A decree for specific performance is in such a case contrary to the principles recognized by this Court — *Harnett v. Yeilding* (4) and *Kimberley v. Jennings* (5). Mr. Moxon was heard in reply (6).

LORD JUSTICE LORD CRANWORTH. — Since this matter was first brought before us in the former argument both my learned Brother and myself have had ample opportunity of considering it, and having formed a strong opinion upon the case, we think it is not useful to detain the parties, but to give our opinion at once. This is a claim, the object of which is to get the specific performance of a contract, or alleged contract, contained in a deed of covenant entered into by the defendants. That deed of covenant is a deed binding on the parties who entered into it, namely, the railway company, to carry into execution certain articles of

(4) 2 Sch. & Lef. 553.

(5) 6 Sim. 340; a. c. 5 Law J. Rep. (N.S.) Chanc. 115.

(6) The case for the plaintiff was heard on the 5th and 6th of March, and on the latter day Mr. Bethell addressed the Court for the company. Mr. Malins then offered that the company should pay Mr. Webb's parliamentary costs not exceeding 150*l.*, and all the costs of the suit, and also the sum of 500*l.* for compensation. This offer was refused, and on the 25th Mr. Malins and Mr. W. J. Bovill were heard for the company, and Mr. Moxon then replied.

(1) 20 Law J. Rep. (N.S.) Exch. 218.

(2) Cited in *Drewe v. Hanson*, 6 Ves. 678.

(3) 1 Sim. N.S. 586; a. c. *ante*, p. 61.

agreement, or alleged articles of agreement, entered into by three gentlemen, Crowley, Baines, and Laurie, with the plaintiff on the intended formation of the company. What the plaintiff says is, that according to the true construction of that instrument, these three gentlemen bound themselves, among other things, to pay to him the sum of 4,500*l.* by way of purchase-money for any eight acres of land of his, within certain limits, which the company should think fit to take for the purpose of making their railway; that the 4,500*l.* was to be accepted by him from the company as the purchase-money of the land, and as the consideration for the consequential damage to his property; and he contends that that instrument amounted to such a contract; that the defendants, the company, after that company came into existence pursuant to the act of parliament, entered into a deed, whereby they bound themselves to adopt that as their contract, upon the consideration that he released the contracting parties; and now he asks as against these defendants specific performance of that which he alleges to be the contract to purchase this property.

The first question,—and a very important one it is,—is whether there is any contract at all? Upon the view we take of this case, it does not become necessary for us to give any positive opinion upon that subject. In the case before me, when I was Vice Chancellor, of *Preston v. the Liverpool and Manchester Railway Company*, it appears by the note at the end of the report that I gave the parties the opportunity of trying the question, a mere legal question, at law. I do not apprehend that I had myself any sort of doubt there about the contract, and that case can afford no authority for the present; I mean that part of the present case which consists of the doubt whether the contract was entered into at all. No doubt if the Portsmouth Railway had been formed, and the land taken, there was a contract that would have bound the parties; but the railway not having been formed, the question is, whether, under the circumstances, the contract to purchase ever arose. On the part of the plaintiff, it is said the construction must be that there was a contract. On the part of the

defendants, it is said such is not the reasonable construction, for if there was no railway, there was no contract to sell or purchase at all; and although the nine clauses preceding the tenth of the agreement appear to be absolute in form, namely, that the company shall make a bridge over the railway, and do such and such other acts connected with the railway, yet that it is necessarily implied that such works were to be done if the railway was formed, and the whole was conditional on the existence and formation of the railway. I say that what is the true construction of the contract is matter at all events of a very doubtful nature. Assume, for the purpose of the argument, and for that only, that the contract is such as that contended for by the plaintiff. I will call it the agreement of the defendants, under their seal, that they would select a portion of the plaintiff's land, lying within certain limits, not to exceed eight acres, and to take it for the purpose of the railway, and to pay him 4,500*l.* as the purchase-money for what they should so take. The plaintiff seeks the specific performance of that contract. It is the plain doctrine of the Court, that it is not upon every contract that the Court will interfere to decree specific performance. It does so, to give more complete justice to a party who seeks the aid of this Court, where a contract has been entered into to purchase an estate. It may often happen that the mere legal remedy of recovering damages for the non-performance of the contract would afford very inadequate relief, and from the earliest time it has been the doctrine of this Court to interfere to make the party do that which he has engaged to do, namely, convey the land he has agreed to sell. Whether, in order to give a corresponding remedy on the other side,—or for what other reason we need not stop to inquire,—but undoubtedly the same relief is also given, unless there be some reason against it, to the vendor who seeks to have the purchase-money. But even in the case of a suit by a purchaser, if there be circumstances rendering it unjust that the Court should interfere, the Court will not interfere in his favour; and I should say much more readily will the Court listen to an objection that is made against a vendor seeking a

specific performance, because, of necessity, the vendor can get complete relief at law. Looking at that principle, let us see whether this is a case in which we ought to interfere.

I assume the instrument to amount to a contract, such as the plaintiff alleges it to have been. I think this is not only a case in which we ought not to interfere, but it is a case in which we should be exactly reversing the order of things, and making the machinery of this Court instrumental in doing injustice if we did interfere, because the only relief we could give would be to decree the payment of 4,500*l*. But here it is admitted, that what the contract amounts to is really this:—A contract to pay 4,500*l*. : to select eight acres of the plaintiff's land, and take it from him; and for such land and consequential damage to pay the 4,500*l*. Now, what the plaintiff would have to do at law, as I believe, would be to state this contract, and state the default, the breach of that contract on the part of the defendants—which will be their not having taken the eight acres of land; and not having so done, of course, consequential damage—and not having paid the 4,500*l*. The amount of damage to be calculated will, then, as I conceive, be, a calculation made on the aggregate what, taking all these circumstances into consideration, will do justice? Whereas the relief that would be afforded in this Court would be positive injustice. It would be giving to this gentleman 4,500*l*. as the purchase-money for that which they have not taken, and which, I believe (for there is reason to think that their parliamentary powers are gone) they never can now take. I do not, however, wish to commit myself on that subject. It may be that they could still take it and re-sell it. At all events, it is one of those cases in which, assuming the instrument to amount to what the plaintiff says it amounts to,—a contract to pay 4,500*l*. by way of purchase-money and compensation for damage to be done to other land,—he has the ready means of obtaining complete redress at law; and, we think, to that redress he ought to be left. Our opinion is, that this claim ought to be dismissed; but, we think, under the circumstances,

not with costs, and without prejudice to the rights of the parties in an action. I own I very much regret, and my learned Brother concurs in that, that the offer that has been made has not been acceded to.

LORD JUSTICE KNIGHT BRUCE.—Lord Cranworth has spoken for himself as well as for me. I should have thought that the very obscurity of this instrument would have been alone a bar against decreeing a specific performance; but I am far from intimating that obscurity is the only reason.

LORDS JUSTICES. } *Ex parte* DALE, in re THE
 1852. } WOLVERHAMPTON, CHES-
 Jan. 31; } TER AND BIRKENHEAD
 March 8. } RAILWAY COMPANY.

Company—Winding-up Acts, 1848 and 1849—Contributory—Provisionally-registered Association—Provisional and Managing Committee-men having accepted Shares—Order for Call for Expenses of Winding up—Objection to Master's Report.

*An association was provisionally registered, but no deed of settlement was executed, and it was ordered to be wound up. The Master, by his report, found that the only contributories were provisional and managing committee-men, who had agreed to take shares, and thereby became liable equally among them to the expenses of forming the concern and to the expenses of its being wound up; that the greater part of the expenses had been paid by means of calls and other payments: but for paying all the remaining expenses, costs of winding up, &c., which he estimated at a certain sum, money must be raised by a call of 60*l*. on each of the contributories. He accordingly made an order for a call, dated the same day as his report:—Held, that each contributory was liable to pay the call; that the principle on which the Master had proceeded was correct; that it was no objection to the call that if all the contributories paid, more than sufficient would be raised; and that it was unimportant whether the liabilities were liquidated or unliquidated.*

Held, also, that the call, being founded on a report, which the contributories had an

opportunity of questioning, but which they did not question, could not be impeached on the ground of any invalidity of the report.

The company or association under the above title was provisionally registered in 1845, but no deed of settlement was ever executed, and on the 3rd of November 1849 its affairs were ordered to be wound up. On the 30th of July 1851 Master Brougham made a report, in which he stated, "I have proceeded with the said reference, and have settled on the list of contributories the following persons as contributories, being members of the provisional and managing committees with their own consent, and having agreed to take one or more shares, upon such share or shares being allotted to them according to the provisions of the said company, and to each of whom twenty-five shares were allotted, that is to say,"—[here followed a list of forty persons, among them Mr. Dale.]—The Master then stated that on the 12th of July 1850 he made a call on these persons of 150*l.* each, which produced 858*l.* 14*s.* 9*d.*, which was expended in paying 79*l.* 16*s.*, a claim on the company; 188*l.* 14*s.* in paying Cottle's costs, as directed by the House of Lords; and 556*l.* 2*s.* 11*d.* in part payment of the expenses of winding up; leaving 84*l.* 1*s.* 10*d.* in the hands of the official manager. That from the books of the company it appeared that 11,243*l.* 2*s.* 5*d.* was incurred in debts and expenses, all of which had been discharged by contributories in unequal proportions, with the exception of 216*l.* 0*s.* 8*d.*, which still remained due. All this was founded on the books of the company and the report of the official manager. The report then proceeded, "And I find that there have been costs ordered by the Court to be paid by the official manager, and which are already taxed, amounting to the sum of 237*l.* 0*s.* 4*d.*, of which the sum of 188*l.* 14*s.* has been paid by the official manager as aforesaid, leaving 48*l.* 6*s.* 4*d.* still remaining unpaid; and that in the winding up of the affairs of the company, the official manager has, by himself and his solicitor, expended large sums of money and properly incurred costs, which, together with the costs so ordered to be paid, I estimate will amount to 1,248*l.* 6*s.* 4*d.*,

and upwards; and the said official manager has proposed to me, that for the purpose of paying outstanding liabilities, and adjusting the claims of the contributories, and for raising the sum of 1,248*l.* 6*s.* 4*d.* for the costs of the winding up, a call should be made of 60*l.* on each of the said contributories so settled on the list as aforesaid. And I am of opinion and find that the sum of 5,227*l.* 3*s.*, being that part of the expenses incurred between the 1st of November 1845, being the date of the consents to act as provisional committee-men and take one or more shares, signed by each of the said committee-men as aforesaid, and the 1st of December 1845, being the day on which the said managing committee decided on suspending all proceedings, were expenses necessarily incurred in preparing to launch the common concern in which the said several contributories had engaged; and I find that each of the said several contributories so settled on the list as aforesaid is legally liable to bear and pay his rateable proportion of the said necessary expenses of the committee in preparing to launch the common concern, and also to bear and pay his rateable proportion of the costs incurred in winding up this company, and I am of opinion it is necessary and proper to raise the said sum of 5,227*l.* 3*s.*, being the amount of the expenses incurred as aforesaid between the 1st of November and the 1st of December 1845, and also the said sum of 1,248*l.* 6*s.* 4*d.* for the said costs, by means of a call of 60*l.* upon each of the several before-mentioned contributories, each of the several contributories who has already made any payment by way of contribution to the said expenses, or otherwise, having credit given him for the amount so paid by him against such call; and I direct an order for the call of 60*l.* to issue against each of such several contributories upon whom notice of the intended call has been served, as appears by the affidavit of William Lowther, clerk to the official manager, sworn before me on the 30th of July instant."

The Master, on the same 30th of July, made a peremptory order for the call of 60*l.* on each of the contributories mentioned in the report, and peremptorily ordered each contributory to pay to the

official manager, on the 28th of August then next, "the balance, if any, which will be due to him, after debiting his account in the company's books with such call."

From this order for the call Mr. Dale appealed, asking that it might be discharged or varied, and the same was heard before Vice Chancellor Kindersley, who considered that as the report on which the call was founded was not questioned, the order for the call could not be interfered with, and therefore dismissed the appeal. This appeal was heard on the 16th of December 1851.

On the 31st of January 1852 the decision of the Vice Chancellor was appealed from, when, after some discussion in which it was said that as the report and call were made on the same day, Mr. Dale had had no opportunity to shew that the report was wrong, it was agreed that he ought to have the opportunity then of doing so by the production of further evidence to shew his non-liability, or to shew that the evidence on which the Master had acted was wrong, and thereupon their Lordships directed the motion to stand over, "with liberty for the appellant to make such application to the Master as he might be advised, with liberty to any party to apply." Mr. Dale, therefore, made an application to the Master to alter his report; but as no new evidence was produced to shew that the facts stated in the report were wrong, nor any evidence which would shew his non-liability, the Master refused to vary his report; he also refused to make any modification of the order of the call.

March 8.—*Mr. Glasse and Mr. Greene*, for the appellant.—The whole foundation of this matter is erroneous. The Master has no jurisdiction to make that which he has designated a report. He has stated his finding of certain alleged facts, and embodying them in a paper which seems to be placed with the file of proceedings, he has denominated that paper "a report." A report to whom it does not state, nor does the Master shew. If it be a report, it is a report to no one but himself. Even supposing, for the sake of argument, that this document can be termed a report, and as such acted on by the Court, still it was

made on the very day the Master made and signed his peremptory order for a call. The appellant had no means of questioning its validity, and ought not to be held bound by the order for the call, founded as it is upon such an irregular and obscure document. No evidence is adduced to shew that the amount for which the call is made is justified by the amount of the debts and costs of the company to which the contributories are liable; all that the Master has done has been to make a guess at the amount, and without giving the contributories the opportunity of shewing that his surmise is incorrect, he has made the peremptory order for the call. This is contrary to the principle of *Upfill's case* (1) and *Hunter's case* (2), both before one of your Lordships. The order for the call ought never to have been made, and therefore ought now to be discharged.

Mr. Bethell and Mr. Roxburgh, for the official manager.—As this order for the call is based upon the report of the Master, and as that report remains unquestioned, the order for the call is valid and binding on all parties. If an attachment be issued, the party against whom it is issued cannot be permitted to dispute its validity so long as he does not question the correctness of the judgment, decree, or order under which it has issued. If Mr. Dale could have shewn that there were no costs, no expenses to be provided for, whereas the report states there are, he should have done so, and in proving the report to be erroneous, the order must have actually fallen. So far from doing so, Mr. Dale never applied to the Court, as he might have done, under the 99th section of the Winding-up Act of 1848, for leave to impeach the report; nor did he even, as he might have done under the liberty afforded by this Court, on the 31st of January, make any attempt to shew that the report was erroneous. He must, therefore, be held bound by that report, and all its natural consequences will follow, if, as is the case without doubt or

(1) 1 Sim. N.S. 395; s. c. 20 Law J. Rep. (N.S.) Chanc. 480.

(2) 1 Sim. N.S. 435; s. c. 20 Law J. Rep. (N.S.) Chanc. 483.

question, on the face of that report there is sufficient to shew that he is liable. This is shewn by the statement of Mr. Dale's consent to act as a managing committee-man, and at the same time consenting to take shares. By all this so shewn he rendered himself, equally with the other contributories named in the report, liable for the debts incurred in the attempt to form this company. The amount of this liability the Master has ascertained, whether consisting of costs, or debts, or otherwise. Then, the Master having ascertained the data on which to found his report, goes on to apportion the debt among the parties liable, and he has made the call accordingly. It must be admitted that the present call of 60*l.*, added to the former call of 120*l.*, would, if all the contributories should pay up the full amount, produce a sum more than enough to meet the sums stated in the report; but the Master, acting on the authority given by the 83rd section of the act of 1848, and the 28th section of the act of 1849, has made the best calculation he could of the probabilities of payment. These sections, in effect, enabled the Master, after having ascertained the liabilities, to make such a call as should appear to him to be probably sufficient to raise the amount of them, having regard, among other things, to the circumstance, if it appeared to him probable, that some of the contributories might not be in a condition to pay. For all these reasons, the course the Master has taken appears to be correct, and the appeal ought to be refused, with costs.

Mr. Glasse, in reply.—No legal liability is shewn in the report to exist, and the legislature never meant to say that parties should be liable under an order for winding up, where there was no liability before. All that appears on the report is, that the official manager thought fit to state to the Master something as to the appellant being bound by the call. Because he did not question a report which he had never the means of seeing, or even of knowing of its existence, before the call was made, the Court will not permit it to stand in his way. At any rate, the only order which the Court will now make will be similar

to that in *Ex parte Hall, in re the North of England Joint-Stock Banking Company* (3), namely, that the motion should stand over, with liberty to the official manager to take such proceedings at law as he may be advised, and no step to be taken against Mr. Dale as a contributory in the mean time.

LORD JUSTICE LORD CRANWORTH.—We are both of opinion that the decision of the Master is perfectly right. The Master's order proceeds upon a preceding report of even date, and no doubt some anomaly and difficulty might exist in dealing with that in point of form, because what Mr. Roxburgh says is perfectly true, that if the parties object to the order, because the foundation of the order proceeded upon an error in point of fact, that is, on the supposition that the parties were liable to something for which they were not liable, that which ought to be objected to would be the foundation, and not the order; in other words the report, and not the order. The report being in this case concurrent with the order of the same date, and being, therefore, in all probability a document to which the parties affected by the order never had access, there is in point of form, or there might have been, some difficulty. But that is a difficulty which this Court would not listen to for one moment. If the party were damnified by an order, proceeding upon a report, which he had no practical opportunity of questioning, the circumstance that he made his complaint to the form of the order itself, and complained against the order instead of against the report, would be a matter which this Court certainly would not have listened to. We should have given him an opportunity of questioning the report, in some way or other, and thus of permitting the substantial merits to be decided. We did, at least we thought we had done so, by giving the party an opportunity of going before the Master to make any application he might be advised to make, and if he had any means of questioning the accuracy of that which the Master calls, and probably ac-

(3) 1 Hall & Twells, 580; s. c. 1 Mac. & G. 307; 19 Law J. Rep. (N.S.) Chanc. 69.

curately calls, his report, by shewing that it was inaccurate, no doubt he would have done so. Not having done so, I think we are bound to assume that that report is substantially correct as to the demands that are existing against this association or company, or by whatever name it is to be designated.

Taking that to be so, what the Master finds in substance is this: that the contributories of this company consist now only of forty persons; that every one of these forty persons is liable to the same amount, each having been liable, because they all on the 1st of November 1845 agreed, being members of the provisional committee, to take shares, and they so rendered themselves liable to the expenses thereafter to be incurred of forming the company. Mr. Dale was one of these parties, and has been said—but I do not go much on that—to have been a leading member of it. Expenses were incurred between that day and the 1st of December following, to the extent of 5,000*l.* and more. The Master finds all that, and, therefore, carrying into execution the principle laid down in the House of Lords, in *Upfill's case*, (followed by me, at least in this sense followed by me in *Upfill's case*, that I did not at all question what the House of Lords had done—but shewed only or attempted to shew to what extent it did apply,) the Master follows out these views, by saying, "What the House of Lords has directed, followed by what the judgment of the Vice Chancellor has directed, is this—that I am to ascertain to what extent each and every of the contributories are liable. Having done that, I am to make a call to meet that liability. I do ascertain what is the extent to which the contributories are all liable, namely, five thousand and odd pounds, in respect of liabilities incurred at a given period. They are liable to that; they are liable also to the costs of winding up the concern, which is their concern, and their concern exclusively. There is no other contributory, no other liability to be at all wound up." The Master, therefore, further says, "As a call must be made to meet this 5,000*l.*, together with the costs, I now will do with regard to the costs the best that the nature of the thing enables me to do. I cannot tell to a shilling what it will be, but I esti-

mate and make the best account I can, and having made out that account, which is made out with practical accuracy, I find that the whole amount is, the sum of 5,000*l.*, together with another sum of 1,200*l.* Therefore to that 5,000*l.* plus the 1,200*l.*, the parties are to contribute. Almost all of it has been paid, that is by means of another call, and I suppose payments before any call was made; large sums have been paid on account; but in order to equalize all this, and to do justice, I now, having made a call of 120*l.* before this time, make a call which, in my judgment and the judgment of the official manager, will meet the case with practical accuracy,—a further call of 60*l.*" I think that is all the Master can do, or ought to do. He has no possibility of arriving at a conclusion as to what absolutely to the fraction of a farthing these persons will have to pay. This section clearly shews that the act did not mean to impose a practical impossibility in point of figures. That is not what he is to do. Having ascertained all the *data* on which he is to proceed—having ascertained that the parties before him are all equally liable to these outstanding liabilities, so far as there are any outstanding, they are to equalize them among themselves so far as they are to be liquidated, and are to contribute to the costs. "I make that which, on the best estimate I can come to, will raise the sum which will be necessary." That I think is all the Master can do. He seems to me not only not to have come in conflict with my decision in *Upfill's case*, as was argued by Mr. Glasse, but to have carried into effect the principle I laid down there, and which until I am set right I believe was the correct principle: neither does he come in conflict with *Hunter's case*, which simply was this, that the Master has no right because a man is a contributory, which may mean nothing but that he is liable to 5*l.*, to say, "I now rate you with all the rest of the contributories of 5,000*l.* costs." That was the principle I laid down in *Hunter's case*, but which does not touch the present case, for here the Master proceeds upon the *data*, on which he has come to the conclusion, in respect of the liabilities to third persons—whether liquidated or unliquidated is unimportant,—

because, if liquidated, they have been liquidated in unequal proportions. He says further, "the parties liable to this are the forty;—the parties liable to the winding-up are the forty; the gross sum necessary for liquidating the two sums will be met by the call, and this call I make." I think the Master was quite right in making that call; and, therefore, the motion must be refused, with costs.

LORDS JUSTICES.

1852.

Mar. 6, 9, 15, 16.

PATERSON v. SCOTT.

Will—Construction—Payment of Debts—Primary Fund—Marshalling applicable to Legatees and Annuitants.

A testator directed his debts to be paid out of a fund after provided; he directed his real estate to be sold, and out of the produce his debts and funeral expenses to be paid, the residue to be held by the trustees upon certain trusts; he afterwards gave certain legacies and annuities; and he then bequeathed his personal estate, "after and subject to the payment of his debts, funeral expenses, legacies and annuities," to the party chiefly interested under those trusts, absolutely:—Held, that the personal estate was the primary fund for the payment of the debts.

Held, also, that the doctrine of marshalling was applicable in favour of legatees and annuitants, who were, therefore, decreed to stand in the place of the specialty and simple contract creditors as against the real estate devised in trust for sale, and payment of debts.

This was an administration suit. George Watkins, by his will, dated the 26th of December 1840, directed that all his just debts and funeral and testamentary expenses should be fully paid and satisfied by his executors, with all convenient speed, out of the fund thereafter provided for payment thereof. And he gave and devised all his freehold and leasehold messuages or tenements, lands and hereditaments at Pimlico (excepting one particular house), to certain trustees, their heirs, executors, administrators and assigns upon trust for sale; and he directed, that out of the

monies to arise by the sale, and the rents and profits until such sale, his said trustees should pay and satisfy all his just debts and funeral and testamentary expenses, and the costs, charges and expenses of such sale, and after payment thereof to lay out and invest the residue in their names upon certain trusts therein particularly mentioned, for the benefit of H. E. C. Scott and her three sisters; and the testator gave and bequeathed several annuities or yearly sums, free from taxes and clear of all other deductions whatsoever, by equal half-yearly payments, the first half-yearly payment thereof to begin and be made at the end of six calendar months after his decease unto the persons thereafter named, and amongst them, to John Jennings, his servant, one annuity of 30*l.*; which said several annuities he directed to be paid to the said several annuitants during their respective natural lives in manner aforesaid. And as to all and every his goods, chattels, credits, monies and securities for money, and all his personal estate and effects whatsoever and wheresoever, not thereinbefore by him otherwise disposed of, after and subject to the payment of his just debts and funeral and testamentary expenses, and the annuities thereinbefore bequeathed, he gave and bequeathed the same and every part thereof unto Hannah E. C. Scott absolutely. The testator appointed H. E. C. Scott and several other persons executors. Two of them only, namely, W. S. Paterson and G. W. S. Jago, proved the will. Those persons filed the bill against H. E. C. Scott and other persons interested under the will, for the administration of the estate of the testator. At the hearing upon further directions, before Vice Chancellor Shadwell, a question was argued whether the testator had not by the expressions in his will shewn an intention to charge his real estates primarily with the payment of the debts. His Honour was, however, of opinion that he had not, and therefore that, according to the ordinary rule, the personal estate would be the primary fund for the debts, and that the testator's specifically bequeathed freehold and leasehold estates were not nor was the produce thereof subject to the payment of the pecuniary legacies and annuities: and so decreed.

An appeal was presented against this decree by the annuitant of 30*l.*, John Jennings.

Mr. Rolfe, *Mr. Cole* and *Mr. Beavan*, in support of the decree, were not called upon.

Mr. Moxon and *Mr. W. Marshall*.—The effect of the decision of the Court below will be to exclude the appellant, amongst others, from any benefit under the will, as the debts, which chiefly consisted of mortgage debts to a considerable amount created by the testator himself, will exhaust the personal estate. The testator has indicated an intention sufficiently plain to make his real estate a primary fund for the payment of his debts. The fact that he directs the application of the rents and profits until a sale, in payment of debts, and then that it is only the residue after payment of debts and funeral and testamentary expenses, which is to be held upon the special trusts, indicates sufficiently clearly the object the testator had in view. The fact subsequently appearing of a gift of the personal estate subject to the payment of the debts, makes no difference, for the same thing occurred in the case of *Hancox v. Abbey* (1), where a testator devised his real estate upon trusts for sale, and a direction that a particular mortgage debt should be paid off, and another sum raised and paid to his two daughters. He then bequeathed his personal estate, subject to the payment of his debts, in a particular way. There, upon the plain intention apparent on the will, it was held that the mortgage debt was not to be paid out of the personal estate, nor the particular sum directed to be raised, but that the real estate was liable to both. Sir William Grant there observed, after admitting the general rule, that a devise to sell for payment of all debts would not exonerate the personal estate, because that shewed only an intention that all the debts should be paid, that clearly the testator died under the persuasion that he had disposed of the whole of his real estate, and the decree was to exonerate the personal estate. In the case now before the Court, the testator as evidently intended all his real estate to be sold, and only the surplus produce after payment of the debts to be held upon the trusts.

(1) 11 Ves. 179.

LORD JUSTICE LORD CRANWORTH.—Independently of many well-known older authorities, there is the case of *Collis v. Robins* (2), before my learned Brother, and in which he had occasion to consider all the authorities (though *Hancox v. Abbey* does not appear to have been cited), in which the testator had devised his real estate to trustees in trust for sale, and out of the proceeds and out of the rents until a sale (the same as in the case before the Court) to pay his debts and certain legacies, and he then gave his personal estate to his god-son, Thomas Robins. There it was held that, as between the heir-at-law and Thomas Robins the personal estate was the primary fund for payment of the debts. I quite agree in that decision. We are both of opinion that the decree of the late Vice Chancellor of England was right, and that there is nothing in this will to take the case out of the ordinary rule, by which in the absence of intention, either express or implied on the part of a testator, to exonerate his personalty, that personalty is the primary fund for the payment of the debts.

LORD JUSTICE KNIGHT BRUCE.—Has it occurred to counsel to consider that although the personalty is primarily liable to the debts, still a case of marshalling may arise as between the legatees and annuitants on the one hand, and the parties entitled to the produce of the freehold and leasehold estates on the other, to the extent of the mortgage debts upon the devised estates?

Mr. Moxon said the question had not been considered, and asked that the case might stand over in order that the authorities might be looked into.

March 15 and 16.—*Mr. Moxon*.—The general rule as to marshalling applies to this case, and the annuitants and legatees are entitled not only to stand in the place of mortgagees, but also in the place of all

(2) 1 De Gex & Sm. 131; s. c. 16 Law J. Rep. (N.S.) Chanc. 251.

the other specialty and simple contract creditors of the testator as against the real estates devised for sale and payment of the debts; and if it be so, a great injustice will be averted, for there will be sufficient for the annuitants and legatees to be paid in full, and none of the objects of the testator's bounty will be wholly disappointed. Here the creditors can resort to two funds for the payment of their debts, namely, to the money to arise from the sale of the real estate devised expressly for the payment of debts, and the general personal estate of the testator, while, on the other hand, the annuitants can only claim payment out of the latter. In *Foster v. Cook* (3) it was held that there was a charge on the land of the debts, and that the legatees must come upon the real estate so far as the personalty had been applied in payment of debts. The same was held in *Bradford v. Foley*, in a note to the same report, and in *Webster v. Alsop*, also in the same note, a testator directed all his debts to be paid out of his personal estate, and if that was deficient he charged his real estate with so much as was deficient, and then he devised his real estate to trustees, subject to annuities and other payments upon certain trusts, and gave several legacies: and it was held, that as the personal estate was deficient, the legatees were entitled to stand in the place of the creditors for so much of the personal estate as had been exhausted by them in payment of their debts. Counsel also cited:—

Haslewood v. Pope, 3 P. Wms. 822.

Arnold v. Chapman, 1 Ves. sen. 111.

Norman v. Morrell, 4 Ves. 769.

Aldrich v. Cooper, 8 Ibid. 396.

The following treatises were also referred to—*Sugden's Vendors and Purchasers*, *Ram on Assets*, *Williams on Executors* and *Jarman on Wills*.

Mr. Cole.—There is no marshalling in favour of legatees and annuitants as against real estate devised, although for the payment of debts, and the legatees cannot stand in the place of the creditors against the devisees.

Herne v. Meyrick, 1 P. Wms. 201.

(3) 3 Bro. C.C. 347.

Clifton v. Burt, Ibid. 678.

Forrester v. Lord Leigh, Ambl. 171.

Wythe v. Henniker, 2 Myl. & K. 635;

s. c. 3 Law J. Rep. (N.S.) Chanc. 24.

Headley v. Readhead, Geo. Cooper, 50.

Mirehouse v. Scaife, 2 Myl. & Cr. 695;

s. c. 7 Law J. Rep. (N.S.) Chanc. 22.

But even if this be not so, and the Court should think that there should be a marshalling as to the ordinary debts of the testator, there can be no marshalling as to the funeral and testamentary expenses.

LORD JUSTICE KNIGHT BRUCE.—Will there be enough to pay the annuities? If so, there will be no need to go into the second branch of the argument.

Mr. Cole said there would be enough.

Mr. Beavan was not heard.

Mr. Moxon was not called upon to reply.

LORD JUSTICE LORD CRANWORTH.—We are both clearly of opinion that the doctrine of marshalling is applicable to this case, and that the cases of *Foster v. Cook*, and of *Webster v. Alsop* and *Bradford v. Foley* in the note to it, are directly in point. There are, indeed, some few *dicta* to be met with which may be thought to lean the other way; and, indeed, in *Mirehouse v. Scaife* Lord Cottenham, under similar circumstances, held the doctrine of marshalling not to be applicable; but in that case the authorities do not appear to have been cited, nor the point to have been drawn to His Lordship's attention. That decision appears to have been made *per incuriam*. In the important case of *Aldrich v. Cooper* Lord Eldon expressly recognized the doctrine of marshalling in such a case as distinguished from a case where the land was devised, but not charged with debts. "The case," observed his Lordship, "is exactly the same with reference to the distinction taken, that where lands are specifically devised the legatees shall not stand in the place of the creditors against the devisees; for that is upon the supposition that there is in the will as strong an inclination of the testator in favour of a specific devisee as a pecuniary legatee; and, therefore, there shall be no marshalling. But if, though specifically devised, the land is made subject to all debts, that distinguishes

the case, for there is a double fund; and as by that denotation of intention the creditor has a double fund—the land devised and the personal estate—he shall not dis-appoint the legatee." It is true this was only a *dictum* of Lord Eldon, but it is fully borne out by the authorities, which shew that the doctrine of marshalling is applicable to this case. There must be a declaration in favour of the right of this annuitant.

LORD JUSTICE KNIGHT BRUCE.—It is true, as my Lord Cranworth has stated, that the passage he has read from *Aldrich v. Cooper* is only a *dictum* of Lord Eldon; but it is to be observed, that a *dictum* of that most distinguished Judge is almost as valuable as a decision. The authorities seem clear, and the statute 3 & 4 Will. 4. c. 104, although passed to render real estate liable for simple contract debts, seems rather to favour the doctrine of marshalling in such a case than otherwise. The order will be to declare that the pecuniary legatees and annuitants are entitled to stand in the place of the mortgagees, and specialty and simple contract creditors in respect of the produce of the freehold and leasehold estates devised in trust for sale and for payment of debts, to the extent that such creditors have exhausted or shall exhaust the general personal estate.

Mr. Cole applied for the costs, as the appellant had failed on the principal ground on which he disputed the decision of the Court below; but

Their LORDSHIPS considered that as he had succeeded on the question of marshalling, the costs ought to come out of the estate, and the deposit be returned.

L.C. }
1851. } SCOTT v. SPASHETT.
Feb. 8; }
Nov. 12. }

Baron and Feme—Wife's Equity—Assignment of Reversionary Fund—Stop-order—Petition.

*Under the will of the testator a married woman was entitled to a sum of 600*l.* and upwards, and a share in a sum set apart to*

*answer a life annuity, amounting to 346*l.* In an administration suit the 600*l.* was paid to the husband, with the consent of the wife. The husband and wife then joined in assigning their reversionary interest in the annuity fund for value, and the assignees procured a stop-order upon the fund. On the death of the annuitant, the wife petitioned for a settlement of the fund:—Held, reversing the order of the Court below, dismissing the petition, that the wife was entitled to have the whole fund settled on herself and children, the husband being insolvent and having made no settlement upon her; that the claim of the wife was properly raised by petition; and that the assignees, though no parties to the administration suit, had, by obtaining the stop-order, sufficiently brought themselves before the Court to enable it to deal with the fund upon petition.*

This was an appeal from an order of the Vice Chancellor of England, dismissing the petition of Sarah Ann Spashett, the wife of John Spashett, by her next friend, for a reference to the Master to approve of a proper settlement of property, bequeathed to her under the will of Thomas Upton.

The facts of the case are fully set out in the judgment.

Mr. Lee and *Mr. Welford*, for the appeal, cited—

Purdew v. Jackson, 1 Russ. 1.
Brett v. Greenwell, 3 You. & C. 230.
Napier v. Napier, 1 Dr. & War. 407.
Greeley v. Lavender, 19 Law J. Rep. (N.S.) Chanc. 494.

Mr. Giffard, for the respondents, the assignees of the husband and wife, contra, cited *Lady Elibank v. Montolieu* (1), and objected that the claim could not be made upon petition, as the assignees were no parties to the suit; and he cited—

Sanford v. Morrice, 11 Cl. & F. 667.
Pentland v. Quarrington, 3 Myl. & Cr. 249.
Drever v. Mawdesley, 4 Ibid. 94; s. c. 10 Law J. Rep. (N.S.) Chanc. 23, n.
Rock v. Cook, 2 Ph. 691.

Nov. 12.—THE LORD CHANCELLOR.—

(1) 5 Ves. 737.

This is an appeal by Sarah Ann Spashett, the wife of John Spashett, against an order of the late Vice Chancellor of England, dismissing a petition presented by her, for a reference to the Master, to approve of a proper settlement. Under the will of Thomas Upton, the appellant was entitled to a share in a part of his residuary estate, and by an order of the 15th of November 1829, in a suit for administering the estate of Thomas Upton, it was ordered, on the consent of the appellant, given in court, that that share amounting to 306*l.* 6*s.* 8*d.* Bank 3*l.* per cent. annuities, and 303*l.* 14*s.* 5*d.* reduced annuities, should be paid to her husband. Under the same will the appellant and her husband were each entitled to a share in a fund set apart for securing an annuity, and payable upon the termination of the annuity. By an indenture of the 25th of October 1831, which was in the lifetime of the annuitant, the appellant and her husband, in consideration of 140*l.*, assigned to William Harding their respective shares in the annuity fund. In 1833 the appellant's husband took the benefit of the Insolvent Debtors Act, and his estate became vested in Thomas Allen, as the assignee under the insolvency. The interest of William Harding and Thomas Allen afterwards became vested in the respondents, the trustees of a Reversionary Interest Society, who, in 1837, procured a stop-order on the shares of the appellant and her husband in the fund reserved for the annuity. The appellant, Mrs. Spashett, has four infant children; no settlement was ever made on her and her children. Her husband has also received in her right, under the same will, a sum equal to double the amount of that which is the subject of this petition. In Hilary term, 1850, the appellant presented a petition praying for a reference to the Master to approve of a proper settlement on herself and her children of 346*l.* 13*s.* 4*d.*, being her share of the annuity fund, and which was then distributable in consequence of the death of the annuitant. The reversionary society, the respondents, appeared and opposed the petition, and the late Vice Chancellor of England by an order, dated the 23rd of February 1850, dismissed the petition, and as I understand, on the ground that as the respondents claimed to be entitled to

the fund, the wife's right to a settlement of that fund, or any part of it, could only be set up by a bill bringing the respondents before the Court. I am of opinion that the petition ought not to have been dismissed upon this ground, but that, upon principle and authority, the petitioner was entitled to the relief she prayed by the petition. I see no reason or advantage in putting the parties to the more expensive litigation by bill. There can be no question between the parties which cannot be discussed upon the petition equally as well as in the new suit; the only effect of which would be additional delay and expense, exhausting a very small fund. The reasons for driving the parties to that, ought to be very clear and decisive to induce the Court to adopt them. In my opinion, nothing short of clear proof that justice cannot be properly administered upon the present petition, ought to induce the Court to abstain from deciding upon the right claimed by the petitioner, and no such case has been made out by the respondent. No authority which has been cited is inconsistent with the opinion which I have formed.

In *Greedy v. Lavender*, a married woman and her husband had assigned her reversionary interest in a trust fund, and the assignee deposited the deed of assignment as a security with Richard Kirkman Lane; the interest ceased to be reversionary in the lifetime of the husband and wife; the wife then presented a petition for a settlement, and Lord Langdale directed that a settlement should be made. The suit had not been instituted at all in connexion with any question relating to the wife's right as claimed by the petition, and it also appears from the report of this case on another point, in 18 *Law J. Rep.* (N.S.) Chanc. 62, that the married woman and R. K. Lane were co-defendants; and yet no objection was made by counsel for the latter, that the petitioner ought to have proceeded by bill. I have inquired of the Registrar, and I am told that it is the constant practice of the Court in such cases to proceed by petition. If the respondents had been parties to the present suit as plaintiffs, I see no reason why the question of the equity to the settlement should not have been decided on petition, and neither do I perceive any

reason why it should not now be decided on petition. In my opinion the respondents, although neither plaintiffs nor defendants, have by the obtaining a stop-order brought themselves before the Court sufficiently to enable it to deal with the case. The effect of the stop-order is, that the fund cannot be paid out without notice to them; it has not the effect of varying the mode of proceeding by the party entitled to the fund; it only entitles them to notice, so as to give them the power of opposing the payment of the money out of court; they have availed themselves of that notice, and have opposed such payment, and by so doing have brought themselves before the Court so as to enable it to decide, if there should be any just cause why the Court should not deal with the fund according to the rights of the parties; and unless they can shew that the question cannot be decided without the machinery of a distinct suit, I think it is the duty of the Court to adjudicate on the question between them and the appellant.

Upon the general question of the wife's right to a settlement out of her absolute equitable chose in action—whether against her husband or against his assignees in bankruptcy or insolvency, or against a particular assignee for valuable consideration,—I think no doubt can be entertained in the present day, and it would be a waste of time to refer to the authorities. As respects the husband himself, the wife's claim to settlement is considered as a clear equity, and as respects those claiming under him the rule applies, that the assignee must take subject to the equities of his assignor. Doubts were formerly entertained as to the equity to a settlement as against a particular assignee for valuable consideration; but it was decided by Lord Northington in the case of *The Earl of Salisbury v. Newton* (2), that a wife has an equity for a settlement even against a particular assignee for valuable consideration. In *Macaulay v. Phillips* (3) Sir R. P. Arden said, "I am clearly of opinion an assignment for valuable consideration will not bar the equity of the wife." In *Wright v. Morley* (4) Sir W. Grant, who was quite

familiar with the question, explains the reason why the wife's equity should prevail even as against a purchaser. "If the husband has but the right of reducing the wife's interest into possession, how can he for valuable consideration or otherwise convey more than he has?" "If the assignee acquires a right different from that which the husband had, the husband parts with something different from what he has." In *Elliott v. Cordell* (5) Sir John Leach said, where an absolute equitable interest is given to the wife, the Court will not part with the fund in favour of the husband without making provision for the wife, or without her express consent; and all who claim under the husband must take his interest subject to the same equity. The amount which is to be settled is discretionary, and depends on the particular circumstances of each case. In *Brett v. Greenwell* Alderson, B. said, "It appears to me the insolvent's wife and her children are entitled to the whole fund, and, if I am bound by the practice of the Court to take away from her any portion of it, I will take away a shilling." In *Gardner v. Marshall* (6), the whole was settled on the wife for her separate use, in consequence of the large sums the husband had received from the wife's family, the fact that she was not provided for, and her former circumstances and condition in life. In the present case I think that the whole should be settled upon the wife, as the husband received double the amount of this fund under the order of the 15th of November 1829, and no settlement has ever been made on the wife or her children. I have the less hesitation in directing the whole to be settled, as the assignees only paid 140*l.* for the two shares of the husband and wife. The appeal must be allowed, and it must be referred to the Master to approve of a proper settlement of the funds mentioned in the petition.

Mr. Lee submitted that a reference was unnecessary, and that the fund ought to be paid to trustees for the wife.

Mr. Giffard agreed to this, for the purpose of saving expense.

And it was ordered accordingly.

(2) 1 Eden, 370.

(3) 4 Ves. 19.

(4) 11 Ibid. 16.

(5) 5 Mad. 166.

(6) 14 Sim. 587.

TURNER, V.C. }
Feb. 20, 21. } ADAMS v. JONES.

Will—Construction—Misnomer of Legatee.

The Court will not hold a testamentary disposition to be void for uncertainty if there is a reasonable degree of certainty as to the testator's intention. Therefore, where a testatrix bequeathed a legacy to the wife of a person by the name of one of their daughters, an infant of tender years,—Held, on claim by the husband and wife, that they and not the daughter were entitled to the legacy, and that the gift was not void for uncertainty.

This was a claim by Thomas Adams and Hannah his wife against the sole executor and residuary legatee of Mary Ann Garrett, for payment of a legacy of nineteen guineas bequeathed by her will to Clare Hannah Adams, the wife of Thomas Adams. The name of the plaintiff's wife was Hannah only, but the name of one of his daughters (who at the date of the will was only two years old) was Clare Hannah Adams.

Mr. Chapman Barber, in support of the claim, argued that the misnomer of the legatee was remedied by the description of her as the wife of the plaintiff: that the description of wife rendered it unnecessary to mention the name of the legatee—*Co. Litt.* 3 a; and that it was impossible to surmise that the testatrix intended the legacy for the infant child of the plaintiff. He cited *Pitcairne v. Brase* (1).

Mr. Begbie, for the defendant, argued first, that the daughter of the plaintiffs might have a better claim than her parents to the legacy in dispute, as, amongst other reasons, it was possible that the words "daughter of Hannah" might have been omitted by mistake from the will; and secondly, that the legacy was void for uncertainty. On the second point he cited—

Thomas v. Thomas, 6 Term Rep. 671.

Doe d. Le Chevalier v. Huthwaite, 3 B. & Ald. 632.

He also referred to—

Newbolt v. Pryce, 14 Sim. 354.

Blundell v. Gladstone, 11 Sim. 467;
a. c. 1 Ph. 279; 12 Law J. Rep.
(N.S.) Chanc. 225.

Mr. C. Barber replied.

Feb. 21.—TURNER, V.C. after stating the clause in the will bequeathing the legacy, said—The case is peculiar, for the name of the wife of the plaintiff is Hannah Adams only, and he has a daughter whose name is Clare Hannah Adams. The questions are, therefore, whether the plaintiff's wife or his daughter is entitled to the legacy; and whether the bequest is void for uncertainty. Now, I think that no disposition by will is to be held void for uncertainty if the Court can arrive at a reasonable degree of certainty as to the testator's intention. On the will in this case, I think the Court can arrive at a reasonable degree of certainty. The testatrix could not have been mistaken in the description of the legatee as the wife of Thomas Adams; and it could not have been an infant of two years old whom she thus designated. If, therefore, there has been any mistake, it must have occurred in drawing up the will, and either in taking the instructions or putting them into form. Now, can the Court presume that such a mistake occurred here? I think not, and that the Court is not justified in the case of this particular will in making such a presumption; but, on the contrary, I think that this will must be taken to have been drawn up correctly. The gift differs from that in *Doe v. Huthwaite*, where the testator gave to Stokeham Huthwaite, the second son of John Huthwaite (Stokeham being in fact the third son of John), in which it is probable that the testator knew the name, and only added the words "second son" merely as a description. But in the present case, the testatrix must have known who was the wife of Thomas Adams, and probably made a mistake in her name. The cases of *Blundell v. Gladstone* and *Newbolt v. Pryce* lay down the same principle; and I shall therefore make a decree for payment of the legacy and interest as asked by the claim.

(1) Finch, 403.

PARKER, V.C. }
Dec. 12. } MONDAY v. WAGHORN.

Costs, Security for—Feme Covert—Husband out of the Jurisdiction.

Bill by a feme covert by her next friend:—Held, that an objection, stated in the answer, that the next friend was in needy circumstances, and that security for costs ought to be given, could not be taken at the hearing of the cause.

Suit by a feme covert in respect of her separate estate, in which her husband was named as a defendant. The plaintiff proved at the hearing that her husband was out of the jurisdiction:—Held, that the suit was properly constituted.

The bill in this case was filed by Mrs. Monday, a married woman, on behalf of herself and all other the creditors of Mr. Waghorn, against the personal representatives of Mr. Waghorn, in respect of a debt due to her from the estate of Mr. Waghorn, to which debt she was entitled for her separate use.

The defendants, by their answer, stated that the next friend of the plaintiff was in needy circumstances and unable to pay the costs of the suit, and claimed the same benefit by their answer as if they had demurred to the bill, or moved that all proceedings should be stayed until a new next friend was appointed or security given for costs.

The husband of the plaintiff was named as a defendant, but he was out of the jurisdiction.

The cause now came on to be heard.

Mr. Torriano, for the plaintiff.

Mr. Karlake, for the defendant, objected to the hearing of the cause on the grounds, first, that the next friend was in needy circumstances—*Smyth v. Myers* (1), *Drinan v. Mannix* (2); and, secondly, because the husband was out of the jurisdiction.

Mr. Pownall, for the other parties.

(1) 3 Madd. 474.

(2) 3 Dr. & War. 154.

NEW SERIES, XXI.—CHANC.

PARKER, V.C. said that the first objection raised was that the circumstances of the next friend were such as to render security for costs necessary. This, however, was not an objection which could be taken at the hearing. The other objection was, that the plaintiff was a married lady, suing by her next friend, her husband being out of the jurisdiction. The general rule was, that, where a married woman sued in this court by her next friend, she must make her husband a party to the suit. In the present case the plaintiff had done this by naming him as a defendant on the record. She had done all that she could. It would be a denial of justice if she could not institute a suit because her husband was out of the jurisdiction. The case then came to this, there was a creditors' suit, and there must be the common administration decree.

PARKER, V.C. }
1851. }
Dec. 10, 15. } DURRANT v. FRIEND.
1852. }
March 29. }

Insurance—Specific Legacies—Illegitimate Son.

A testator bequeathed certain chattels to A, and afterwards insured them from loss by sea. The testator embarked with these goods in a ship, which was totally wrecked, and he and the chattels perished together:—Held, that A. had no interest in the money recovered by the executors from the insurance office.

A testator gave the residue of his estate to B, the interest to be paid to her until her first-born son should attain the age of twenty-one years; one-half of the said principal sum then to be paid to her aforesaid son, the other half to be paid to his mother. Should his mother die before the said son, the whole to be paid to him. Should the aforesaid son die before his mother, his share to go to her. B. had one illegitimate son at the date of the will, who was maintained by the testator:—Held, that this son was not entitled under the above bequest.

Daniel Friend made his will, dated the 10th of December 1847, which contained the following bequest:—

"I give and bequeath unto my father aforementioned, and my three brothers, George, John, and Stephen Friend, the whole of my wearing apparel, sea clothes, charts, mathematical and musical instruments, to be equally divided share and share alike; and I give unto my aforementioned adopted daughter, Eliza Friend, my gold watch, gold chain, and pianoforte, with all musical books and pieces belonging thereto."

The testator then bequeathed one half part of his residuary personal estate on the trusts therein named. The will then proceeded as follows:—

"I give and bequeath the other half unto my adopted daughter, Eliza Friend, the interest and dividends to be paid to her half-yearly, until her first-born son attain the age of twenty-one years; one-half of the said principal sum then to be paid unto her aforesaid son for his own absolute use and benefit; the other half to be paid unto his mother, my adopted daughter aforementioned; but should his mother die before the said son attain the age of twenty-one years, the aforesaid interest and dividends shall be paid unto the said son for his maintenance and education until he attain the age of twenty-one years, then the whole of the said principal sum to be paid unto him for his sole use and benefit. Should the aforesaid son die before he attain the age of twenty-one years, I bequeath his share or moiety unto his mother for her own absolute use and benefit, and I declare that the same shall not be liable to any debts, controul, or engagements of any husband she may hereafter marry, and that her receipt alone shall be a sufficient discharge for the same."

At the date of the will the testator was possessed of some wearing apparel, sea clothes, charts, and mathematical and musical instruments, and a gold watch and chain, which, in February 1848, he insured in the Royal Exchange Insurance Company for 200*l*.

The testator, who was a seafaring man, afterwards embarked in the ship *Canton* for China, taking all these articles with him. The ship was totally wrecked in the

North Pacific Ocean, on her homeward voyage, and the testator and all hands perished.

The will of the testator was proved by the executors, and in 1849 they received from the insurance company the amount for which the articles were insured.

The bill in this suit was filed by the executors of the testator against the specific and residuary legatees.

One of the questions raised was, whether the testator's father, and brothers George, John, and Stephen Friend, and Eliza Friend were entitled to the sum received from the insurance office in respect of the articles specifically given. The other arose from the following case:—"Eliza Friend, named in the will, had an illegitimate child, who was born in 1844. This child was maintained at the expense of the testator, who was in the habit of advancing money from time to time for that purpose." The question was, whether the testator under the description of "the first-born son" of Eliza Friend intended to benefit this child.

The above-mentioned facts had been found by the Master on a reference made to him.

The cause now came on for further directions on this report.

Mr. B. L. Chapman, for the plaintiffs.

Mr. Welford, for the defendants, contended, first, that the illegitimate child of Eliza Friend was entitled; and, secondly, that the specific legatees were entitled to the sum received from the insurance office. On this point he cited *Rook v. Warth* (1), *Norris v. Harrison* (2), *Parry v. Ashley* (3), and *Rogers v. Grazebrook* (4), which were questions relating to money received from insurance offices, in respect of houses burnt down, and *Sillick v. Booth* (5).

PARKER, V.C.—Eliza Friend, the legatee in this case, had an illegitimate son. The

(1) 1 Ves. sen. 460.

(2) 2 Madd. 268.

(3) 3 Sim. 97.

(4) 12 Sim. 557; a. c. 11 Law J. Rep. (N.S.) Chanc. 329.

(5) 1 You. & C. C.C. 117; a. c. 11 Law J. Rep. (N.S.) Chanc. 123.

testator knew of this, and made provisions for its maintenance. It has been suggested that this son should take, as a person designated, certain benefits given by the will to the first-born son of the legatee. Now, from the language used by the testator, the gift for the first-born son would be strictly applicable to a legitimate son. There are no circumstances in the case to take it out of the general rule, and I must, therefore, hold that the illegitimate child in this case has no interest in the property.

As to the other question, I think that as the testator and the articles perished by the same act, the legatees never had any interest in them. Had the testator perished before them, it might have been different. I will, however, think of this point further.

PARKER, V.C.—The testator, being a seafaring man, bequeathed chattels to certain persons. He and the chattels perished together. These chattels he had previously insured. The question is, whether the legatees are entitled to the money received from the insurance office. If the testator had died, leaving the goods in existence, the legatees would have had an interest in them, and it would have been quite reasonable that the executors should have held the policy in trust for them. If the chattels had wholly or partially perished in the lifetime of the testator, and no money had been received from the office, the testator would have had, at the time of his death, a right of action on the policy, and it is clear that the legatees would not have had any interest in the money to be recovered by means of it. Here, however, the testator and the goods perished together. It is a very difficult thing to say how such a case should be dealt with. I thought of the case several times; but I am unable to change the opinion I expressed before, which is, that the legatees never had any vested interest, under the will, in the chattels, and that they are not entitled to the money recovered from the office.

PARKER, V.C. }

1851.

Dec. 5.

WACE v. MALLARD.

Will—Construction—Precatory Words—Gift for Wife and Children.

A testator bequeathed all his property to his widow, her heirs, executors, administrators and assigns, for her sole benefit, in full confidence that she would appropriate and apply the same for the benefit of his children:—Held, that this amounted to a gift of an estate for life in the property to the widow, with a power of appointment in favour of the children, with a gift in default of appointment to the children as joint tenants.

Mr. Mallard made his will, dated the 20th of March 1823, in the following terms:—"I give, devise, and bequeath all my estate and effects whatsoever and where-soever, and of what nature or quality soever, which I shall or may be possessed of, interested in, or entitled unto, either in possession, reversion, remainder, or expectancy at the time of my decease, unto my dear wife Mary Mallard, her heirs, executors, administrators or assigns, to and for her sole use and benefit; in full confidence that she, my said wife, will in every respect appropriate and apply the same unto and for the benefit of all my children." The testator then appointed his wife his sole executrix.

The testator made a codicil to his will, dated the 27th of May 1826, which was as follows:—"Since the making of my last will and testament on the 20th day of March 1823, I have built two houses called Melville Place, Devonshire Hill, in the parish of Hampstead. Now, my will and desire is, that all my right, interest, and property in that estate should be disposed of to my beloved wife Mary Mallard for the same intents and purposes as in my last will my other property is directed to be applied to."

The testator died in September 1828, leaving four children.

Mrs. Mallard, by her will, gave the property bequeathed by the will of the testator to the four children for their lives, with remainder to their issue.

The question in this suit was as to the effect of the will of the testator.

Mr. Nevinson, for the plaintiff.

Mr. Russell and *Mr. Toller*, for the children of the testator, contended, that the widow had only an estate for life, with a power of appointment among the children; and that, in default of appointment, they took as joint tenants. They cited *Crockett v. Crockett* (1).

Mr. W. M. James, for the grandchildren, contended, that the widow took the property absolutely, subject only to the charge of maintaining the children.

Mr. Shebbeare, *Mr. C. H. Keene* and *Mr. Urquhart*, for other parties.

Mr. Russell replied.

PARKER, V.C. said that he thought that the widow took a life estate with a power of appointment among the children, and that the gifts by the will to the children for life were valid, but that the remainders over were an excess of the power. The children of the testator took the unappointed part of the property as joint tenants.

PARKER, V.C. }
Jan. 30. } DODD v. WAKE.

Baron and Feme—Separate Use without Power of Anticipation.

A sum of stock was vested in trustees upon trust to pay the dividends to A, a married woman, for her life, for her separate use, without power of anticipation, and, after her decease, to pay the capital to B. On the petition of A. and B, the Court ordered a transfer of a portion of the stock to B, and a sale of such other portion as would be sufficient to purchase a government annuity equal to the dividends of the two sums of stock, and that the sum thereby produced should be laid out in the purchase of such annuity, to be settled on A. for her separate use, without power of anticipation.

A testator bequeathed all the residue of his personal estate to trustees, upon trust to pay the income to his daughter for her life, for her separate use, without power of

(1) 2 Phill. 553; s. c. 17 Law J. Rep. (N.S.) Chanc. 230.

anticipation, and, after her death, to pay the income to her husband, for his life; and, after his death, to divide the capital among the children who should attain twenty-one.

The testator's daughter was sixty-three years of age, was married, and had four children, who were all of age, and the capital was invested in the funds.

This was a petition by one of the sons praying for the sale of a part of the stock which represented his share, and the payment to him of the proceeds, and for the sale of such other part as would be sufficient to purchase a government annuity for his mother equal to the dividends of the two sums of stock to be sold, such annuity to be settled on her for her life, for her separate use, without power of anticipation.

This petition was consented to by all the parties interested in the fund.

Mr. Russell and *Mr. G. L. Russell*, for the petition.

Mr. Bichner, for the other parties.

PARKER, V.C. made the order.

M.R. }
Feb. 12. } BROWN v. SMITH.
Domicile.

A Scotchman, a surgeon, came to England and was appointed hospital mate in the Haslar Hospital. He subsequently was appointed an assistant surgeon, and afterwards surgeon on board various ships of the Royal Navy. He was then for several years employed under the Admiralty on board various convict ships, and also upon other medical duties. During this time he twice, while on half-pay, re-visited Scotland and remained there up to the time of obtaining employment, but he ultimately, while on duty, died at Malta:—Held, though he removed all his goods from Scotland, and also his sister and only relation, and never afterwards returned, that he had not lost his domicile of origin.

William Conborough Watt, by his will, dated the 11th of January 1830, gave to his sister Margaret, as then of London, but who died in his lifetime, all his wages

and money due for service as therein mentioned, to purchase an annuity for her, for her life, and he gave her all the rest and residue of his estate, both real and personal, and appointed her and Richard Smith, surgeon, of Lasswade, near Edinburgh, executors of his will.

The testator died without altering his will, which was proved by Richard Smith, in the Prerogative Court of the Archbishop of Canterbury, and this bill was filed by William Brown, John Bryson, and Christina Brown, his wife, and Margaret Brown Waddell, the first being the maternal uncle, and the two last the maternal aunts of the testator, W. C. Watt, against R. Smith, for the administration of his estate in this court.

Upon the hearing of the cause, a reference was directed to the Master to ascertain, among other things, the domicile of the testator at the time of his decease, and he, by a separate report, dated the 26th of November 1850, found, that W. C. Watt was born in Scotland, of Scotch parents, and was baptized, on the 12th of June 1795, in the parish of New Monkland, in the county of Lanark, and was educated in Scotland for the medical profession.

The testator had one brother, Thomas Watt, and an only sister, Margaret. Thomas Watt was an assistant-surgeon in the Royal Navy, and resided chiefly at Deptford, in the county of Kent, and upon his death was buried at Greenwich.

W. C. Watt resided in Scotland until 1811, when he came to England and was appointed a surgeon in the Royal Navy, and was employed as hospital-mate at Haslar Hospital.

In 1812 he was appointed assistant-surgeon to Her Majesty's ship *Aboukir*. He then employed H. Stanger of Clement's Inn as his agent in England, upon whose decease he was succeeded by Joseph Dufaur, and afterwards by his son, and from time to time he remitted money to them for investment in England.

After serving in several ships, the testator, in May 1817, was appointed acting surgeon in the *Raccoon*, in which he remained until December 1818, when, for the first time, he was put upon half-pay. He then returned to Scotland, and resided there until January 1821, when he returned

to England, and was appointed surgeon of the *Grasshopper*, in which he continued until January 1824, and about February in the same year was appointed surgeon of the *Arachne*, in which vessel he served in India.

On the return of that ship in October 1826 he was for the second time put upon half-pay, and again went to Scotland. On arriving in Glasgow he found the circumstances of his family much altered for the worse, his mother had died in that year, and his father, who died in March 1833, had become of irregular habits, and his sister Margaret was in circumstances and in society very unsatisfactory.

The testator then left Glasgow, taking his sister with him, and went to reside at the house of Richard Smith, at Lasswade, where he placed his sister in the boarding school of the Misses Mutter, and continued to reside there until the autumn of 1828, during which time he took the degree of M.D. from the University of Glasgow.

In 1828 he expressed a desire to obtain a private practice in England, but as none offered he visited Falkirk, in the county of Stirling, and endeavoured, but unsuccessfully, to make arrangements for succeeding to a business there.

In the autumn of 1828, having obtained employment, he removed his sister from school to the family of R. Smith, and was appointed surgeon to the convict ship *Edward*, which he held until October 1829. While on this voyage the wife of R. Smith died; the testator then removed his sister to the house of a lady near London.

In December 1829, the testator was appointed surgeon of the *Roslin Castle* convict ship, and before sailing made his will; he left this ship in December 1830, and in January 1831 was appointed to the *Exmouth* convict ship, which was lying at Deptford: he took his sister with him, and placed her in the house of a lady there: he also caused her pianoforte to be removed from Scotland to her then residence. The testator subsequently served on board the ship *Mary*, and was afterwards for a short time with a marine detachment at Spike Island, off the coast of Cork, when, in April 1834, he was appointed surgeon to the *Temeraire*, and to the ships in ordinary at Sheerness, which he held until the

end of September 1839, when he was for the last time placed upon half-pay.

While at Sheerness the testator's sister Margaret resided with him in the town.

After being placed on half-pay he was appointed secretary to the medical officers of the Navy, who were then raising a fund among themselves to present a testimonial to their chief, Sir W. Burnett. This required his presence in London, and he accordingly removed with his sister and took lodgings at Pimlico, where he resided until 1841, during which time he pressed his claim for employment and promotion in the Navy. There being a prospect of employment which would complete his period of service and entitle him to retirement, the testator wrote two letters to R. Smith, dated the 8th and 18th of December 1840, requesting him to procure a residence in or near Edinburgh for his sister, in one of which he said, should he be spared to return, "it is more than probable that my final abode will be in Scotland, unless I shall succeed to a staff appointment." Lodgings such as described were not obtained.

Early in October 1841 the testator was appointed a Deputy-Inspector of Fleets, and joined the *Queen* at Portsmouth, and sailed for the Mediterranean, and remained in that ship until March 1843, when he was appointed Deputy-Inspector of Hospitals, and went to Malta. This appointment he held until his death there in August 1848.

He was joined by his sister at Malta, where they resided until her death in 1846; he informed Mr. Smith of that event, requested him to announce it to his friends, and asked counsel and advice as to retirement on half-pay and coming to reside at Lasswade, as the money he had realized and his half-pay would enable him to live comfortable. The testator, in conversing with John Campbell when he referred to his ultimate intentions, spoke of finally settling in Scotland, and a desire to endow certain bursaries in one or other of the universities in Scotland. Similar conversations were also deposed to by other persons.

Upon these facts the Master certified that the testator at the time of his decease was domiciled in Scotland.

The plaintiffs excepted to this report,

and insisted that the testator at the time of his decease was domiciled in England.

Mr. Stuart and *Mr. Hetherington*, in support of the exceptions.—Had the testator been in the service of the East India Company, there would have been an undoubted abandonment of the domicile of origin, but a distinction was made when the service was under the Crown. In this case, however, the testator had abandoned his domicile of origin *animo et facto*, and when that was done, even if the party did return, it was necessary that it should be for the purpose of restoring the original domicile. His only brother was residing here, he removed his sister here, and all the connexions he had were here. He had found Scotland not a home; it had been made distasteful to him. He had removed himself and his sister from the land; he left there no house; he left there no property, and no connexions; he even removed his sister's piano and became a stranger in the land of his birth. On the other hand, after leaving Scotland, his intention was evidently to fix his residence in England, to make it the centre of his affairs and the source of all his future occupations. It was true he had gone subsequently to Scotland, but it was upon visits to his mother and sister, and when the former had died, he, after a temporary residence for which a purpose was apparent, removed the only remaining relation, and with her the luxuries of life, to the chosen scene of his operations, and not a doubt could be raised of its being *animo manendi*. His sister had followed him to Malta, they had both died there, his father had died without relations, and by the law of Scotland the present plaintiffs could take nothing as next-of-kin to his mother.

The Attorney General v. Dunn, 6 Mee. & W. 511, 526.

Whicker v. Hume, 20 Law J. Rep. (N.S.) Chanc. 369.

Munroe v. Douglas, 5 Madd. 379.

Somerville v. Lord Somerville, 5 Ves. 750, 758.

Bruce v. Bruce, 2 Bos. & P. 229.

Bempde v. Johnstone, 3 Ves. 198.

Ommaney v. Bingham, 5 Ves. 757; 6 Bro. P.C. 550.

1 *Burge Com.* 34, 40.

Story on Conflict of Laws, 48.

Mr. Elmsley and Mr. G. S. Carr, for Richard Smith, were not heard.

THE MASTER OF THE ROLLS.—I regret that the plaintiffs, by the law of Scotland, will not obtain any advantage from the property of their maternal relative, but I can only administer the law as I find it here. The testator's time of service had been divided by three periods of half-pay of nearly two years each: on each of those occasions he had gone to Scotland and spent his time there, and had even speculated upon establishing himself either in England or Scotland; had it been in England there might have been a change, but whatever was contemplated, nothing was done, and as soon as employment in his office offered, he came to England and remained in the government service to 1826. There having been no alteration, his domicile consequently was in Scotland, as employment in the Navy creates no change in the domicile. Subsequently he was employed in convict ships, but it was in the service of the Admiralty. In October 1839 he was again on half-pay; he lived in lodgings at Pimlico, and remained there from a state of circumstances caused by hopes and necessities; that residence was, no doubt, chosen from its being contiguous to the place from which he hoped to obtain employment, and not for any fixed or permanent residence. In the case of *Bruce v. Bruce* the employment was for life. In the case of *Ommancey v. Bingham*, Sir Charles Douglas had been in foreign service before going to reside at Gosport, his only residence, but that was not so here; on the contrary, every act shewed that the residence was only until employment could be obtained in the Navy; had however any change been shewn, it must have been *animo manendi*, but the permanence was negatived by its being only to obtain employment: and during this residence he wrote to Mr. Smith in a way which shewed the disposition with which he remained in England and his *animus* towards Scotland. Subsequently he went to Malta and died there; it was argued that he was disposed to marry and settle in England and not in Scotland, but this amounted to nothing, and it did not appear that the testator had lost his domicile of origin. I therefore think the con-

clusion of the Master right; but though I must overrule the exception, I shall give the costs out of the estate (1).

TURNER, V.C. }	
Dec. 11. }	
L.C. }	PIDDOCKE v. SMITH.
Dec. 13. }	

Guardian ad litem—Lunatic.

Guardian ad litem to lunatic defendant (not found so by inquisition) appointed without a commission.

This was a motion, by the plaintiff, that H. might be appointed guardian *ad litem*, without a commission for that purpose, to the defendant Thomas Piddocke, a lunatic, but not found so by inquisition. The motion was supported by affidavits of the wife of the lunatic and of his medical attendant as to the lunacy; and of the solicitor in the cause as to the fitness of H. to be appointed such guardian.

Mr. W. H. Terrell, for the motion, cited *Drant v. Vause* (2).

Mr. H. F. Bristowe (who appeared to consent), cited *Howlett v. Wilbraham* (3).

TURNER, V.C. declined to make the order without a commission; but recommended the case to be mentioned to the Lord Chancellor.

Dec. 13.—*Mr. W. H. Terrell* mentioned the case to the Lord Chancellor, who made the order.

(1) The testator's father was illegitimate, and died in March 1833, before the testator. In Scotland, where the father succeeds to personal estate as the child's next-of-kin, he does so to the entire exclusion of the mother: she, though the father is dead without leaving any person who can succeed through him, is in no case accounted as of kin capable of succeeding to her children, dying intestate, though the property originally should have come from her.

(2) 2 You. & C. C.C. 524; a.c. 12 Law J. Rep. (n.s.) Chanc. 439.

(3) 5 Madd. 423.

M.R. }
Feb. 18. } ROSE v. GOULD.

Legacy—Residuary Legatees—Private Ledger—Debts—Set-off—Statute of Limitations.

A testator gave his residuary estate equally among his six children, and directed that sums of money appearing by his private ledger to be due from them, should in the division be brought into account:—Held, that allowance must be made for all sums appearing due, though they were barred by the Statute of Limitations.

Richard Rose, by his will, dated the 15th of June 1835, gave the residue of his estate among his six children, Richard N. Rose, Maria Gould, Hannah Bellin, Eliza Stanger, Sarah D. Rose, and William Rose, in equal shares, subject to the several provisos, directing "that in order to equalize my residuary estate between and amongst my six children, in case it shall appear by my private ledger, or any other of my books, that any, or either of them, my children, or the present or any future husband or husbands of any or either of my daughters, are indebted to me at my death in any sum or sums of money; or in case I have, or shall at any time during my life become security or responsible for the payment of any sum or sums of money, on their or any of their accounts, which shall be then outstanding and unsatisfied, then and in either or any of such cases, such debt or debts, security or securities, shall be considered as forming a part of my residuary estate, for the purpose of equalizing the same between and amongst my children; and in such case the share or shares of such of my sons respectively, or of such of my daughters whose husband or husbands shall be so indebted to me as aforesaid, or for whom or on whose behalf I may have become such security or responsible as aforesaid, of and in my residuary estate, shall in the first place be subject and liable to pay and discharge such debt or debts to my estate, or redeem such security or securities, as the case may be, and if the same shall not be sufficient for that purpose, then the deficiency shall be paid and made good to my estate by the party or parties by whom such debt or debts shall

be owing, or for whom or on whose behalf such security or securities shall have been given by me." The testator then directed his son Richard's share to be invested in trust for his son Richard for life, with remainder for his wife for life, with remainder to his children.

This bill was filed on behalf of George Rose, an infant, the only child of R. N. Rose, for the administration of the estate of the testator.

It appeared that the testator kept a debtor and creditor account, in a private ledger, against all the members of his family, in which he made entries, whether to his debt or credit. At the decease of the testator, 1,557*l.* 14*s.* 10*d.* appeared to be due from his son R. N. Rose, which was made up of sums advanced and payments and interest upon balances, which had been calculated every six months, and added to the principal. Some of these were made more than thirty years ago, and were barred by the Statute of Limitations; and the question now was, what sums were to be deducted from the share to which the testator's children were entitled in the residuary estate.

Mr. Stuart and Mr. Bates, for the plaintiff.—Sums not barred by the Statute of Limitations are alone to be deducted from the shares of the testator's children; they are sums due that are to be deducted, not debts that have ceased to exist. In this case, it appears from the ledger that the greater part of the debt due from R. N. Rose is barred by the statute. The income of R. N. Rose's share ought to be invested and accumulated, to make good to the plaintiff the amount which R. N. Rose has received of the capital.

Mr. R. Palmer and Mr. Batten, for Richard N. Rose.—The testator by his will intended benefits for his children, and he evidently meant that, what was properly speaking a debt should be deducted, and not those sums which had been barred by the Statute of Limitations. Were it otherwise, they might have been deprived of all advantage under the residuary bequest.

Mr. Lloyd and Mr. Sheffield, for S. D. Rose, W. Stanger, and Eliza, his wife, and other persons interested in the residue.—The testator intended that the residuary

legatees should participate equally in his estate.

Courtenay v. Williams, 3 Hare, 539; s. c. 13 Law J. Rep. (N.S.) Chanc. 461.

Philips v. Philips, 3 Hare, 281; s. c. 13 Law J. Rep. (N.S.) Chanc. 445.

Williamson v. Naylor, 3 You. & C. Exch. 208.

Mr. Stuart, in reply.

THE MASTER OF THE ROLLS.—The construction which must be put upon the clause is very evident. It has been contended the proviso in this will did not mean the items which appeared upon the ledger, but that it meant only what appeared by the ledger to be by law a subsisting debt; but nothing was more apparent than that what appeared to be due by the private ledger was what the testator referred to, and what he intended to be deducted. The son could only take under the will, and in doing so he must bring the debt, whatever it was, and however it was made up, into the general account of the residuary estate, for the purpose of making an equal division.

M.R. }
Feb. 11, 12. } PAUL v. ROY.

Foreign Debt—Conflict of Laws—Jurisdiction—Foreign Court—Interlocutory Order—Assignment—Parties.

Messrs. P. and R, the plaintiff and defendant, were writers to the Signet in Edinburgh, *P.* being the agent of the mortgagee, and *R.* being the agent of the mortgagor of an estate in Scotland, upon which various incumbrances were existing. 2,100*l.*, part of the mortgage-money, was deposited in the Bank of Scotland, in the joint names of Messrs. *P.* and *R.*, to discharge existing claims upon the estate, but this sum was subsequently drawn out by them from the deposit account, and applied partly in payment of charges upon the estate, and partly to satisfy other liabilities of the mortgagor. Some creditors of the mortgagor afterwards obtained an order from the Court of Session in Scotland to arrest the money in the hands of Messrs. *P.* and *R.*, and after various

proceedings in Scotland an order was made upon them jointly and severally that they should re-deposit in the Bank of Scotland the fund paid out. *R.* did deposit a part, and afterwards left Scotland and came to England. *P.* then re-deposited the whole of the fund, in pursuance of the order of the Court of Session, and took an assignment of the order of the Court, and after exhausting the process in Scotland against *R.*, and failing to enforce payment there, filed a bill in this court:—*Held*, that no final judgment had been obtained; that this Court would enforce a foreign judgment if final; that the order made was not final, and that this Court would not enforce an interlocutory order of a foreign court; that the assignment of the order by parties in the foreign suit did not render them the less necessary parties to this suit, and created no separate contract between Messrs. *P.* and *R.*; and that this Court had no jurisdiction, and the bill was dismissed, with costs.

The plaintiff and the defendant were Writers to the Signet, and this bill was filed by Thomson Paul, asking this Court to declare that Robert Roy was bound to relieve him from all sums of money drawn from the 2,100*l.* which had been placed in the Bank of Scotland upon a deposit account, and which had been applied for purposes different from those for which the deposit had originally been made, and that he might pay the balance due, with interest, and also the sum of 271*l.* 3*s.* 3*d.* and the costs of the actions of forthcoming and multiplepoinding in the courts of Scotland, when taxed and ascertained, for which purposes it asked that accounts might be taken. It also asked in the alternative a declaration that the defendant was bound to contribute rateably with the plaintiff to make good the sums of money improperly drawn out, and pay his proportion to the plaintiff, and give him the benefit of all liens and collateral securities he might have against the estate of Robert Anstruther, in respect of the sums of money.

In February 1835 Robert Anstruther borrowed 10,000*l.* on the heritable security of an estate called "Caiplye," and Third Part, which was subject to annuities and other charges, and upon which divers of

his creditors had used the diligence of inhibition, which, by the effect of the law of Scotland, created a judicial security upon the real estate of the debtor.

Upon the agreement for the loan, on the 26th of February 1835, a memorandum was drawn up as follows:—

“Memorandum as to loan of 10,000*l.* by Messrs. Wood to Robert Anstruther, the rate of interest to be 4½ per cent., and no change on either side for three years. Major Anstruther to grant an heritable bond, or disposition in security for the 10,000*l.*, interest and premiums of insurance over the estate of Third Part in common form, and also to grant a conveyance of the estate along with his present trustees, Messrs. Mackonochie & Paul, to Mr. Renton, accountant, in trust for behoof of the lenders, and the better to secure them, Mr. Renton, the trustee, to engage that any charges of management shall be postponed to the claims of the lenders for interest and insurance. The money to be applied preferably in paying the 1,000*l.* heritable bond to Lady Anstruther, and in redeeming the present annuities, amounting to 5,500*l.*, and these securities to be conveyed to the lenders as a collateral security. The following policies now subsisting on the life of Major Anstruther to be assigned to Messrs. Wood, by the respective holders, viz., Edinburgh Life, 2,000*l.*, Eagle, 2,000*l.*, Insurance Company of Scotland, 1,000*l.*; an additional insurance to the amount of 5,000*l.* to be effected for the benefit of Messrs. Wood; Major Anstruther's and Major Sinclair's bond for 1,000*l.* to be assigned, at Major Anstruther's expense, to a party, who will restrict the security, so far as regards the bond, to Messrs. Wood. The debt to Mr. Thomson's representatives to be paid out of the loan, and the inhibition discharged, as well as the other inhibitions now subsisting. The debt to Mr. Paul to be settled out of the loan, and the titles of the estate to be placed with Mr. Renton on an acknowledgment that they are so for behoof of the lenders in the action now depending at Mr. Paul's instance decerned to pass, by consent, for the amount as reported by the auditor in terms of the libel. Major Anstruther's account to Messrs. Dickson & Stuart to be paid, and

the policy of 450*l.* held by them, also to be assigned to Messrs. Wood, to secure any arrear of interest at the death, Messrs. Wood to receive a proper guarantee from Mr. Renton that the sum of 2,000*l.* payable to the tenants for amelioration shall be set apart out of the present loan or in some other way equally satisfactory to them, that is to say, that Mr. Renton shall become bound to account for the rents, without abatement, for the yearly payments in respect of the said improvements.”

The 10,000*l.* was advanced by Christopher Wood alone, and under this agreement 7,900*l.* was expended, and on the 20th of May 1835 2,100*l.* remained unapplied, which Messrs. Paul and Roy agreed to deposit in the Bank of Scotland, in their joint names, upon a deposit receipt as follows:—

“Bank of Scotland, 20th May 1835.—2,100*l.*—No. .—Received for the Governor and Company of the Bank of Scotland, from Thomson Paul, Esq. W.S., and Robert Roy, Esq. W.S., jointly, 2,100*l.* sterling, which is placed to the credit of their deposit account, by order of the board of directors.”

On the 27th of June 1835 the plaintiff and the defendant drew out of the Bank of Scotland 861*l.*, including a sum of 4*l.* 7*s.* 6*d.* for interest, and employed it in satisfaction of claims which were considered preferable, and for the discharge of which it was alleged the deposit-money was primarily applicable, that is to say, 496*l.* 16*s.* 1¼*d.*, the amount of a debt owing from R. Anstruther to Messrs. Dickson & Stuart, and secured by inhibition affecting the estate; the sum of 209*l.* 13*s.* to the plaintiff for expenses connected with the loan, and the security; 70*l.* 6*s.* 4¼*d.* to Robert Roy, for costs relating to the loan; and the sum of 84*l.* 17*s.*, repaid to the plaintiff for principal and interest monies advanced to pay the first premium on a policy of assurance upon the life of Robert Anstruther, for 5,000*l.* in the Asylum Life Assurance Company.

On the 9th of July 1835, Messrs. Paul and Roy drew out a further sum of 182*l.*, including 16*s.* 3*d.* for interest, and applied it in paying 55*l.* 2*s.* 11*d.* due from Robert Anstruther to Dr. Briggs, for which he

held an infetment in security over the estate, and also 99*l.* 8*s.* 11½*d.* due from R. Anstruther to Mr. Brockell, which was secured by inhibition affecting the estate, and the remaining 27*l.* 8*s.* 1½*d.* was retained by R. Roy to meet claims which he had against R. Anstruther.

On the 13th of November 1835, Messrs. Paul and Roy drew from the deposit account 452*l.* 16*s.* 8*d.*, including 7*l.* 17*s.* 10*d.* for interest, and on the same day Mr. Roy gave the plaintiff a letter saying, "In respect you have at my request agreed to draw the sum of 452*l.* 16*s.* 8*d.* from the money deposited in our joint names for behoof of C. Wood and Major Anstruther, in order to satisfy the arrears of interest and premiums of assurance, and also for payment to me of 200*l.* on account of advances for and business charges against Major Anstruther, I hereby engage to indemnify you against all responsibility for having consented to this appropriation of the money, and if necessary for that purpose to replace the same."

This sum of 452*l.* 16*s.* 8*d.* was applied by the defendant in payment to the plaintiff of 130*l.* 17*s.* 5*d.* which had been advanced by him on the 1st of August 1835 to C. Wood for interest on the loan; 3*l.* 12*s.* 3*d.* for progressive interest and expenses, and 70*l.* 15*s.* advanced by the plaintiff to pay premiums upon policies of assurance effected for securing the loan. 47*l.* 12*s.* was retained by R. Roy for advances made by him on account of premiums of assurance, and also 200*l.* which he claimed for advances made on account of Major Anstruther.

A jointure of 1,000*l.* a-year was secured to Lady Anstruther, the mother of Major Anstruther, upon the estates of Caiplic and Third Part, and the plaintiff, as her agent, applied to R. Roy, the factor and agent of Major Anstruther, for payment of the half year's jointure, which came due the 31st of July 1835, but, not being able to discharge the demand, the plaintiff at his request paid the 500*l.* upon Mr. Roy's promising to repay it out of the rents of the estate; but after various applications for payment, Messrs. Paul and Roy on the 12th of May 1836 drew from the deposit account the sum of 519*l.* 6*s.* 3*d.*, being the half year's jointure, with interest, to the

12th of May 1836, and applied it in paying the advance which had been made, and on the same day R. Roy gave the plaintiff a letter as follows:—"You have just now delivered to me a receipt for Lady Anstruther's jointure due on the 31st of July last, viz. 500*l.* with 19*l.* 6*s.* 3*d.* of interest, together 519*l.* 6*s.* 3*d.*; you having at my request advanced that money to her ladyship soon after falling due, I beg to explain that the repayment has been made by an indorsation to the above extent in your favour of a bank deposit receipt in our joint names of part of the loan from Mr. Wood to Major Anstruther."

On the same day, R. Roy wrote another letter as follows:—"In respect there is now due to you the half year's jointure due to Lady Anstruther at the 31st of July last, amounting with interest to this date to 519*l.* 6*s.* 3*d.*, I have for your relief countersigned the Bank of Scotland deposit receipt of the 13th of November last for 616*l.* 12*s.* 5*d.* to you and myself, being a part of the loan made by C. Wood to Major Anstruther, in order that if you find it necessary you may draw the same to the extent of the foresaid advance, and in that case I agree and engage to apply the free rents and produce of the estate of Third Part, after satisfying all public burthens, the jointure to Lady Anstruther, and the payments to Mr. Wood, in replacing the said sum in the Bank to answer its original purpose, viz. of securing Mr. Wood against the inhibition at the instance of the late Mr. Thompson, when such inhibition shall be made effectual by his representatives, in so far as such free rents and produce shall come into my hands or the hands of Major Anstruther's trustee."

The interest upon the 616*l.* 12*s.* 5*d.* from the 13th of November 1835 to the 12th of May 1836 was 6*l.* 3*s.*, and after drawing the sum of 519*l.* 6*s.* 3*d.* from the bank, that amount of interest was included in the balance of 103*l.* 9*s.* 2*d.* for which a new deposit receipt was given, as had always been done before when the account was reduced.

From the years 1835 to 1838, Mr. Roy received the rents of the estates of Caiplic and Third Part, amounting to nearly 2,000*l.*, and in his accounts took credit for the

payments made on account of Major Anstruther out of the monies drawn from the deposit account, except those retained by himself, and except the three sums of 496*l.* 16*s.* 1½*d.*, 55*l.* 2*s.* 11*d.* and 99*l.* 8*s.* 11½*d.* paid to Messrs. Dickson & Stuart, Dr. Briggs and Mr. Brockell, and also except the sum of 209*l.* 13*s.*, the plaintiff's expenses of the loan. It was also alleged that R. Roy, as agent for R. Anstruther, took credit in his cash accounts for the sum of 209*l.* 13*s.* as if he had advanced the same, and that he also took credit for the sum of money paid upon the deposit account.

Messrs. Dickson & Stuart had another claim against Major Anstruther of 433*l.* 13*s.* 5½*d.* after deducting 8*l.* 19*s.* paid on account. They brought an action to recover the sum, and on the 13th of June 1835 they obtained arrestments, and arrested or attached the funds belonging to Major Anstruther in the hands of Messrs. Paul and Roy to the extent of 1,000*l.* more or less, and having obtained a decree in the action, they, on the 26th of January 1838, commenced an action of forthcoming in the Court of Session in Scotland against Messrs. Paul and Roy as arrestees, and Robert Anstruther, as the common debtor, to obtain payment out of the money arrested of their debt with 12*l.* 17*s.* the expenses of the action, and 1*l.* 3*s.* 7½*d.* the dues for extracting the decree.

After various proceedings, the action of forthcoming was directed to stand over, that Messrs. Roy and Paul might, in an action of multiplepoinding, bring before the Court all parties interested in the money deposited in the Bank of Scotland.

On the 28th of December 1840, R. Roy commenced an action of multiplepoinding in the names of himself and plaintiff, concluding the balance of the consigned money, as the same might be ascertained, might be paid to the parties having the best right, and calling as parties defenders the said C. Wood, Messrs. Dickson & Stuart, Lucy Thompson, the personal representative of James Thompson, W. S. and afterwards the wife of Robert Davidson, the only inhibiting creditor of R. Anstruther, whose debt had not been satisfied.

On the 22nd of June 1841, after various

proceedings were taken in the conjoined actions, Lord Murray, Ordinary, made an order upon Mr. Roy, stating that he "appoints the pursuer, Mr. Roy, to consign the part of the fund *in medio* admitted to be in his hands, and that in the Bank of Scotland upon a receipt taken payable to such person or persons as may be preferred thereto by the Lord Ordinary or the Court in the course of the process."

On the 30th of June 1841, Mr. Roy having failed to comply with the order "the Lord Ordinary of new appoints the pursuer Mr. Roy to consign the part of the fund *in medio* admitted to be in his hands in the terms specified in the former interlocutory, and decerns against him to that effect accordingly, and if the said consignment is not made within fourteen days from the date, allows an interim decree to the above effect to go out, and be extracted at the lapse of that period at the expense of the pursuer."

On the 2nd of July 1841, R. Roy deposited in the Bank of Scotland 569*l.* as being the whole amount of the monies not applied in pursuance of the agreement.

On the 15th of June 1843, after further proceedings in the conjoined actions, Lord Murray pronounced an interlocutor, viz., "The Lord Ordinary having heard counsel for the parties, and thereafter made *avisandum* to himself with the whole cause, and considered the same before answer, remits to Mr. Donald Lindsay, accountant, to report as to the amount of the fund *in medio*, being the residue of the sum of 2,100*l.* deposited in the name of Messrs. Paul and Roy, so far as the same was not paid in terms of the memorandum referred to in the letter by Mr. Roy of the 26th of February 1835, for the better security of the loan of 10,000*l.* from Mr. Wood to Major Anstruther, and whether the same is more or less than the sum consigned by Mr. Roy."

The accountant by his report stated his opinion that Messrs. Roy and Paul should be ordered to replace all the sums drawn out, except so much as had been applied in paying the debts of creditors who had used inhibition, namely, the three debts of 496*l.* 16*s.* 1½*d.*, 55*l.* 2*s.* 11*d.* and 99*l.* 8*s.* 11½*d.*; and also excepting the sums of 209*l.* 13*s.* and 70*l.* 6*s.* 4½*d.*, the

expenses incurred by the plaintiff and R. Roy, connected with the loan, on which sum, the amount of the fund *in medio* with Bank interest would be 1,445*l.* 7*s.* 11*d.*, or if the Court should be of opinion that the expenses of the loan ought not to have been paid, that the fund *in medio* would amount to 1,770*l.* 12*s.* 3*d.*, or if interest of the legal rate of 5*l.* per cent. were chargeable, the amount of the fund *in medio* would be 1,981*l.* 15*s.* 2*d.*

On the 15th of February 1845, the Lord Ordinary, by his decree, approved of the accountant's report according to the second view, "and in the terms thereof finds that the fund *in medio*, in the hands of Messrs. Paul and Roy as at the 12th of July 1843, amounted to 1,981*l.* 15*s.* 2*d.*, stating and appointing them conjointly and severally to consign that sum under deduction of 726*l.* 18*s.* 10*d.*, being the sum reported on as deposited in bank at that date, together with the legal interest of the sum of 795*l.* 7*s.* 5*d.* thereof, being principal from the said 12th of July 1843 till the date of consignment in the Bank of Scotland, upon a receipt taken, payable to such person or persons as shall be found entitled thereto by the Lord Ordinary, or the Court, and decerns; and if the said consignment is not made within three weeks from this date, allows an interim decree therefore at the instance of the claimants and at the expense of Messrs. Paul and Roy to go out and be extracted accordingly, and further finds Messrs. Paul and Roy liable to the expenses of the discussion relative to the amount of the fund *in medio*, and the consignment thereof, subject to modification, and allows account thereof to be given in, and when lodged remits to the auditor to tax the same and to report."

Messrs. Roy and Paul severally presented reclaiming notes, which are petitions of appeal, against this order; but on the 23rd of May 1845, the inner house affirmed the interlocutor of the Lord Ordinary, and remitted the cause back.

On the 9th of July 1845, the Lord Ordinary found the amount of the costs incurred in the inner house and the outer house, for which he decerned against Messrs. Roy and Paul conjunctly.

Messrs. Dickson & Stuart having obtained a warrant on the 18th of July 1845, caused a messenger-at-arms to execute a charge of consignment and payment on Messrs. Roy and Paul respectively, in pursuance of the foregoing orders.

On the 21st of July 1845, the plaintiff presented a petition of appeal to the House of Lords, which had the effect of staying execution until leave to proceed should be obtained from the Court (48 Geo. 3. c. 151. s. 17), and in consequence of this Messrs. Dickson & Stuart, Mrs. Thompson, the wife of R. Davidson and her husband, C. Wood, together with J. W. Arnold, and J. T. Murray, writer to the Signet, and the agents of Mrs. Thompson and Mr. Wood, to whom the payment of costs had been directed, presented a petition in the conjoined actions, and on the 6th of December 1845, obtained an interlocutor from the first division of the Court of Session, allowing execution to proceed, notwithstanding the appeal on the interlocutors of the 15th of February, 23rd of May, 28th of June, and 9th of July, 1845, caution being first found to pay back the sums of expenses decerned for with interest, and also the difference between bank and legal interest, if it should ultimately be found that the arrestment must be removed *unico contextu* with the consignment.

On the 11th of March 1846, Mr. Paul alone deposited the sum of 1,981*l.* 15*s.* 2*d.* under deduction of 726*l.* 18*s.* 10*d.*, with legal interest of the 795*l.* 7*s.* 5*d.*, being principal from the 12th of July 1843 to the date of consignment, amounting, after deducting income-tax, to 1,357*l.* 12*s.* 9*d.*, and he also paid the costs, amounting to 271*l.* 8*s.* 3*d.*

By a deed of assignation in the Scotch form, dated the 10th, 16th, and 18th of February 1846, Messrs. Dickson & Stuart, C. Wood, Mrs. Thompson and her husband, R. Davidson, Walter Malcolm as assignee of Mr. Davidson, and J. W. Arnold, and J. T. Murray, after reciting the decrees and orders, and the consignment and payment by the plaintiff, assigned, transferred and made over from them and their respective heirs and successors, to and in favour of T. Paul, his heirs and donators,

the aforesaid decree for consignment and payment and warrant, at their instance pronounced in the conjoint actions; and they surrogated and substituted T. Paul, his heirs and donators, in their full right and place of the premises to enable him to follow out and enforce the decrees and warrants against R. Roy as joint debtor along with him.

By virtue of this the plaintiff, according to the law and practice of Scotland, claimed to be entitled to proceed against R. Roy in a summary manner, to enforce the relief in respect of the deposit or consignment, and the payments made, and stated that if the defendant had any grounds for objecting to such proceedings, he could do so by suspension and interdict in the Courts of Scotland.

On the 12th of March 1846 the plaintiff sued out letters of horning on the decree and assignment against the defendant, directed to the messenger-at-arms, who, on the 14th of March 1846, charged the defendant as follows: "Our will is, therefore, and we charge you that on sight hereof ye pass, and in our name and authority command and charge the said R. Roy personally, or at his dwelling-place, if within Scotland, and forth thereof by delivering a copy of charge at the office of Keeper of the Record of Edictal Citations at Edinburgh, to make payment to the complainees of the several sum and sums of money above specified, all in terms and to the effect contained in the decree and extract and assignation above written within, and have referred to as repeated *brevitatis causâ* within fifteen days, if within Scotland, and if forth thereof within sixty-one days next after he is charged by you to that effect, under the pain of rebellion." The letters also contained a warrant to arrest and distrain the goods, money, and effects of R. Roy.

Subsequently letters of caption were sued out to seize and incarcerate the defendant, but it was found impossible to execute them as the defendant was in England out of the jurisdiction of the Scotch Courts. The plaintiff also had been unable to discover any property in Scotland belonging to the defendant.

The bill then charged that R. Roy was

bound to re-deposit the money, and to relieve the plaintiff from the payment made, and that the defendant in account of the rents of the estate had taken credit for the several sums drawn out of the deposit accounts, and had the defendant continued in the jurisdiction of the Scotch Courts, that the plaintiff would have obtained it in Scotland without making the other parties to the actions of forthcoming and multiple-poining parties to any action or suit.

That warrants of execution had been issued in Scotland against the defendant, who had no heritable or movable estate in Scotland available to satisfy the claim.

The defendant, by his answer, admitted generally the facts stated in the bill, but denied the jurisdiction of the Court, and said that he had re-deposited 569*l.* in the Bank of Scotland, which was a larger sum than he had guaranteed, and was more than the money misapplied, and that he was not further responsible as no surplus rents had come to his hands, and because the inhibition of the representatives of James Thompson, deceased, had never been effectual, and that as factor he had received rents amounting to about 1,800*l.* a-year for the years 1835, 1836, 1837, and 1838, but that there was a balance of 192*l.* 19*s.* 11½*d.* due to him, besides the 569*l.* re-deposited; that his residing temporarily at Chester was by the law of Scotland not a withdrawal from the jurisdiction of the Scotch Courts, and that if the plaintiff was entitled to any relief he could obtain it through process issued from the Scotch Courts; that the plaintiff could sue him in Scotland, and he could appear there and plead, but that from the plaintiff residing in Scotland he was prevented from obtaining any relief under this bill, or in any other proceedings in this court, and that he knew nothing of the deed of assignation.

Mr. Anderson and *Mr. Toller*, for the plaintiff.—By the law of Scotland the plaintiff is justified in applying to this Court to enforce a claim legally available there, but which the defendant has rendered it impossible to enforce there by removing to another jurisdiction. But the Courts of England are ever anxious to do justice, and they avail themselves

of all means to effect it, and for that reason they operate *in personam*—*Penn v. Lord Baltimore* (1). If therefore two Scotchmen or other foreigners have cause of suit there *inter se*, and one comes and resides in this country, that gives the one remaining in Scotland a direct right in these courts, and authority to sue, and entitles him to relief in this country, the same as if they were both in Scotland. In this case, Mr. Roy, jointly with Mr. Paul, was ordered by a Court of competent jurisdiction to make a payment of an ascertained sum; and by the law of Scotland if one executor paid a sum of money which the Court of Session had directed two to pay, the one paying would have his remedy against the other. The sum having been ascertained, it is also immaterial that other persons have been parties to the proceedings in the Scotch Courts during the progress of those suits, as these proceedings have been determined and concluded by the decree of the 15th of February 1845: and the deed of assignation, by the law and practice of the Courts of Scotland, has vested all the right to the money in Mr. Paul, and gave him a right to summary relief against Mr. Roy for the money deposited, as well as the payments under the decree. It, in fact, in England, amounts to an original claim by Mr. Paul against Mr. Roy for the non-performance of his liability—*Young v. Wildey* (2). It is, in fact, a liability in Mr. Roy to make good money paid by Mr. Paul for what they as co-trustees have been made responsible.

Rawson v. Samuel, Cr. & Phil. 161; s. c. 10 Law J. Rep. (N.S.) Chanc. 214.

Marquis of Breadalbane v. Lord Chandos, 4 Cl. & F. 43; s. c. 2 Myl. & Cr. 727; 7 Law J. Rep. (N.S.) Chanc. 28.

Bentinck v. Willink, 2 Hare, 1.

Lingard v. Bromley, 1 Ves. & B. 114.

Dering v. the Earl of Winchelsea, 1 Cox, 318.

Lefroy v. Gore, 1 J. & L. 571.

Wilson v. Goodman, 4 Hare, 54.

1 *Story's Eq. Jur.* 551, 4th ed.

Grant v. Pédie, 1 Wils. & Shaw, 716.

Douglas v. Forrest, 4 Bing. 686; s. c. 1 Mo. & P. 663; 6 Law J. Rep. C.P. 157.

Mostyn v. Fabrigas, 1 Smith's Leading Cases, 340, 368, n. 3rd edit.

Don v. Lippman, 5 Cl. & F. 1.

Angus v. Angus, 1 West, temp. Hardw. 23.

2 *Madd. Chanc. Pract. by Spence*, 12.

Bayley v. Edwards, 3 Swans. 703.

King of Spain v. Machado, 4 Russ. 225, 560; s. c. 6 Law J. Rep. Chanc. 61.

Alivon v. Furnival, 1 Cr. M. & R. 277; s. c. 4 Tyr. 751; 3 Law J. Rep. (N.S.) Exch. 241.

Arnott v. Redfern, 3 Bing. 353; s. c. 4 Law J. Rep. C.P. 89.

Houlditch v. Lord Donegal, 8 Bligh, N.S. 301, 337; s. c. 2 Cl. & F. 470; Ll. & G. temp. Sug. 83.

Price v. Dewhurst, 8 Sim. 279; s. c. 4 Myl. & Cr. 76; 8 Law J. Rep. (N.S.) Chanc. 57.

Bent v. Young, 9 Sim. 180; s. c. 7 Law J. Rep. (N.S.) Chanc. 151.

Mr. R. Palmer, Mr. Goodeve and Mr. Forbes, for the defendant.—It is impossible to consider this suit apart from the proceedings in the Courts of Scotland. Without them there is no evidence of the transaction or of the contract. The suit here was founded entirely upon them; an order has been made by the Scotch Courts to bring the fund *in medio*, in other words to bring it into court. Mr. Roy has complied with the order to the extent of 569*l.*, the sum he had received, which exhausted his liability. The rest had been received by Mr. Paul, who was the party to bring it back. The fund, however, was ample to satisfy the claims of the creditors upon the estate, as Mr. Thompson's representatives have been held to have no claim for their debt in consequence of its not being duly registered—*Malcolm v. Mansfield* (3). This, therefore, is not a case in which this Court will entertain a suit to carry out by its forms, elaborated from its dealings with trusts, the claim made by the plaintiff. Neither can the Court deal with the forms of proceedings in the Scotch Courts, or get rid of them. An assignment

(1) 1 Ves. sen. 454.

(2) 4 Law J. Rep. (N.S.) C.P. 253.

(3) 6 Bell's Ap. Cases, 359.

has been made behind the back of Mr. Roy, but no final decree has been made. How can this Court, therefore, inform itself of the foreign law? No action at law can be brought upon an assigned decree. The plaintiff either can or cannot get final judgment: if he gets it, he can then proceed at law; but if he cannot, why is he to call upon a court of equity to support his claim? The Courts of Scotland, therefore, are competent to enforce their own decrees, and no original jurisdiction has arisen in this country. The deed of assignment of the order to deposit gave rise to processes peculiar to the laws there. The defendant also is not personally liable. He was only the agent of Major Anstruther. The plaintiff also was merely the agent of C. Wood, whose consent was necessary to the institution of this suit, to which Major Anstruther was a necessary party. The bill, therefore, must be dismissed.

Houlditch v. Lord Donegal, 8 Bligh, N.S. 301, 337; s. c. 2 Cl. & F. 470.

Price v. Dewhurst, 8 Sim. 279; s. c. 4 Myl. & Cr. 76; 8 Law J. Rep. (N.S.) Chanc. 57.

Bent v. Young, 9 Sim. 180; s. c. 7 Law J. Rep. (N.S.) Chanc. 151.

Earl Nelson v. Lord Bridport, 8 Beav. 527.

Yates v. Thomson, 3 Cl. & F. 544.

Mr. Anderson, in reply.

THE MASTER OF THE ROLLS.—After considering this case, my opinion is, that the plaintiff is not entitled to the relief he asks, and I do not think that the case made would sanction my making a decree. The facts, so far as it is necessary for me to state them, are that Major Anstruther in the year 1835 being entitled to an estate, or the life interest in an estate in Scotland called Caiplic, which was heavily encumbered, borrowed the sum of 10,000*l.* from C. Wood, which, by a memorandum of agreement, was to be applied in the discharge of several incumbrances or charges affecting the estate. The estate itself was to be conveyed to Mr. Renton, in trust that the rents arising therefrom might be applied for the purposes there specified, 7,900*l.* was accordingly applied, and the remaining sum of 2,100*l.* was deposited in

the Bank of Scotland in the names of the plaintiff, who was the agent of C. Wood, and the defendant, who was the agent of Major Anstruther in this transaction, for the purpose of carrying out the stipulations expressed in the memorandum.

In the years 1835 and 1836, payments were made by Messrs. Paul and Roy out of this fund; and Major Anstruther being still indebted, certain of his creditors by inhibition commenced proceedings by arrestment, which is analogous to the proceedings in this country by attachment, and a suit of forthcoming having been instituted to compel Messrs. Paul and Roy to re-deposit the funds, that they might be made available for the purposes of the creditors, the Court of Session determined that many of these payments had been improperly made; and the rights and claims of all the parties interested in the funds having been ascertained in this suit, the Court directed Messrs. Paul and Roy to bring back and re-deposit certain sums specifically enumerated. Under an order made in July 1841, Mr. Roy re-deposited a sum of 569*l.*, asserting at the same time that it was the utmost amount that had not been properly applied; but subsequently, in the year 1845, the Lord Ordinary directed the sum of 795*l.* 7*s.* 5*d.* then in the Bank to be made up to 1,981*l.* 15*s.* 2*d.*, and this order was made jointly upon both parties. After this order, Mr. Roy came to England and Mr. Paul paid in the whole amount, and obtained an assignment of the decree from the creditors in the suit in the Court of Session; and this enables him in the terms of the decree to call upon Mr. Roy to repay not merely one-half, but the whole amount which he had paid into court according to the order. Mr. Paul upon this took out letters of horning, but not having obtained any satisfaction from the goods or movable estate of Mr. Roy, he obtained letters of caption, which entitled him to take the defendant himself, and imprison him until the whole amount claimed was satisfied; but as Mr. Roy had come to England, Mr. Paul was unable to execute the letters of caption; he, therefore, instituted this suit.

I was early embarrassed in the case when considering in what way the Court had jurisdiction, if it had any. Whether

it was upon the ground of its being a foreign judgment, or that it was a contract which I was called upon to enforce, between strangers, the subjects of a foreign country, one or both of whom had come afterwards into this country. This Court has jurisdiction to enforce a foreign judgment, and in the great majority of cases to enforce the debts and rights which may arise on a contract made between two persons of another country when they come afterwards into this country and reside here. I first thought whether it was a foreign judgment which must be considered final, as it would be new to find that this Court would enforce a foreign judgment unless it were final. I have not found, nor have I been referred to, any case in which this or any Court in similar cases would enforce a merely interlocutory judgment, and give relief which must be enforced by final judgment in another country. By so doing the Court might do great injustice. If there is a final judgment to pay a certain sum of money, the Courts of this country can compel the debtor, if residing here, to pay the foreign judgment creditor. But, considering this case either as a final judgment or not, in no way can this be considered as a suit for enforcing a foreign judgment. The decree, in the first place, directs the plaintiff and the defendant jointly and severally to pay the money into the Bank of Scotland, that is, as between the creditors and the plaintiff and defendant themselves. They were jointly liable to pay the whole amount; but then, upon one paying in the whole amount and obtaining an assignment of the decree this singular result takes place, that if by order of the Court of Session, the plaintiff obtains such an assignment of the decree, it enables him and gives him a right to obtain repayment from the other, not of the proportion of the amount ordered to be paid jointly, but of the whole amount he has paid into the bank. In such a case the Court, no doubt, would inquire into the propriety of the foreign judgment. Even if this were the case of a final judgment in a foreign court, the case of *Houlditch v. Lord Donegal* shews that it is to be treated as *prima facie* evidence of the right in the party who had obtained the judgment, and that its

propriety may be inquired into; and therefore that the Court has jurisdiction. If so, then the only case to be considered is, that of contribution; and the ground brought forward is, that the Court having ordered two persons jointly and severally to pay a sum of money into court, it is inequitable that one of them, the plaintiff, should pay in the whole amount; but so, on the other hand, it must be considered equally inequitable that the other, the defendant, should be called upon to repay the whole amount to him. Yet the effect of it would be, if I were to make a decree in favour of the plaintiff, to make the defendant pay the whole amount of the money into court. That is a result so monstrous that the Court has not been asked to give such relief or effect to the judgment pronounced in Scotland; and I consider, if I were to act upon it, it would be treating it as the final judgment of a foreign Court and not an interlocutory order of the Court of Session. In that court relief and justice might be administered between the parties, notwithstanding such a decree; and therefore I am not able to consider this as a case of enforcing a foreign judgment. It would be unjust to do so, and the bill, although it states the proceedings in the court of Scotland, and asks that effect may be given to the whole of the judgment of the Court of Session, only asks this Court to give effect to a portion of it.

Independently of the question of not enforcing a foreign judgment, I have then to consider whether anything has arisen upon the proceedings in Scotland which enables the plaintiff in this court to require the defendant to pay, either, as the prayer of the bill puts it, the sums of money which have been improperly paid out of the 2,100*l.*, or to pay half of the sum of money which has been paid into the Bank of Scotland. In the first place, as to the money which has been paid out of the 2,100*l.* for the purposes mentioned in the memorandum. From the evidence that has been given, there was paid out with propriety a sum of 551*l.* 19*s.* for inhibition debts: upon that no question is raised on either side or with respect to the necessary sums which were paid out, but there are various sums amounting altogether to 1,019*l.*, which, according to the statements

in the bill and the whole of the evidence, seem to have been paid to the plaintiff himself. One sum was for costs, another sum was to replace premiums on policies which the plaintiff had paid, and which fact he not merely mentions, but also states that the money paid to him included the interest from the time when he advanced the money; and the aggregate sum paid out of the money in the bank consists of the capital amount of the premiums and the interest due to the plaintiff. The observation is material as shewing that the money was not paid out merely to be applied in payment; but that the premiums on the policies had been actually paid by the plaintiff at that time, and that he then came to make the trust fund available to repay him, with interest upon the amount so paid, without considering the sums received or paid by Mr. Roy. There could be no question the Court of Session having determined that these sums of money were improperly paid, that the person who received them ought to replace them; in that manner this Court, and I have no doubt the Court of Session, will ultimately work out the rights of the parties and the equity of the case. There were some sums of money advanced by the plaintiff out of his own pocket, which, he says, were properly payable out of the rents; and he makes this sum of 2,100*l.* available to repay himself. The Court of Session having decreed that sum to be replaced, both the plaintiff and the defendant must, as against the creditors, make it good. But, suppose this solely a trust fund, and that the money had not been applied for any other purpose, it would rest simply between the plaintiff and the defendant, and each would have to pay the sums he had received. These sums were paid out to repay debts, in respect of which the plaintiff was a creditor; but an elaborate account has been gone through on both sides, and the plaintiff says, that, in fact, although the plaintiff paid this annuity to Lady Anstruther, the rents of the estate were applicable to this purpose; and that the defendant Roy has had credit in his account for that express application of the rents. I assume that to be so; observing that Mr. Roy was in possession of the estate, as factor to the trustee; and

according to the law of England the factor could only be answerable to his trustee, and not to the *cestuis que trust*, for any of those rents:—the factor, being nothing more than what we in England call a steward, a person who, by authority, receives the rents, having misapplied those rents. The trustee as between himself and the factor would equally remain answerable and liable for the due application of the rents received by himself, his factor or agent. In fact, were the case different, it would be totally impossible for me to take an account of the rents to see whether they had been properly applied. It could not be done, because it is obvious that Mr. Renton would be and is a necessary party to a suit for that purpose, and also that Major Anstruther should be a party, or else the Court would be taking accounts which would not bind absent parties, and it would have to take them over and over again for every one of those parties as they instituted proceedings in this court.

It is impossible, therefore, that I can, in a suit constituted as this is, regard any question arising upon the rents of the estate for the purpose of considering whether it is true or not that the defendant Mr. Roy has, in the account of those rents had allowance for those very sums advanced by Mr. Paul, which were repaid to him out of the 2,100*l.* improperly, and which the Court of Session has ordered to be replaced. In this view of the case therefore I consider that this suit is not constituted in a form which would enable me to look at anything except the 2,100*l.*

The other alternative of the prayer is, that the plaintiff may have contribution, that is to say, that the defendant may be compelled to pay into the Bank of Scotland or into the Court of Session one-half of the sum which Messrs. Paul and Roy were ordered jointly to repay. Upon what ground can I do that? Not upon the ground that it is a foreign judgment, because it is not a final judgment: not on the ground that it is shewn to be the proper amount between the parties, because it is not possible for me to ascertain that it is the proper amount; but it is only upon the ground that a foreign Court has directed two persons to pay a sum of money into court, jointly and severally, and has thought

proper to make a decree, under which this Court is asked to say they ought to pay it into the Bank of Scotland separately, while the Court of Session has jurisdiction, and while proceedings are going on in that court to work out full and complete justice. If I were to deal with the case in its present state I should be carrying on the suit concurrently with the Court of Session; not having before me the whole of the parties who are before the Court of Session or the evidence which is before the Court of Session, or the means of obtaining that evidence, or the means of doing justice between the parties. When the arguments were proceeding I put this question: supposing I should order Mr. Roy to pay to Mr. Paul one-half of what I should consider was due, or any other sum, and the Court of Session would not afterwards look upon that decision as correct, and should determine that it was not the proper amount to be paid, and should call upon Mr. Paul to repay it, how could I enable Mr. Roy to get it back? Were I to make such an order I should be making a final decree in a case pending in another court, when that Court has made no final decree in that case. I am also of opinion that it would be necessary for the plaintiff to ascertain, by proceedings in the foreign court, the amount properly due from the defendant. I am not satisfied that he has not the means of efficiently doing that, or that by means of an account taken against the defendant in the foreign court the plaintiff has not the means of discovering whether he has property. I am not satisfied that there is not property in Scotland belonging to Mr. Roy which might give a right of jurisdiction against him. I do not call upon Mr. Roy to shew that he has property; but if it is true that the plaintiff could not obtain a final decree against the defendant, the burthen would lie upon him to prove that; and if a final decree had been obtained in Scotland and accounts taken ascertaining what was the sum due, there would have arisen a question, which it is not necessary for me to discuss, whether the plaintiff could have enforced his claim in this court or whether he might not have gone to a court of law. As I have expressed my opinion that no case of a foreign judgment is made out upon which I could

act; and as I have gone into the other questions, I do not stay to inquire whether this is the proper tribunal or not, or whether this is one of those peculiar cases which relate to the accounts of rents in a foreign country in which this Court would have jurisdiction to enforce a contract entered into by foreigners alone, because I am of opinion that no case for relief has been made out; and therefore the bill must be dismissed, with costs.

M.R. { COOKE v. LAMOTTE.
Nov. 18, 19, 21. { LAMOTTE v. COOKE.

Bond—Undue Influence—Testatrix—Disposing Power—Will, Restraint on—Suppression of Facts.

*L. F. requested her nephew, J. L. L., to come and reside with her, and while so doing she altered her will in his favour; she subsequently made several other alterations, and by the last, the greater portion of the property she had power to dispose of was given to J. L. L. and his two brothers. These alterations were made by her own solicitor. After the last of these alterations, she executed a post obit bond for 15,000*l.* in favour of J. L. L. and his two brothers. This was done by a solicitor unknown to her, who was employed at her request by J. L. L. Differences afterwards arose between L. F. and her nephew J. L. L., who left her house. L. F. then sent for her own solicitor, and, without taking any notice of the bond, altered her will, and disposed of the whole of her property among other persons, and died leaving insufficient to pay the bond. Her solicitor, who was one of her executors, upon communicating the decease of the testatrix to J. L. L., was, for the first time, informed of her having executed the bond; and upon a bill by the executors to set it aside,—Held, that the bond was obtained by undue influence and upon a suppression of facts, and was void, and that it must be delivered up to be cancelled, with costs to be paid by J. L. L.*

This bill was filed by Isaac Cooke and Simon Frazer Piggott, the executors and trustees of Louisa Foster, deceased, praying for a declaration that a bond, dated the 7th of February 1846, was fraudulently

obtained and was void, and that it might be delivered up to be cancelled.

By the will of John Lagier Lamotte, the father of Louisa Foster, four eighth parts of his residuary personal estate were settled in equal proportions upon Louisa Foster and his three other daughters and their respective children; and it was declared as to the said eighth shares of his daughters, who should have been married and die without issue, that the trustees under the will should assign, transfer and make over the share of such his said daughter unto such person or persons as his said daughter who should so die without issue should by her last will duly appoint.

Louisa Foster intermarried with Lieut.-General Thomas Foster, who died in May 1843, and she never had any issue.

The defendants John Lewis Lamotte, Charles Wyndham Lamotte and George Thomas Crespigny Lamotte, knew that the plaintiff, Isaac Cooke, was the confidential solicitor of Thomas Foster and also of Louisa Foster, their aunt. After her husband's decease, she retired and kept up no correspondence with her nephews; but in November 1844, her health was broken, and J. L. Lamotte came to see her at Clifton; he at first stayed a week, but subsequently returned and stayed with her until June 1846. She had previously made her will, which had been prepared by Isaac Cooke, but she became greatly attached to J. L. Lamotte, and took an interest in his and his brothers' welfare.

On the 23rd of December 1844, Louisa Foster executed another will, and appointed J. L. Lamotte her sole residuary legatee, and signed a letter of that date, which was inclosed in the will, requesting him to divide what he might receive from her property equally with his brothers. In July 1845, I. Cooke prepared a fresh will for her, by which J. L. Lamotte was appointed sole residuary legatee, and which she executed in July 1845, and signed another letter similar to that she had signed when she executed the former will. In November 1845, L. Foster again instructed I. Cooke to prepare a new will for her, and directed that all the defendants should be made her residuary legatees, which was done, disposing of more by the residuary

gift than was disposed of by the former wills. On each occasion Mr. Cooke informed L. Foster that the amount given to J. L. Lamotte by the will of July 1845, was about 18,000*l.*, and by the will of November 1845, was about 22,000*l.*

In June 1846, in consequence of a quarrel, all friendly feeling between L. Foster and J. L. Lamotte ceased, and she continued estranged from him until her death, and this feeling extended to her nephews Charles W. Lamotte and George T. C. Lamotte.

On the 22nd of September 1847, L. Foster executed another will, by which she appointed all her one-eighth share of her father's residuary estate, and gave all her personal estate and effects to Isaac Cooke and Simon Frazer Piggott, upon trusts therein mentioned, and appointed them her executors.

On the 18th of May 1848 she executed a codicil, but did not vary the bequests.

The principal part of the property which L. Foster had power to appoint, consisted of 24,000*l.* reduced annuities, standing in the name of John Henry Lamotte, Lord Tenterden, and J. L. Lamotte, as trustees of the will of her father.

In giving instructions to I. Cooke for her will, L. Foster made statements of the amount of her property, which exceeded 20,000*l.*, and the bequests were made upon the supposition that she had a right to dispose of property to that amount, and that she was not indebted to the defendants or any other person in the sum of 15,000*l.*

The testatrix made bequests to sixty-seven legatees of sums amounting to 19,487*l.* 8*s.* 6*d.* sterling, and the residue was estimated at 2,945*l.* 6*s.* 6*d.* sterling.

The testatrix died on the 14th of December 1848, and her will was proved by I. Cooke and S. F. Piggott.

A special gift of some plate was made to G. T. C. Lamotte, and also an annuity of 100*l.* a year to him and to his brother, C. W. Lamotte, payable after the death of his brother J. L. Lamotte, but no legacy was given to J. L. Lamotte.

J. L. Lamotte, upon being informed of the death of his aunt, wrote to Mr. Cooke, on the 22nd of December 1848, informing him that by will made in 1845, he and

his brothers had been appointed residuary legatees, and that their interest was secured by a bond given to them in February 1846.

This was the first intimation received by the plaintiffs that the testatrix had executed any instrument in favour of the defendants.

Messrs. White & Borrett afterwards wrote to Mr. Cooke :—"Jan. 2, 1849.—Sir,—Understanding from Mr. John Lamotte that you are one of the executors of the will of his late aunt, Mrs. Foster, we beg to acquaint you that we hold her bond to her nephew for 15,000*l.*, dated the 7th of February 1846. The bond was prepared by us, and has remained in our custody from its execution. Mr. J. Lamotte and his brothers will not be entitled to the bond in addition to any legacy under the aunt's will, but such legacy, according as the amount may be, is to be considered as in satisfaction or *pro tanto* in satisfaction of the bond." In reply, Mr. Cooke requested a copy of the bond. On the 5th of January 1849 Messrs. White & Borrett, at the request of I. Cooke, enclosed a copy of the bond, and wrote as follows :—"We may state that a similar bond for 10,000*l.* was first given by Mrs. Foster to her nephews, but which was cancelled, and the bond for 15,000*l.* signed; the cancelled bond we find is with our draft."

This bond was dated the 7th of February 1846, and was given to John L. Lamotte, C. W. Lamotte, and G. T. C. Lamotte, and was for 30,000*l.*, and was conditioned to be void if the heirs, executors, or administrators of Louisa Foster should pay to them or the survivors or survivor of them, their or his executors, administrators or assigns within six calendar months after her decease the full sum of 15,000*l.* with interest in the meantime, or if the said J. L. Lamotte, C. W. Lamotte, and G. T. C. Lamotte, or the survivors or survivor of them, should become entitled under the last will and testament or any testamentary appointment or disposition of the said L. Foster to a legacy and sum or sums of money of equal or corresponding amount with the sum of 15,000*l.* intended to be thereby secured.

The cancelled bond for 10,000*l.* varied only in amount.

It was now alleged that if the bond was executed by the testatrix, it was done so

in ignorance of its nature, effect, and contents, without professional assistance, and at the solicitation and at the request and under the influence of the defendant J. L. Lamotte, and under the impression that it was an instrument of a different character.

The bill then charged that J. L. Lamotte had suggested to the testatrix that a bond of the nature of the instrument of the 7th of February 1846 should be prepared for her execution, and that by his influence he procured its execution, but that he never informed her that she would deprive herself of the power of disposing by will of property to the extent of 15,000*l.*, and that if she executed a bond of that nature, she could not deprive the defendant of the right to receive that sum out of her assets. That he had previously drawn up a written statement to obtain legal or other advice, whether, by means of a bond, the testatrix might not be prevented from making any alteration to his disadvantage in the will then in force in his favour, and whether he could not thereby secure the benefit given to him by the will from being taken away or revoked by a subsequent change of mind of the testatrix. That he did obtain such advice, but never informed the testatrix, and that she never intended to create in favour of the defendants, or either of them, an irrevocable demand against her estate, and that the different nature of a gift to the defendants of a sum of money by will or by bond, to be paid after her death, was never explained to her by the defendant J. L. Lamotte, or any other person, and that she never understood the nature and effect of an instrument of that description, but to the end believed that she had the power to dispose of the whole of her property and of exercising her power of appointment the same as if the bond had never been executed. That the defendants alleged that the testatrix executed the instrument with the intention of creating a debt against the assets in favour of the defendants; that thereby, and on the security thereof, J. L. Lamotte and C. W. Lamotte might be enabled to purchase promotions in their respective services, and that G. T. C. Lamotte might obtain preferment in the church; but had such been the case, it was done under the impression that it was to effect

an immediate object, and that no attempt had ever been made by any of the defendants to raise money upon the instrument.

The defendants by their joint answer said, that J. L. Lamotte went by invitation to visit his aunt in November 1844, and that, with occasional short absences, he stayed with her until the month of August 1846; that Louisa Foster made many inquiries respecting the pecuniary circumstances of the defendants, and ascertained that no fortune had devolved upon them by the death of their maternal grandfather; that she then expressed a determination to alter her will in favour of J. L. Lamotte, which she afterwards told him she had done, and in July 1845, she again altered it through I. Cooke, who furnished her with an epitome, which she shewed to J. L. Lamotte. In 1841 J. L. Lamotte became by purchase one of the corps of gentlemen-at-arms, and was, in 1845 and 1846, desirous of purchasing promotion in the corps; that on the 6th of August 1837, G. T. C. Lamotte was ordained by the Bishop of Ripon, and Louisa Foster in January 1846, became desirous that he should obtain church preferment, that J. L. Lamotte should purchase promotion in the corps, and that C. W. Lamotte should purchase his majority in the army, and urged this upon J. L. Lamotte, as she was providing handsomely for them by her will: and that in July 1845, J. L. Lamotte suggested to her that the provision by will would not enable them to obtain money necessary to procure such promotion and preferment as it could be easily altered, but that she could enable them so to do by giving them a bond, and that this suggestion was much considered by Louisa Foster. That at that time J. L. Lamotte had not made any inquiry as to its legality; but in the month of July he wrote to his brother G. T. C. Lamotte, requesting him to mention it to a friend, who told him that it was commonly called a *post obit* bond, but promised to mention it to Mr. Francis Turner, the conveyancer, upon being furnished with a written statement; that the testatrix afterwards told J. L. Lamotte that she had altered her will, and that upon his advocating the claims of the legatees who had been deprived of legacies, an angry discussion

ensued which induced him to leave her house on the 29th of November 1845, and that while absent he wrote the following statement:—

“Louisa Foster, of Clifton, widow, made a will in November 1845, by which she made her three nephews residuary legatees. To prevent the possibility of her hereafter making any alteration to the disadvantage of the above nephews, is it not practicable that she now give a bond for 10,000*l.* in favour of one or all the three nephews which will not be invalidated by any further will she may make? The amount of her property is 24,000*l.* invested in the 3*l.* per cent. reduced consols, in the names of J. H. Lamotte, Lord Tenterden and J. L. Lamotte, one of the residuary legatees, as trustees under the will of her father John Lagier Lamotte. She has no controul over the property during her life, but possesses absolute power of bequeathing her property. The estimated amount of the residuary estate is 19,000*l.*”

This statement was given to G. T. C. Lamotte that it might be shewn to Mr. Francis Turner, which, for want of opportunity, was not done until the 2nd of February 1846.

In January 1846, a treaty was on foot to purchase the advowson of the rectory of D—, and the terms were arranged. Inquiry was also made respecting G. T. C. Lamotte becoming incumbent of the parish of H—, but in June 1846 the idea of purchasing was abandoned. Louisa Foster expressed a desire to assist, and on the 1st of February 1846, she, in conversation, desired J. L. Lamotte to have a bond made for her to execute in favour of the defendants; she was asked if she would write to I. Cooke, but having become dissatisfied, she refused to employ or consult him, thinking him less attentive to her than formerly, and she had refused to see him when he called. In compliance with the wishes of Louisa Foster, who desired that her giving the bond might not be made known to any of her relations or friends, J. L. Lamotte wrote to G. T. C. Lamotte in London the following letter:—

“Our aunt has this day expressed a strong desire to benefit us during her lifetime, and has asked me in what way her wish can be

fulfilled. I answered, that in case of any of us purchasing promotion or preferment, although her residuary legatees, we could not raise the money on her will, a fact of which she is fully aware. I have suggested the only means in her power to benefit us is, to give us a bond conjointly in our three names, securing us the money bequeathed to us, which she is now most anxious to effect, and which I need not say that I am as anxious to obtain and thereby guard against her future whims and oddities. On asking me to name the sum we wished to be secured, I named 10,000*l.* as being half of the residuary estate bequeathed to us in her last will. As Mr. Cooke, I regret to say, is on the black list for the absurd reason I stated to you, she will on no account listen to me employing him as bondsman on this occasion, and I cannot, therefore, with propriety apply to any one else. With respect to our cousin Lagier, it may cause some family heart-burning in such a case, which I think had better be avoided. You will do well, therefore, to apply to Mr. Goodchild's friend to draw up the bond, taking care to instruct him as to our present position in her will, and that our chief object is to secure our interest in it, and guard against the caprice of the most *varium et mutabile* of her kind. I have been diffident in naming a larger sum, though, perhaps, I should have acted wisely in securing the whole sum bequeathed to us, although she vows she never will alter her last will. Having incurred her displeasure once by refusing to swear eternal enmity to her foes, I shall feel safer in possession of her bond. Lose no time, therefore, in getting it ready for execution, and forward it. All going on here as dull as ever. Love to my mother. Yours, &c.

"P.S.—I had almost forgotten to say by express command that this business is to be confined exclusively to ourselves; and neither you nor C. to address one word of thanks to our benefactress. I need not observe, I am sure you will do what your feelings will naturally prompt by return of post."

G. T. C. Lamotte called on Mr. F. Turner, and through him was referred to Messrs. White & Borrett, whom he instructed to prepare the bond, which was

settled by Mr. F. Turner, and the engrossment sent by Messrs. White & Borrett to G. T. C. Lamotte, who forwarded it to his brother, J. L. Lamotte, at the house of his aunt at Clifton.

On the 4th of February L. Foster expressed her regret that the bond had not been for 15,000*l.*, and on J. L. Lamotte saying that the 10,000*l.* was ample, she, unknown to J. L. Lamotte, wrote to G. T. C. Lamotte.

"(Private.)

"Feb. 4th, 1846.

"My dear George, On second thoughts I insist on a bond for 15,000*l.* to your dear brothers and self—employ your solicitor. Your affectionate aunt,

"L. Foster.

"N.B.—On this important, I pray you to be silent. The deed must faithfully be promised, Saturday. God bless those I love best."

She gave this letter to J. L. Lamotte open, and requested him to read it and forward it, which he did not do, as G. T. C. Lamotte was that day to leave town. On Thursday the 5th of February the engrossment arrived at Clifton, and was read by J. L. Lamotte to Louisa Foster, while she looked over it herself, and expressed herself as if she understood it, and approved of everything, except the amount, which she desired to be increased to 15,000*l.*, but at the same time she stated her determination to execute that engrossment, and have a fresh bond for 15,000*l.* prepared; that she objected to having her physician as a witness, as also Giles the elder, but approved of R. W. Giles the younger, who attested her execution of the bond. After its execution, it was sent to Mr. Borrett, requesting the preparation of another bond for 15,000*l.*, and saying, "You are aware, I presume, that the principal object of myself and brothers in obtaining such a document is to prevent any future change in any will Mrs. Foster may be prevailed on to make to our disadvantage, my brother and myself being bequeathed by her last will the residuary property amounting to 19,000*l.*" Mr. Borrett, by return of post, sent another bond to secure the 15,000*l.*, which J. L. Lamotte took to his aunt and read over to her, while she looked over it and read it herself; that she expressed herself satisfied,

and, at her request, R. W. Giles again called and attested her execution, after which it was returned to Mr. Borrett. In April 1846 G. T. C. Lamotte was appointed curate of D; he completed his purchase of the advowson in July 1846, and since the death of the incumbent had become the rector, and G. T. C. Lamotte, C. W. Lamotte and Sarah Lamotte the mother had since resided there.

J. L. Lamotte disposed of his aunt's house and furniture at Bayswater, and after recovering from an illness, he went to her at Clifton on the 3rd of May 1847, but finding her under the dominion of her servants he remonstrated with her, which gave offence, and on the 5th of May 1847 he left her residence, and never saw her again.

In a further answer the defendants said, that in 1845 Louisa Foster hoped and firmly believed that the plaintiff, Isaac Cooke, was on the point of making her an offer of marriage, but that at the end of the year 1845, or early in 1846, she found or fancied that his visits were less frequent, and expressed to those about her great displeasure and surprise at his not calling, and gave directions to her servants not to admit him when he called, and on one occasion she refused to see him, but that in April 1846 he called and took leave of her on the eve of her leaving Clifton for London.

Mr. Elmsley and *Mr. Whitbread*, on behalf of the plaintiffs, contended that the bond was obtained entirely through the influence which J. L. Lamotte had over the testatrix, without any professional assistance, without its effect being explained to her, and without her knowing that it would create a legal disability to her disposing of so much of her property. The bond had been prepared at a distance by solicitors unknown to her, though she had a solicitor in whom she had always placed the greatest confidence; and so little did she know what she had executed, or the effect of such an instrument, that in the subsequent disposition of her property she did not think it necessary to mention it to her solicitor, but disposed of nearly the whole. The bond had clearly been obtained by the influence which J. L. Lamotte

had over the testatrix, and though it was in favour of her nephews, who were the objects of her bounty by will, this Court would not allow them, relations though they were, to obtain, through their personal influence, a deed to render a revocation of that bounty impossible or tolerate any trick to deprive her of her disposing power by will.

Dent v. Bennett, 7 Sim. 539; s. c. 8 Law J. Rep. (N.S.) Chanc. 125; 4 Myl. & Cr. 269.

Bridgman v. Green, 2 Ves. sen. 627; *Wilmot's Opinions and Judgments*, 58.

Ahearne v. Hogan, Drury, 310.

Huguenin v. Baseley, 14 Ves. 273.

Griffiths v. Robins, 3 Madd. 191.

Pratt v. Barker, 1 Sim. 1; s. c. 4 Russ. 507; 6 Law J. Rep. Chanc. 186.

Hunter v. Atkins, 3 Myl. & K. 113.

Mr. R. Palmer, *Mr. Walpole* and *Mr. Busk*, for the defendants, contended that the circumstances attending the preparation and execution of this bond were so peculiar, that it was impossible to say that any surprise, misrepresentation, or deceit had been practised upon the testatrix. It was also difficult to suppose that she did not know the effect of what she was doing; there were but few who did not know that a deed or bond was a solemn act not to be torn or obliterated at pleasure, and few also who did not know that a will was a document revocable to the hour of dissolution. In the present case the testatrix was desirous of giving an immediate advantage to the defendants; their advancement was in her mind; their welfare was at her heart; it was sharpened perhaps by her own disappointments, at finding that the acme of her expectation was not to be reached; she had therefore denied herself to Mr. Cooke and had refused him admittance. Was it, therefore, to be wondered at that she had refused to consult him respecting the bond or its details? Might it not be said that the plaintiff, Cooke, himself had been the cause of not being consulted? Had not his visits been fewer and his attentions more frosty? When, therefore, the testatrix had resolved to give a benefit to her nephews, and to execute a bond to secure it, was it surprising that she should tell her nephew that he must take the necessary steps to

have it prepared, or that he should communicate with those with whom he was acquainted, whose legal knowledge was undoubted, and in whom all must feel confidence? Was it also surprising that being ignorant of the law, he should seek advice respecting it? All case of deception however had vanished; all that remained for equity was influence alleged to have been improperly exercised, but it was that alone which was dictated by kindred and by affection. While that prevailed, this lady had considered the situation of the family and her relationship, and she had placed herself *in loco parentis* and looked upon her nephews as objects of her favour and compassion. She intended to provide for them. Did she then understand the effect of the documents she was executing? Was there any evidence she did not? Or that she did not know that the effect of a bond was to give an immediate legal security? If therefore she intended to provide for her nephews, and had done so, whether the security was revocable or irrevocable, whether *in presenti* or *in futuro* was immaterial. Where was the undue influence exercised? No misrepresentation had been made to her. It had been said that J. L. Lamotte stood in a fiduciary relation to the testatrix, but that was no ground for depriving him of *post mortem* benefits: let that but once be assigned for reason, and no one would take upon himself the execution of trusts. Upon the whole, the plaintiffs' case, therefore, must fail.

Mr. Elmsley was not heard in reply.

THE MASTER OF THE ROLLS.—I have carefully considered this case, and after anxiously looking at the papers I entertain no doubt upon the decree which ought to be made. It is said that the rule with respect to these cases is, that where there are relationships through which dominion may be exercised by one person over another, then the Court will not allow a deed to stand unless the person who takes the benefit of it can shew that the whole transaction was a righteous one. It is difficult to say what is meant by the expression, "where there is a relationship existing by which one person may exercise dominion over another." Lord Cottenham says it ought not to be confined to cases

of a doctor and his patient;—a person and his spiritual adviser, when recourse is had to a clergyman for spiritual instruction:—a guardian and ward, only, as if it was capable of no extension; but that it is applicable to every case in which a person takes a benefit from another to the prejudice of that person and to his own advantage: but in each of those cases it is essential, if subsequently questioned, that the transaction should be proved to be one which this Court will allow to stand, and that the person voluntarily and deliberately performed the act with a clear knowledge of what it was, its operation and its effects. It is not, I think, possible to draw the rule closer or to make it more stringent, and it seems to embrace every case.

There are undoubtedly cases in which the Court considers from the relationship of the parties that there is a probability of undue influence being used, as in the case of guardian and ward, solicitor and client, and various other transactions of a similar description in which the Court from the nature of the relationship looks at the matter with jealousy. But as a general rule, I consider that in every transaction in which a person takes a benefit from another it is requisite that he should be able to establish that the donor did so voluntarily and deliberately, knowing what he was doing. That may be said in some respects to contradict the judgment in *Hunter v. Atkins*. There may be passages not quite consistent with what I have stated, but they are also inconsistent with a long series of authorities decided at different times. It is undoubtedly a peculiar case, but if carried further it might sap the foundation of one of the most valuable rules of equity, and might prevent the Court from administering that equity which has not only made its decisions established principles of jurisprudence, but at the same time has enforced an observance of high morality.

I shall first consider whether the evidence establishes that this lady, knowing what she was doing, voluntarily and deliberately performed the act,—as this I consider comes within that class of cases in which, if the Court cannot arrive at a conclusion one way or another, the instrument cannot stand, and it is upon that ground and upon that principle I put

it. It is one of those cases in which the onus is not so much upon the plaintiff to establish a direct case of fraud, as it is necessary for the person claiming the benefit under the instrument to prove that the transaction is one which the Court will allow to remain unimpeached. Lord Eldon, in *Gibson v. Jeyes* (1), says, "It is necessary to say broadly that those who meddle with such transactions take upon themselves the whole proof that the thing is righteous," and that expression, I think, applies to this case; it remains, therefore, to consider, whether the evidence proves that the transaction upon the whole was a righteous one. From the year 1806, when J. L. Lamotte was born, to the year 1825, when the testatrix was married, he and his brothers seem to have been objects of her affection, and she made them a great many gifts. After her marriage there was less intercourse between them, but the correspondence was carefully preserved, and a great deal was put in evidence up to 1825. From that time, a great deal of correspondence is produced, and some is referred to after the decease of General Foster. After the decease of the General, the testatrix renewed her correspondence with J. L. Lamotte; she asked him to come to see her, which he did, and resided there at intervals, until the middle of the year 1846. The testatrix had made several wills during that time, giving increasing bounties to J. L. Lamotte and his two brothers. The last of these was made in November 1845, and gave a residue of 22,000*l.*, calculated at least to that amount, between the brothers. In the same year there was a correspondence, or rather conversation, with respect to a bond, but what the conversation was does not appear; but in December 1845 J. L. Lamotte prepared a statement to be laid before counsel, and the inquiry whether she could not give a bond "to prevent the possibility of her hereafter making any alteration in her will to the disadvantage of her nephews," was by no means immaterial.

This document was sent to George T. C. Lamotte, to be laid before Mr. F. Turner, for his opinion; but it does not appear that the statement was laid before

the testatrix, or that it was made by her desire or at her wish; this was next followed by the letter of the 1st of February 1846, from J. L. Lamotte to G. T. C. Lamotte, which is also of importance. It has been said, on behalf of the defendants, that the real question was, whether the testatrix did or did not know that what she was about was, to make that irrevocable which was revocable. That was the object expressed in the statement that was to be shewn to counsel. In the letter of the 1st of February 1846, J. L. Lamotte explained why Mr. Cooke was not called in to prepare the bond, and why it was necessary to have it prepared in London. As to not calling in Mr. Cooke, I think it is not sufficient that in cases of this description there is no third party for the purpose of shewing that a transaction is invalid: still it is a very important ingredient in the transaction, but it amounts only to this, that the Court requires distinct evidence that the transaction is a "righteous" one; therefore, the investigation of a third person acting solely on behalf of the donor is the best security that can be given that she understood exactly what it was that took place. But if the Court receives that evidence from other sources, it will not consider the non-introduction of a third person, as in the present case, will be fatal to the transaction.

The bond was prepared by Mr. Borrett, a solicitor in London, and was sent down to J. L. Lamotte, but there was no one who acted on behalf of Mrs. Foster. Mr. Borrett did not consider that he acted as her solicitor; had he been, he would have taken care that the bond had been fully and entirely explained to her, and that she knew exactly its operation and effect. Did she then know that it was to make an irrevocable gift? It is suggested in this letter that her wish was to benefit them during her lifetime, and that this instrument was suggested as the means of effecting that purpose, and that money might have been raised upon this bond. But a security of this description would have been of no value, or at any rate of very little, for raising money. The property of the testatrix consisted chiefly of a large sum of money in the funds, of which she was tenant for life, with a power of appointment at her decease,

(1) 6 Ves. 266, 276.

but without any power of disposition during her life, and if she had not executed that power of appointment the bond was absolutely useless; and no person would advance money on such a bond, unless under very remarkable circumstances, and at very usurious interest. He could not have been secure that this lady would have executed this power of appointment; the bond, therefore, as an advantage to the defendants during their aunt's lifetime, was valueless, and no attempt having been made to raise money upon it shewed the impression, and such also appeared to have been the impression of the advisers in this matter.

Did, then, this lady, when she executed the bond, consider that she was making her will irrevocable? J. L. Lamotte admits that he never told her anything to that effect; he says, he believed she understood it, because he believed she knew that the transaction was to bind herself; and it has been argued that any person reading the bond must have understood that to be the effect of it; but there is no evidence that she did read the bond, or that it was ever read over, but there is distinct evidence by J. L. Lamotte that he never explained the nature of the bond; that when she signed it, in the presence of Mr. Giles, he says it was not read over by her, and that no explanation was given, but that she simply and voluntarily signed it. Is it certain that an elderly lady between seventy and eighty would, upon reading that bond, understand the effect of it? J. L. Lamotte, himself, did not consider that he knew the effect of such a bond without legal advice; he took the opinion of counsel before the bond was prepared, and he even thought it necessary to refer to his solicitor for explanation why the bond was double the amount of the gift. These, then, apparently, were not things understood by persons clearly, simply, and as a matter of course, though the effect might be apparent to a lawyer who read it. In the absence therefore of evidence, my impression is, that no person told this lady that the effect of the bond would be to make her will irrevocable.

Without information this lady could not have understood the effect of the bond, and it would be a monstrous assumption

to say that she did; and I cannot consider that the transaction was explained to her, if she did it under the notion that it was to benefit them during her life. Why was not Mr. Cooke called in? It is stated in one of the letters that he was on "the black list;" but a reconciliation took place so shortly afterwards that it certainly seems it might have taken place before as well as so shortly after the transaction, and why did not Mr. J. L. Lamotte make the attempt to produce a reconciliation, that there might be no question or doubt about the validity of the transaction? If, however, it had taken place before the transaction, and the evidence on this is not clear, then there is no ground for not calling him in.

Mr. Borrett advised that a solicitor or some gentleman of high respectability should be called in to witness the bond; had it been an ordinary transaction in which a simple witness would have done, any person who could swear to the handwriting would have been sufficient; what, therefore, was meant was, not merely a person against whose character there was no impeachment, but a person of such rank and station as of itself would be a security that this lady knew what she was executing. There was no impeachment upon the character of Mr. Giles, whose evidence was given in the clearest and most truthful manner: he witnessed the execution of both documents, and could speak to the execution of one, but was not quite certain about the execution of both. The transaction being the same in both cases, and there being no explanation, it seems clear that the bond was not explained at the time; that Mr. Giles did not explain it, and so far as the evidence extends, it was not explained to her by any other person. What evidence, therefore, is there that she herself understood it?

There were then the letters of the 1st and the 4th of February; the last was not sent by the post to London, because George had left on the 5th for Brighton, but it is difficult to understand why she executed the first bond on the same day that she wrote the letter insisting upon the second bond; why also did she execute the second bond without requiring the first to be delivered up to be cancelled? But both

were executed, and sent to Mr. Borrett, who might have got both stamped, and kept them in his possession; but I cannot explain how this lady wrote this letter coupled with the fact of her executing the first bond almost contemporaneously with it. At the same time there is her handwriting "I insist on a bond." There is also undoubtedly her handwriting in her pocket book, "February 7, 1846.—This day gave my dear John a bond," but it is open to the same explanation. It is impossible also to consider if she believed that there was a bond which made her will irrevocable, that she should not have informed Mr. Cooke of it during the subsequent period when she employed him to make her will, and I cannot doubt that Mr. Cooke was ignorant of the whole transaction, and that he never heard of the existence of the bond.

The letter of the 1st of February 1846, also, cannot pass without remark. Why was it desired that neither George nor Charles should write to thank the lady? They would be informed of the transaction, as the lady herself wrote to George, insisting on a bond for 15,000*l.*; why, then, did she require that they should not write to thank her for her bounty? If the answer could have thanked her for making an unalterable gift, that would have explained the transaction, and had it been entered into with her eyes open the Court would not have set it aside, though no party had been engaged on her behalf. If also it was necessary to employ a London solicitor, it would not have been improper to send him down to explain it, and had he witnessed the transaction he would undoubtedly have explained, and taken care that the lady knew the nature of the transaction before she signed it. I, however, think that the proof that she did understand the effect of the bond, lies upon the defendants, and it is their duty to establish the propriety of the transaction; it is not necessary for the plaintiffs to establish the contrary, and in this case the evidence shews that she did not know that the bond would make her will irrevocable.

I place no reliance upon the evidence of the servants: it is open to grave observations.

I do not think that any question arises

upon the preservation of the bond after it was executed or of no communication being made respecting the bonds, either on the one side or the other, except that it was not communicated by the testatrix to Mr. Cooke: but when in 1847 all intercourse ceased, and she deprived J. L. Lamotte of all benefit under her will and gave certain sums to her other nephews, that is quite inconsistent with the notion that she understood the nature of the instrument.

It has been argued that I ought to look at this transaction as if it had been impeached by the lady immediately after it took place; but that is not my opinion, and if I could there would be this disadvantage, so far as the defendants are concerned, that it must be on the assumption that there was a denial by the lady herself that she had any knowledge of the transaction, and that the onus of proof would lie upon the defendants to establish what the transaction was, and that she was not ignorant of the nature of the instrument. Had it been contested in her lifetime she might have given evidence in answer to a cross-bill, and it might have set up the case of the defendants; but it is they, I do not say improperly, who have made that impossible; as Mr. J. L. Lamotte, when, in 1847, he wrote to Mr. Cooke respecting some supposed improper acts of the servants, might have mentioned that he had this bond. Mr. Cooke would then undoubtedly have mentioned it to this lady, and he would have had the advantage of as full and complete an answer as she would have been compelled to give to any suit if he had thought fit to institute any proceeding. The defendants, however, cannot take advantage of the absence of any testimony that might have been obtained from her admission. It was, however, subsequently, in September 1847, that she made her will, and a codicil in May 1848, and she died on the 14th of December 1848: then immediately Mr. Cooke was informed of the bond.

Considering the whole of these facts, therefore, I am of opinion that it is not a case in which I ought to direct any issue, but I think it a case in which it was incumbent on the defendants to prove the validity of the transaction, and that its validity has not been proved. I am also of opinion, from the evidence, that the transaction was

not properly explained to the lady when she executed the bond; but I do not consider that cases of this description require greater or stronger evidence than ordinary transactions, but there must always be sufficient to satisfy the Court. In this case, however, it is not proved, but I think the contrary is proved, that the bond was sufficiently and properly explained. But if credit is given to J. L. Lamotte's statement, that he believes she understood it, admitting that he did not explain it, the mere possibility of her understanding it is not sufficient to enable me to decide that the transaction can be supported. It is therefore with regret that, by the rules of this Court, which are of the greatest possible importance in transactions of this description, I consider myself bound to say that this bond cannot stand, and that I must make a decree that it shall be delivered up, with costs, to be paid by J. L. Lamotte. As to his brothers, the other defendants, I shall not give any costs. They do not appear to have been mixed up in the transaction further than as they took a benefit. As, therefore, the bond fails against Mr. J. L. Lamotte, it cannot be supported in favour of his brothers. The whole must either stand or fall together. A cross-bill has been filed by C. W. Lamotte and G. T. C. Lamotte, the framers of which would seem to raise a distinction between their cases and the case of J. L. Lamotte; but upon the authority of *Bridgman v. Green*, if the transaction is bad as to John L. Lamotte it is bad as to the others. At the same time, therefore, that I make the decree in the original bill, I must dismiss the cross-bill, with costs.

PARKER, V.C. } THE DUKE OF MARLBOROUGH v. ST. JOHN.
Jan. 12, 26. }

Church — Rectory — Waste — Timber — Repairs.

A rector is justified in cutting timber growing on the glebe, provided that he specifically applies it to the repairs of the rectory-house and the buildings on the glebe; but he is not justified in cutting such timber and selling it.

The circumstance that the rector had applied a much larger sum in the repairs of the

rectory-house than the proceeds of the sale of timber cut by him, was held not to be an answer to a case made against him of cutting and selling timber, in a suit instituted by the patron.

The Duke of Marlborough, the plaintiff in this case, was the patron of Baldon-cum-Woodstock, in Oxfordshire, and Mr. St. John, the defendant, was the rector.

In June 1849, Mr. St. John cut down some timber standing on the glebe. In March 1850, Mr. St. John cut down more timber, sold it, and received the purchase-money. In April 1851, he cut down more timber, the greater part of which was lying on the glebe lands.

The plaintiff filed a bill against the defendant in respect of the timber which he had cut. The bill prayed that the defendant might be restrained from cutting timber growing on the glebe lands belonging to the rectory, except such trees as might be required for repairs necessary to be done on the buildings or lands of the rectory, and as should be assigned for that purpose, either by the agents of the plaintiff, or in such other manner as the Court should direct, and from mutilating or injuriously lopping any of such trees, and from selling or disposing of any of the timber or trees which had been already cut, and remaining unsold, and from applying or employing any part of such timber other than in and about such repairs, and from committing any other act of waste or injury upon or to the rectory or the lands or property thereof, or any part thereof, and for an account of the monies received by the defendant on account of the sales.

A notice of motion in the terms of the prayer was served on the defendant.

In answer to the motion, the defendant filed an affidavit to the effect that he had expended on the repairs of the rectory-house a much larger sum than he had received from the sale of the timber which had been sold.

The motion now came on to be heard.

Mr. Bacon and Mr. Cairns, for the motion, contended that the defendant had no right to sell the timber. They said that in *Knight v. Mosely* (1) there was cer-

(1) Amb. 176.

tainly the following passage from Lord Hardwicke's judgment. — "Parsons may fell timber or dig stone to repair, and they have been indulged in selling such timber or stone where the money has been applied in repairs."—In a note, however, to the case in Mr. Blunt's edition, Lord Hardwicke's judgment was given from Mr. Hargrave's manuscript, in which the corresponding part was stated thus :—"Parsons may fell trees for repairs and dig stone to be applied for the benefit of the rectory," omitting the passage as to the selling. The expressions of Lord Hardwicke were thus commented on, by Lord Eldon, in *Wither v. the Dean and Chapter of Winchester* (2) : — "There, too, Lord Hardwicke expressly declares, (*if his words are rightly reported,*) that parsons may, &c. *If the case referred to be correctly reported,* it was, &c.," thus shewing that Lord Eldon had some doubts as to the correctness of the report.—They also referred to *The Bishop of Winchester v. Wolgar* (3) and *Herring v. the Dean and Chapter of St. Paul's* (4), and cited *Strachy v. Francis* (5), in which case Lord Hardwicke said :—"A rector may cut down timber for the repairs of the parsonage-house or the chancel, but not for any common purpose."

Mr. Willcock and *Mr. Bird*, for the defendant, relied on the passage in Lord Hardwicke's judgment in *Knight v. Mosely*, and cited *Wither v. the Dean and Chapter of Winchester*.

Mr. Bacon replied.

PARKER, V.C. (after stating the terms of the notice of motion).—The defendant on several occasions cut and sold timber, and he said that monies were expended by him upon necessary repairs upon the rectory buildings, exceeding the sums received for the timber sold. It has been insisted, on his behalf, that he was entitled to sell timber to defray the expenses of such repairs, and authorities were cited in support of this proposition. An ordinary tenant for life, it is well known, may take timber for repairs, but, if he sells the

timber, it is considered as an act of waste. Lord Coke says, (*Co. Litt.* 53, b,) "The tenant cutteth downe trees for reparations, and selleth them, and after buyeth them againe, and imployes them about necessary reparations, yet it is wast by the vendition." He laid it down that the tenant could not sell timber to enable him to pay for the general expenses of the repairs. It was not disputed in the argument that a rector was under restrictions as to waste, he being merely tenant for life. I know of no principle of law upon which a rector can obtain more extensive privileges as to waste than an ordinary tenant for life. It will be found that Littleton (pl. 644,) has stated, "That the parson or vicar that is seised, &c., as in right of his church, hath no right of the fee simple in the tenements, but the right of the fee simple abideth in another person." It is true that Lord Coke, in his commentary upon this section, notices that a rector had some rights which do not belong to an ordinary tenant for life. The words are, (*Co. Litt.* 341, a), "Upon consideration of all our bookes, I observe this diversitie, that a parson or vicar, for the benefit of the church and of his successor, is in some cases esteemed in law to have a fee simple qualified; but to doe anything to the prejudice of his successor, in many cases the law adjudgeth him to have in effect but an estate for life." The authorities seem to shew that a prohibition for waste, which was the ancient remedy against tenants for life, lay, if it did not now do so, at the suit of the patron against the rector—*Com. Dig.* tit. 'Wast,' (A 1.), *Vin. Abr.* tit. 'Waste,' (A). It was said that the powers of a rector to take wood could not be thus limited, for that, if timber was grown beyond what was wanted for repairs, the trees might go to decay, and that mines might remain for ever unopened. But it is to be observed, that the parson, with the consent of the patron and Ordinary, has unlimited power of alienation. He may cut timber and open mines, the patron and Ordinary taking care of the interests of the church, and, at this day, the Court would have no difficulty, upon a proper application, in directing timber to be cut, and the purchase-money to be applied for the benefit of the living. *Knight v.*

(2) 3 Mer. 421.

(3) 3 Swanst. 493, n.

(4) Ibid. 492.

(5) 2 Atk. 217.

Mosely, decided by Lord Hardwicke, and *Wither v. the Dean and Chapter of Winchester*, were relied upon. In the latter of these cases, the extent to which the dean and chapter were entitled to cut timber for repairs came in question. But it must be observed, that a dean and chapter have an estate in fee simple, and at common law they have unlimited power of alienation. On whatever grounds, therefore, the restrictions under which they lay as to waste may depend, their privilege cannot be less than those of a rector. In the case before Lord Eldon, the Dean and Chapter of Winchester stated that timber was wanted for repairs of the cathedral, and that the timber growing upon the premises in question was insufficient to supply them. The dean and chapter, as Lord Eldon observed, had an undoubted right to cut the timber, and the question to which he adverted, as a point of some controversy, was, whether an ecclesiastical body having cut timber for repairs was bound specifically to apply such timber to the actual repairs wanted. He intimated an opinion that an ecclesiastical body was not to be compelled to apply the identical timber by removing it from a distant part of the country. The right of an ecclesiastical person to sell timber or to apply the proceeds, generally, without regard to the quantity wanted, was not in question in that case.

In reference to the question before Lord Eldon, it may be remarked that his Lordship referred to the case in *Ambler*, with an intimation of some doubt whether Lord Hardwicke's words were rightly reported. In the case of *Knight v. Mosely*, Lord Hardwicke was reported to have said, "that parsons might fell timber, or dig stone, to repair, and that they had been indulged in selling such timber or stone where the money had been applied in repairs." It appears from Mr. Blunt's note, that this latter part was not contained in Mr. Hargrave's notes of the judgment. The passage was ambiguous. It might only mean that parsons had been indulged to the extent contended for by the permission of the patron. But, however this may be, the report in *Ambler* is too imperfect and too doubtful to give the weight of Lord Hardwicke to the proposition attributed to him, that rectors and

vicars may cut to any extent to provide a fund for general repairs. It is also to be observed, that Lord Hardwicke, in the case of *Strachy v. Francis*, treated the privilege of a rector to cut timber as being the same as that of an ordinary tenant for life. The greater part of the timber in the present case had been cut in 1849, 1850 and 1851. Part of this was sold, and of such part no account had been given by Mr. St. John. Shortly after the filing of the bill, some trees were cut, which are now lying on the glebe lands. There was some dispute as to whether they were cut by Mr. St. John's authority. Considering the admitted fact, that timber on the former occasions was cut by the defendant under circumstances which appear to me to amount to waste, and also the claim of right made by the defendant, I think that the patron is entitled to the injunction sought by him. The terms of the injunction will be very much in the terms of the prayer of the bill—(omitting part of it)—"to restrain Mr. St. John from cutting or felling, or causing to be cut or felled, any timber or other trees growing on the glebe lands, or other the lands belonging to the rectory, except such trees as may be required for the repairs necessary to be done upon the buildings or lands of the rectory, and from selling or disposing of any of the timber or other trees which had been already cut upon such lands, and now remaining unsold." Where the rector is entitled to cut for repairs, he is at liberty to take without anybody's consent. As Mr. St. John has merely taken an erroneous view of his rights, and thereby has committed waste, the Court will not be justified in restraining him beyond what the law had declared to be waste.

M.R. }
Jan. 12. } COOPER v. KNOX.

Practice—Order of Course—Irregularity—Discharge.

Applications to discharge orders obtained as of course at the Rolls should be made to the Court to which the cause is attached.

An order had been obtained as of course

at the Rolls to change a solicitor in this cause, which was a cause attached to the court of Vice Chancellor Turner.

Mr. Moore now moved, before the Master of the Rolls, to discharge it on the ground of irregularity.

Mr. Giffard.—Whatever the practice may have been, it is now settled that applications to discharge orders of course ought to be made in the court to which the cause is attached; the merits of the cause, if necessary, can then be gone into, but that cannot be so in this court, which never considers more than the question of regularity or irregularity: this had been found inconvenient, and it has been abandoned—26th Order of the 2nd of November 1850 (1).

THE MASTER OF THE ROLLS.—The practice has been varied by the Order mentioned, and this application must be refused, with costs.

PARKER, V.C. }
 1851. }
 Dec. 6. } *In re HARTNALL'S TRUSTS.*
 1852. }
 Feb. 13, 17. }

Trustee Act, 1850—Vesting Order.

A sum of stock was standing in the names of A. and B. in trust for C. for life, with remainders over. A. and B. refused to pay the dividends to C. On a petition presented by C. under the Trustee Act, 1850, that the right to receive the dividends accrued and to accrue, might be vested in her,—Held, first, that under the 23rd and 24th sections, an order might be made as to the dividends already accrued, notwithstanding the refusal of the two trustees; and, secondly, that no order could be made as to the future dividends.

Mr. Hartnall, by his will, dated in 1823, bequeathed a sum of stock to trustees, upon trust to pay the dividends to the petitioner for life, with remainders over. This sum became vested in *Mr. Poole*, the surviving trustee. *Mr. Poole* died, and administra-

tion to his estate was granted to two administrators.

This was a petition by the tenant for life stating that the administrators of *Mr. Poole* had refused to receive the dividends, and praying for an order of the Court to vest in her the sole right to receive the dividends which had accrued and the future dividends to accrue due during her life (2).

Mr. Freeling, for the petition, stated the difficulty to the Court arising from the above-mentioned sections of the act. By applying the interpretation clause to the 23rd section, or by the 24th section the case might be brought within the act.

PARKER, V.C. made the order.

On the above order having been made, the Bank of England objected to that part of it by which the right of receiving the future accruing dividends was vested in the petitioner. At their request this point was brought before the Court.

Mr. Cotton, for the Bank of England, contended that the act gave the right only to receive past dividends, and said that the Court was not empowered under it to give an order vesting the right to receive

(2) The 23rd section of the Trustee Act, 1850, so far as relates to the question before the Court, is this:—"That where any sole trustee of any stock shall neglect or refuse to receive the dividends thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the Court of Chancery to make an order vesting the sole right to receive the dividends thereof in such person or persons as the said Court may appoint."

The 24th section is as follows:—"That where any one of the trustees of any stock shall neglect or refuse (using the language of the last section) it shall be lawful for the Court of Chancery to make an order vesting the right to receive the dividends, &c. in the other trustee or trustees of the said stock, or in any person or persons whom the said Court may appoint, jointly with such other trustee or trustees."

By the 2nd section it is enacted, "That generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female."

(1) 20 Law J. Rep. (N.S.) Chanc. iii.

the future dividends in a person not entitled to the capital.

PARKER, V.C. said that he had made the first order on an *ex parte* application. On considering the question, with the assistance of the counsel for the Bank of England, he thought that he had not the power, under the act, of directing the payment of the dividends of stock to a person not entitled to the stock. The effect of this would be to make the Bank of England perform the functions of the Accountant General. He thought that, unless there were express words in the act to that effect, he could not create such a relation between the Court and the Bank of England. The order must be confined to the dividends due at the date of the petition.

PARKER, V.C. }
1851. } MACKENZIE v. MACKENZIE.
Dec. 19. }

Trustee Act, 1850—Vesting Order.

Stock was standing in the names of A. and B. upon trust for C. for life, with remainders over. By an order made in a cause instituted by C. against A. and B, with respect to the stock, it was ordered that A. and B. should transfer the stock to the credit of the cause. A. refused to make the transfer. A petition was presented by C. under the Trustee Act, 1850, and in the cause, praying that the right to transfer the stock might be vested in B. alone:—Held, that the Court had not jurisdiction to make the order.

A sum of stock was standing in the names of R. Mayne and Donald Mackenzie, upon trust for Miss Mackenzie, afterwards Mrs. Simpson, for life, with remainders over. This suit was instituted by Miss Mackenzie against the trustees in respect of this stock. By an order made in the cause, on the 8th of August 1851, the trustees were ordered to transfer the stock to the credit of the cause. Mr. Mayne having declined to comply with the order, Miss Mackenzie presented a petition in the cause and under the Trustee Act, 1850, under which an order was made, in accordance with the prayer, declaring that Mr.

Mackenzie was a trustee of the stock, and that the right to transfer the stock had vested in Mr. Mayne, and directing that Mr. Mayne should transfer it into court.

The sections of the act having reference to this order are the 23rd and 24th (1).

The Bank of England having declined to allow of this transfer, on the ground that the order made was not authorized by the act, a motion was now made for directing them to comply with the order.

Mr. Tennant, for the motion, cited—

In re King, 10 Sim. 605; s. c. 9 Law J. Rep. (N.S.) Chanc. 257.

In re Russell's Trust, 1 Sim. N.S. 404; s. c. 20 Law J. Rep. (N.S.) Chanc. 196. and referred to the 37th and 43rd sections of the act.

Mr. Wigram and *Mr. Cotton*, for the Bank, contended, that the act did not apply to the case in question, as the words were "according to the direction of the person absolutely entitled thereto," whereas in this case the petitioner had only an estate for life.

PARKER, V.C. said that, while he thought that a large construction ought to be put on the act, care must be taken that a loose construction was not put on it. There were two positions to be established in applications under the act: the first, that the case came within it; the second, that the application should be made by the proper parties. The case brought before the Court was the disobedience of a trustee to obey an order where there was an absolute interest

(1) By the 23rd section it is enacted:—"That where any sole trustee of any stock shall refuse to transfer such stock, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the Court to make an order vesting the sole right to transfer such stock, in such person or persons as the said Court may appoint."

By the 24th section it is enacted:—"That where any one of the trustees of any stock shall refuse to transfer such stock, according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days, &c. it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, in the other trustee of the said stock."

in the stock. The proper remedy was to be found in the 1 Will. 4. c. 36. sect. 15. division 15. He thought that the order could not be proceeded with.

Mr. Tennant asked that the order of the 8th of August might be discharged.

PARKER, V.C. said that this could only be done by consent of all parties, or on notice.

PARKER, V.C. }
1852. } MACKENZIE v. MACKENZIE.
March 13. }

Attachment—Affidavit—Title of Order.

By an order entitled in a cause and in the matter of the Trustee Act, A. was ordered to transfer a sum of money into court. The affidavit of service of this order on A. was entitled in the cause only. A. was committed for contempt for refusing to obey the order. The writ of attachment was discharged for irregularity, on the ground of the difference between the title of the order and the title of the affidavit.

Miss E. F. Mackenzie, an infant, by her next friend, filed a bill against Donald Mackenzie and R. Mayne, in respect of a sum of stock standing in their names, and afterwards, having married Mr. Simpson, filed a bill of revivor against him.

By an order made, on the 8th of August 1851, in the cause and under the Trustee Act, 1850, it was ordered (among other things) that the right to transfer the stock should be vested solely in Mr. Mayne, and that Mr. Mayne should transfer such stock into the name of the Accountant General to the credit of the cause. The Bank of England having declined to allow the transfer to be made, on the ground that the case did not come within the Trustee Act, the matter was again brought before the Court, and the Court declined to interfere (see last case).

On the 22nd of January 1852 an order was made, on the motion of Mr. Mayne, whereby it was (among other things) ordered, that the order of the 8th of August 1851 should be discharged, and that Mr. Mackenzie should concur with Mr. Mayne

in making a transfer of the stock into court.

The title of this order was as follows:—
“Between E. F. Mackenzie, plaintiff, and D. Mackenzie, R. Mayne, and P. S. Keir, defendants, and between E. F. Simpson, an infant, by her next friend, plaintiff, and C. R. Simpson, defendant, and in the matter of the Trustee Act, 1850.”

Mr. Mayne having refused to comply with the order, was committed for contempt.

The title of the affidavit of the service of the order on Mr. Mayne, upon which the writ of attachment was issued, was as follows:—“Between E. F. Mackenzie, plaintiff, and D. Mackenzie, R. Mayne, and P. S. Keir, defendants, and between E. F. Simpson, late an infant, by her next friend, plaintiff, and C. R. Simpson, defendant.”

The differences between the two titles were, that in the former there were the words “an infant,” and in the latter “late an infant,” and that in the latter there was no mention of the Trustee Act.

This was a motion that the writ of attachment of Mr. Mackenzie might be discharged for irregularity.

The deponent to the affidavit stated that he “did personally serve the said D. Mackenzie with an order made in this cause.”

Mr. Toller, for the motion, contended that the affidavit of the service was irregular: first, on the ground that in the title there ought to have been the words “E. F. the wife of C. R. Simpson,” instead of “E. F. Simpson;” and, secondly, that the title ought to have contained a reference to the Trustee Act.

Mr. Tennant, for Mr. Mayne, contended that the affidavit was regular.

PARKER, V.C. (after conferring with Mr. Berrey, the Clerk of Records and Writs) said that Mr. Berrey’s opinion was, first, that if the title of the affidavit had followed the title of the order, the affidavit would have been regular, although the title of the order might not have been correct; and, secondly, that as the title of the affidavit did not follow the title of the order (the Trustee Act being mentioned in the one and not in the other), the affidavit was

irregular. He said that he thought that the opinion of the officer of the Court was deserving of great consideration in such matters, and that he should follow it. There was the possibility that there might have been the service of some other order. The writ must be discharged.

Mr. Toller asked that it might be discharged, with costs, and contended that in such a matter the Court had not discretion as to costs.

PARKER, V.C. said that he considered that he had a discretion in the matter, and that he should not give *Mr. Mackenzie* his costs.

Writ discharged, without costs.

LORDS JUSTICES.

1852.

April 26.

SIMS v. HELLING.

Practice—Appeal from an Order on a Claim.

On the hearing of an appeal from the whole order, made at the hearing of a suit by claim, the same rule is followed as to opening as on an appeal from the whole decree made in a suit by bill.

This case came on, by way of appeal from a decision of the Master of the Rolls, by which he made a decree in favour of the plaintiff (1), the defendant appealing from the whole decree.

On the case being called on,

Mr. Roundell Palmer and *Mr. Sandys* requested an expression of opinion from the Bench as to the rule of practice to be adopted on appeals from decrees made upon claims, as to the proper party to open the case. The plaintiff here appeared to support the order of the Master of the Rolls made in his favour, the defendant having appealed against the whole decree.

[*LORD JUSTICE KNIGHT BRUCE.*—We have had this point not unfrequently men-

tioned, but on each occasion we have as yet abstained from laying down any general rule, and have not desired what we did to be taken as a precedent.]

Mr. Bethell and *Mr. Tripp*, for the appellant.—It would be very convenient if a general rule of practice were settled. The general scope of the wording of the 29th of the Orders of April 1850, would seem to imply that the rule respecting appeal motions was to be followed, for it is said, "any order made in pursuance of these Orders may be discharged, altered, varied, or set aside on motion," and the 30th Order says that any order may be discharged or varied "on motion," so that your Lordships would appear to be called upon to frame your proceedings in the same way as if the defendant, the appellant, were now moving to discharge the order made by his Honour the Master of the Rolls. If that be so, then, as appellant, he would begin.

Mr. Bedwell (the Registrar), in answer to a question from the Court, said his impression was, that the Orders contemplated that the proceedings on such an appeal should be conducted on the same rule as on an appeal from a decree made in a suit by bill.

Mr. Roundell Palmer.—That view is borne out by the language, for although the word "order" is used throughout when speaking of the decision come to on a claim, yet the 14th Order says that every order "so to be made is to have the effect of, and may be enforced as a decree or decretal order made in a suit commenced by bill." It certainly appears, independently of the wording of the Orders of April 1850, more rational that the same practice should be followed in a suit by claim, as in a suit by bill, so far as an appeal is concerned.

LORD JUSTICE LORD CRANWORTH.—In my opinion the better rule to follow will be to adopt the analogy to a decree pronounced in a suit by bill, and to treat this appeal and all subsequent appeals in that manner. The appeal here being against the whole decree, the plaintiff will begin. I do not think that by the use of the word "motion," in the Orders, there was any intention to give any collateral

(1) Reported *ante*, p. 76. The appeal was heard a few days after the point above was decided, when their Lordships affirmed the decree of the Master of the Rolls.

advantage as to the opening and the reply in the case of an appeal. The order of the Court, in the case of a claim, is as much a decree as a decree or decretal order in a suit by bill.

LORD JUSTICE KNIGHT BRUCE concurred.

L.C.
1851.
Feb. 12, 14; }
Nov. 6. } HICKLING v. BOYER.

Legacy—Specific Bequest of Leaseholds—Covenant to Repair—Dilapidations.

A testatrix bequeathed leasehold property to R. A. absolutely during the residue of her term, subject to the payment of the rent and performance of the covenants reserved and contained in the lease; and, as to her residuary estate, subject to the payment of her debts, &c., she gave the same to J. B. absolutely:—Held, upon appeal, reversing the decree below, that R. A. took the leaseholds cum onere, namely, with the liability to make good the dilapidations that had accrued during the life of the testatrix; and that R. A. should indemnify the executors against liability under the covenant to repair before he was let into possession.

The principal question in this case was, whether a specific legatee of a leasehold estate took the same subject to the liability, under the covenant to repair contained in the lease, to make good the dilapidations that had accrued in the lifetime of the testatrix, or whether the residuary estate of the testatrix was primarily liable in exoneration. The Vice Chancellor Wigram held that the residuary estate was liable in exoneration of the specific bequest, and directed a certain part of the residuary estate to be set apart as an indemnity fund to the executors of the testatrix.

The present appeal was from that decree.

The Attorney General and Mr. Shapter, for the appeal; and

Mr. Teed and Mr. Craig, contra.

The facts of the case sufficiently appear in the judgment; but the following cases were cited, besides those noticed in the judgment:—

Simmons v. Bolland, 3 Mer. 547.

Rochfort v. Battersby, 2 H. L. Rep. 388.

Wildridge v. M'Kane, 1 Moll. 122.

Thomas v. Montgomery, 1 Russ. & M. 729.

Vernon v. Lord Egmont, 1 Bligh, N.S. 554.

Cox v. King, 9 Beav. 530.

Nov. 6.—The LORD CHANCELLOR.—This is an appeal against so much of an order of Wigram, V.C., made on the 12th of July 1844, on further directions, as directed that a certain sum of stock should be set aside to indemnify the executors of the testatrix in the cause against liabilities in respect of the repair of premises held under a lease, which was bequeathed by the will. The facts of the case are these: Zillah Taylor, by her will, dated in October 1837, bequeathed the leaseholds in question to R. Ashby, his executors, &c. absolutely, during the residue of her term therein, subject to the payment of the rent and performance of the covenants reserved and contained in the lease under which she held the same premises; and as to her residuary real and personal estate, subject to her debts, &c., she gave the same to James Boyer, his heirs, executors, administrators, and assigns absolutely. In September 1839 the testatrix died, and afterwards two of her executors filed a bill for the administration of her estate. In May 1842 a decree was made referring it to the Master to take the usual accounts and directing certain inquiries as to liabilities. In 1844 the report was made, certifying that by an indenture of lease of the 7th of April 1803, a piece of ground and seventeen messuages thereon were granted to George Taylor for ninety-nine years from the 25th of March then last, and that in such lease was contained a covenant on the part of George Taylor, his executors, administrators and assigns, to keep the said premises, and all buildings that might thereafter be erected on the said piece of ground, in proper repair during the continuance of the term; that G. Taylor made three underleases of different parts of the said premises, containing similar covenants to repair; and that the said G. Taylor bequeathed the premises to his cousin

George Taylor, who bequeathed the same to Zillah Taylor; that at the time of her death, dilapidations had taken place (but whether any had taken place before the commencement of her title the Master was unable to state); that in November 1839 it would have required 1,849*l.* to have put the premises in repair, but in April 1843 only 1,369*l.* By the order of the 12th of July 1844 it was ordered, among other things, that the sum of 1,500*l.* 3*l.* per cent. bank annuities should be carried over to an account to be entitled "The Executors' Indemnity Account," and that the dividends thereof should be laid out in the like stock, &c.; and it was ordered that Richard Ashby should be let into possession, and that the deeds should be delivered up and the rents paid to him, and that J. Boyer should be at liberty to take legal proceedings to compel the under-lessees to repair, and for that purpose to make use of the names of the executors, who were to be indemnified out of the indemnity fund. In April 1845 J. Boyer died, and by an order of the 7th of May 1846, it was ordered that the executors of J. Boyer should be at liberty to take proceedings against the under-lessees, to compel them to make good the dilapidations, and for that purpose to use the names of the surviving executors of the testatrix. By an order of the 30th of May 1846, on the petition of the surviving executors of the testatrix, it was ordered that the legacy duty of the residue of the testatrix's estate should be paid, partly out of the indemnity fund, and that the dividends of that fund should be paid to the executors of J. Boyer, and that the deficiency in that fund, caused by such payments thereout, should be made up out of certain other funds. In 1847 R. Ashby died, and William Cherrington, the executor of J. Boyer, has appealed from so much of the order of July 1844 as directed 1,500*l.* to be carried over to an account entitled "The Executors' Indemnity Account," and the dividends invested in trust to the like account, and the executors of the testatrix to be indemnified thereout, and from so much of the order of the 30th of May 1846 as directed the deficiency in the executors' indemnity fund to be made good; and the appellant prayed that what remained of the indemnity fund, after the

payments directed by the order of the 30th of May 1846, with the dividends thereof, should be paid to himself.

The appellant contends that, under the terms of the bequest, the legatee took subject to the liabilities attaching to the lease, and that he, and not the testatrix's estate, was bound to pay the expenses of the repairs; and I am of opinion that by the express terms of the will, R. Ashby was to take the leasehold estate *cum onere*. For the respondents, the cases of *Cochrane v. Robinson* (1) and *Fletcher v. Stevenson* (2) were cited; but in neither of those cases did the will contain any expressions similar to those in the present case. But there are two cases in which similar expressions occur. In *Serie v. St. Eloy* (3) the testator devised his land in D. to A, an infant, at her age of twenty-one, subject to the incumbrances thereupon, the rents to be paid to her father for her maintenance, and he devised other lands to trustees for the payment of his debts. It was objected that the lands in D. were devised subject to the incumbrances thereon, for which reason the devisee must take them *cum onere*; but the Master of the Rolls said that the devise of the estate, subject to the incumbrances, was no more than what was implied; for the testator could not do otherwise; but when the testator devised other lands to pay his debts, that must be intended all his debts; and that was the stronger by reason of the disposition of the *interim* rents, which was as much as to say that they should not be applied in discharge of the mortgage. In *Graves v. Hicks* (4) a testator devised real estate, subject nevertheless to such charges and incumbrances as should, at the time of his death, be existing thereon by virtue of any marriage settlement or otherwise; and he bequeathed his residuary personal estate, subject to and charged with the payment of his debts; the real estate was in mortgage to secure a sum settled on his daughter on her marriage; and the mortgage deed contained the usual

(1) 11 Sim. 378; s. c. 7 Law J. Rep. (N.S.) Chanc. 266.

(2) 3 Hare, 360.

(3) 2 P. Wms. 386.

(4) 6 Sim. 391; s. c. 4 Law J. Rep. (N.S.) Chanc. 239.

covenant for the payment of the money. The Vice Chancellor held, that the mortgaged premises were charged with and subject and liable in the first instance to the payment of that sum; and he grounded his decision partly on the words "subject nevertheless," and partly, on the distinction between an ordinary mortgage and the provisions in a settlement; and he quoted the words of Lord Hardwicke, in *Lanoy v. the Duke of Athol* (5), There being a borrowing and a lending in the case of a mortgage, the real estate is considered only as a pledge, and the personal estate, which is the natural fund, is liable in the first instance; but this rule has never been carried so far as to extend it to a provision upon a settlement. There is a distinction also between testamentary gifts of mortgaged estates and leaseholds; the words "subject, &c." when used in relation to the first, are not mere surplusage, even when they are not construed to import that the party is to take *cum onere*; for they may be meant to shew at once that the estate is in mortgage; but those words, when used with reference to property described as leasehold, are surplusage, unless they are construed to signify that the bequest is to be subject to the performance of the covenant to repair in respect of dilapidations existing at the death of the testator. It appears to me, however, only natural, and in accordance with the presumable intention of the testator in making a specific bequest of leaseholds, that the legatee should take them subject to the burden of repairs. It is true that, except in special cases, the general personal estate is the first fund for the payment of debts, and the other kinds of property are exonerated; but the doctrine of exoneration has no application to a case like the present. Lord Hardwicke, in the passage quoted by the Vice Chancellor in *Graves v. Hicks*, has pointed out a distinction between ordinary mortgages and provisions in a settlement; and even in the case of a mortgage, the cases of *Scott v. Beecher* (6), *The Earl of Ilchester v. the Earl of Carnarvon* (7)

and *The Earl of Clarendon v. Barham* (8) shew that where the mortgage debt was not the original debt of the testator, the estate itself must bear the burden, even though the testator has charged other parts of his property with the payment of his debts; and if there is a distinction between an ordinary mortgage and a settlement by way of mortgage as regards exoneration, there is, at least, an equal distinction between a mortgage and the present case. The general personal estate of the testatrix never received anything which, as in the case of a mortgage debt, it was under a natural obligation to replace; nor was the liability in respect of the dilapidations an actual debt of the testatrix, for *non constat* but that the under-lessees would do the repairs when called upon. Both on the language of the will and on general principles I am of opinion that R. Ashby was liable as between himself and the executors of the testatrix to do the repairs in respect of dilapidations existing at the time of the testatrix's death. But whatever may be the case with respect to the liability to repairs as between the specific and residuary legatees, no disposition and no expression of intention on her part can alter the rights of the lessor.

The testatrix was an assignee of the lease, and an assignee cannot, by assigning over, get rid of his liability for breaches of covenant committed during the period of his occupation. The executors, therefore, are entitled to an indemnity in respect of such liability. I do not consider the lessors barred in this case by not having come in before the Master; for though the liability was known, yet it was uncertain whether it would not be removed by a repair of the premises; which, indeed, has taken place to a considerable extent since the death of the testatrix.

An objection was taken that the right of the appellant has been waived by the petition of the 7th of May 1846, and the order obtained thereon. But this objection is not tenable, for the executors of Boyer were entitled to the residuary estate, and the residuary estate was liable to the lessor, and the under-lessees were liable to those claiming under George Taylor and the

(5) 2 Atk. 444.

(6) 5 Mad. 96.

(7) 1 Beav. 209; s. c. 8 Law J. Rep. (N.S.) Chanc. 245.

(8) 1 You. & C. C. C. 683.

testatrix; and the executors of James Boyer were justified in endeavouring to compel the under-lessees to repair for the purpose of removing the liability of the testatrix's estate; but this did not affect their right as between R. Ashby and themselves to require that the expense of the repairs should be borne by R. Ashby rather than by the residuary estate. In *Shadbolt v. Woodfall* (9) it was held that an executor who had consented unconditionally to a specific bequest of the testator's personal estate was not entitled to an indemnity out of the general estate in respect of a covenant in the lease. But in this case it does not appear that such an assent was given. I think the order of July 1844 was wrong in directing the leaseholds to be given up to R. Ashby, but that he ought to have been required to give an indemnity to the executors before being let into possession; and then there would have been no need of impounding any part of the residuary estate. How to make a decree which will be consistent with the rights of all parties, the executors of the testatrix, the executors of Boyer, the executors of R. Ashby and the lessor, is not easy to determine. But I think I shall be accomplishing this, as far as may be, by declaring that R. Ashby took the premises subject to the liability of performing the covenant to repair, and by directing the personal representative of R. Ashby to deliver up possession to the executors of the testatrix till the repairs be done or indemnity given; and that the present indemnity fund be made up as directed by the order of the 30th of May 1846; and that, when the executors of the testatrix shall have been so indemnified, then the indemnity fund shall be paid to the executors of J. Boyer, and the dividends be paid to them in the mean time; and that the personal representatives of R. Ashby be at liberty to take proceedings against the under-lessees, and for that purpose to use the names of the executors of the testatrix, they being indemnified out of the fund retained by them. At the same time I think it right that the personal representative of R. Ashby should have an opportunity of contesting this order. Therefore, I make the

order I have mentioned, unless such representative within one month after the service of the order present a petition to have the matter re-heard.

M.R.
Nov. 12, 13; }
Dec. 2. } TOULMIN v. REID.

Interpleader—Defendants—Relief against Plaintiffs.

G. P. the elder was the owner of one-third of a ship, Messrs. S, M. & Co., of Calcutta, were the owners of another third, and were mortgagees of the other third, of which G. P. the younger was the owner. R, I. & Co., of London, were the agents of S, M. & Co., and they appointed Messrs. T. the ship's brokers, who as such received the freight, which amounted to 2,721l. 2s. 7½d., and paid one-third, 907l. 0s. 10d., to G. P. the elder. R, I. & Co. accepted several bills of exchange drawn against this freight, and before they became due stopped payment. S, M. & Co. also stopped payment, and finally became insolvent. Claims were then made upon Messrs. T. for the whole freight by R, I. & Co., and also by the holders of the bills drawn by them, as well as on behalf of S, M. & Co. and G. P. the younger, and upon a bill filed by Messrs. T. that the defendants might interplead in respect of the 1,814l. 1s. 9d.:—Held, that no decree could be made in the suit to compel the plaintiffs to bring the entire freight into court; that as no defendant asked to have the bill dismissed, the Court must make a decree of interpleader; and that such decree would only protect them to the extent of 1,814l. 1s. 9d.

This bill was filed, by Henry Heyman Toulmin and Calvert Toulmin, who in and previous to the month of July 1847 carried on the business of ship-brokers at 31, Great St. Helen's, under the firm of "Henry and Calvert Toulmin," against Sir John Rae Reid, Bart., John Irvine, George Reid, James Milligan, Robert and J. Henderson, and against George Palmer the younger and John Cochrane, when they should come within the jurisdiction; and it prayed that the defendants might

interplead together; and that it might be ascertained and declared to which of the defendants the sum of 1,814*l.* 1*s.* 9*d.*, and every part thereof, of right belonged, or was payable, or ought to be paid, the plaintiffs being ready and willing and offering to pay the sum to such of the defendants as should appear to be entitled thereto; and that the plaintiffs in the mean time might pay the money into court; and that Messrs. R. & J. Henderson might be restrained from issuing execution on an attachment issued from the Lord Mayor's Court, or taking any other proceedings in respect thereof against the plaintiffs; and that Messrs. Cochrane & Palmer might be restrained from prosecuting the actions commenced by them, and that Messrs. Cochrane & Palmer, Sir J. R. Reid, and Messrs. Irvine, G. Reid and Milligan might be restrained from taking any proceedings at law against the plaintiffs.

Previously to July 1847 George May and Charles Hampden Pickford carried on business at Calcutta in partnership, as merchants and agents, under the style of Saunders, May, Fordyce & Co. And Sir J. R. Reid, J. Irvine, G. Reid & J. Milligan carried on business in London, in partnership as merchants and agents, under the style of Reid, Irvine & Co.

Previous to this time both these firms were in mutual intercourse and correspondence, and had divers dealings and transactions with each other.

In July 1847 G. Palmer the elder, of Newcastle-upon-Tyne, G. Palmer the younger, now residing at Calcutta, out of the jurisdiction, master mariner, and the defendants, G. May and C. H. Pickford, as the partners constituting the firm of Saunders, May, Fordyce & Co. were possessed, as part owners, of the ship called the *Punjaub*, of which G. Palmer the younger was master, and G. May and C. H. Pickford, as partners constituting the firm of Saunders, May, Fordyce & Co., were possessed of one-third of the ship, and G. Palmer the elder and G. Palmer the younger were respectively entitled each to one-third of the said ship; and G. May and C. H. Pickford alleged that G. Palmer the younger had mortgaged to them, or to the firm, his one-third of the ship to secure the repayment of a consider-

able sum of money; and that such mortgage was subsisting in 1847 and 1848.

In February 1847 the *Punjaub* was at Calcutta, bound on a voyage to London with a cargo of merchandise, and was with the cargo consigned by Messrs. Saunders, May, Fordyce & Co. to Messrs. Reid, Irvine & Co.

In July 1847 the plaintiffs were appointed by G. Palmer the elder and the defendant, G. Palmer the younger, and Messrs. Reid, Irvine & Co. as the correspondents and agents of Messrs. Saunders, May, Fordyce & Co. to be the brokers for the ship *Punjaub*, to transact the necessary business connected with the homeward voyage of the ship, and, upon her arrival in the port of London, to make all necessary payments and disbursements in respect of the ship, and to collect and receive the freight payable for the cargo to the owners of the ship.

On the 21st of July 1847 the plaintiffs received a letter from Messrs. G. Palmer the elder and G. Palmer the younger, as follows:—

“Messrs. H. & C. Toulmin.

“Dear Sirs,—We request you to pay over to Reid, Irvine & Co. the freight per *Punjaub* when received. We are, &c.

“G. Palmer and G. Palmer, jun.”

In July 1847, the ship *Punjaub* arrived in the port of London, and was reported at the Custom House on the 26th of July 1847.

It was alleged by Sir J. R. Reid, J. Irvine, G. Reid and J. Milligan that the said G. May and C. H. Pickford, or the house of Saunders, May, Fordyce & Co., had drawn at Calcutta upon the firm of Reid, Irvine & Co. five bills of exchange, dated in the month of February 1847, and two bills dated in April 1847, amounting to 4,338*l.* 7*s.* 8*d.*, payable respectively ten months and six months after date, against the share of the freight which would be payable to Messrs. Saunders, May, Fordyce & Co. in respect of their own one-third share thereof, and in respect of the said one-third share of the freight so mortgaged to them as aforesaid by the defendant, G. Palmer the younger; and that such bills of exchange had been accepted by the defendants, Sir J. R. Reid, J. Irvine, G. Reid and J. Milligan, and were charged upon the two shares of the freight

of the said Saunders, May, Fordyce & Co. and the said defendant, G. Palmer the younger.

After the arrival of the ship *Punjaub* in the port of London, and before the bills of exchange became due, the defendants, Sir J. R. Reid, J. Irvine, G. Reid and J. Milligan, required the plaintiffs to give them, or the firm of Reid, Irvine & Co., an undertaking in writing to pay to the firm the freight when it should be received, which the plaintiffs did, as follows:—

“Messrs. Reid, Irvine & Co.

“31, Great St. Helen's, 26th July 1847.

“Gentlemen,—We hereby engage to pay over to you the freight per *Punjaub* when received, and we engage not to release the cargo without first receiving the freight. We are, gentlemen, yours obediently,

“H. & C. Toulmin.”

In the month of September 1847 Messrs. Reid, Irvine & Co. stopped payment and dishonoured all the bills of exchange, but continued to carry on the business under a deed of inspection, dated the 1st of January 1848.

On the 4th of November 1847, Messrs. Saunders, May, Fordyce & Co. stopped payment; but George May and C. H. Pickford continued to carry on the business under a deed of inspection, dated the 29th of December 1847.

In consequence of the failure of Reid, Irvine & Co., George Palmer the elder wrote to the plaintiffs as follows:—

“Newcastle on Tyne, September 28, 1847.

“Messrs. H. & C. Toulmin.—Dear Sirs,—From circumstances which have arisen, my son and myself deem it prudent that the freight of the *Punjaub* should either be paid to us or our agent; and we should, of course, prefer you to any other party receiving it on our account. Any order given hitherto to or on behalf of any other person we revoke, as we have been advised we ought. I shall feel obliged by a communication from you in course, that no misunderstanding may arise between us.—I remain, &c. Geo. Palmer.”

The plaintiffs collected the freight, and after deducting their payments and commission there remained in their hands a balance amounting to 2,721*l.* 2*s.* 7*d.*, out of which they paid 907*l.* 0*s.* 10*d.* to George

Palmer the elder, as owner of one-third of the ship, which left a balance in their hands of 1,814*l.* 1*s.* 9*d.*, which, in consequence of the conflicting claims, they could not pay with safety to themselves.

On the 1st of January 1848, William Henry Harton and Hugh Hamilton Lindsay, of 15, South Street, Finsbury, caused the following notice to be served upon the plaintiffs:—“Gentlemen,—We hereby, as the legally constituted attorneys of Messrs. Saunders, May, Fordyce & Co. of Calcutta, merchants, the agents for as well as part owners of the ships or vessels *Punjaub* and *Nankin*, give you notice to retain in your hands for their use all sums of money which you may have collected or received, or which you may hereafter collect or receive, on account of freight earned by those ships or vessels, or either of them, on their last voyages from Calcutta to London; the said Messrs. Saunders, May, Fordyce & Co., as such agents as well as part owners of the said ships or vessels as aforesaid, claiming a lien upon the money in your hands, or which may come to your hands, for the amount of such freight of the said ships or vessels or either of them. Dated the 1st of January 1848. Yours, &c., W. H. Harton, for self and H. H. Lindsay.”

Sir J. R. Reid, John Irvine, George Reid and James Milligan also sent the following letter to the plaintiffs:—

“London, February 23, 1848.

“Messrs. H. & C. Toulmin.—Gentlemen,—Having accepted the under-mentioned drafts of Messrs. Saunders, May, Fordyce & Co. of Calcutta against the freight of the ship *Punjaub*, and having received from you an engagement to account to us for the said freight, we hereby give you notice not to part with the amount except on payment of the said acceptances, and that we shall require it to be so applied. We are, gentlemen, your most obedient servants,
Reid, Irvine & Co.

“No. 6,932	£452	9	2	due	9 Dec. 1847.
6,933	166	15	6	”	9 Dec. 1847.
6,934	519	3	0	”	11 Dec. 1847.
6,935	1,000	0	0	”	28 Sept. 1847.
6,936	700	0	0	”	28 Sept. 1847.
8,098	750	0	0	”	11 Feb. 1848.
8,099	750	0	0	”	11 Feb. 1848.

£4,338 7 8

Messrs. Robert & John Henderson, of

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Mining Lane, alleged that in June 1848 they were holders of two of the bills of exchange mentioned in the letter of the 23rd of February 1848 as being numbered 6,932 for 452*l.* 9*s.* 2*d.* and 6,934 for 519*l.* 3*s.*, amounting together to 971*l.* 12*s.* 2*d.*; and they commenced an action of debt against Sir J. R. Reid, John Irvine, George Reid and James Milligan, in the Lord Mayor's Court in the city of London, upon which an attachment was issued against the 1,814*l.* 1*s.* 9*d.* in the hands of the plaintiffs for the recovery of the 971*l.* 12*s.* 2*d.*; and on the 2nd of June 1848 notice of the attachment was served on the plaintiffs.

"June 2, 1848.

"Messrs. H. & C. Toulmin.—Take notice, that by virtue of an action entered in the Lord Mayor's Court, London, against Sir John Rae Reid, Bart., John Irvine, George Reid and James Milligan, trading under the firm of Reid, Irvine & Co., defendants, at the suit of Robert Henderson and John Henderson, plaintiffs, on a plea of debt upon demand of 2,000*l.*, I do attach all such monies, goods and effects as you now have or which hereafter shall come into your hands or custody of the said defendants', to answer the said plaintiffs on the plea aforesaid, and that you are not to part with such monies, goods or effects without licence of the said Court."

The plaintiffs entered an appearance to the attachment, but though the action was still pending no further proceedings had been taken.

Applications for payment of the freight were afterwards made on behalf of Messrs. Harton & Lindsay, as the agents of Messrs. May & Pickford, the surviving partners of the firm of Saunders, May, Fordyce & Co., and also on behalf of George Palmer the younger.

On the 13th of May 1848, George May, and on the 9th of July 1849, C. H. Pickford respectively became insolvent, and took the benefit of the 11 Vict. c. 21, intitled, 'An Act to consolidate and amend the Laws relating to Insolvent Debtors in India;' and their joint and separate estate and effects became vested in John Cochrane, who resides at Calcutta, as the official assignee; and on the 20th of October 1849 application was made on behalf of J. Coch-

rane for payment of one-third of the freight claimed by them, and a similar application was also made on behalf of G. Palmer, jun.; and these were followed by actions at the suit of J. Cochrane and J. Palmer the younger against the plaintiffs, to recover the 1,814*l.* 1*s.* 9*d.*, upon which this bill was filed, charging that they ought to set forth what rights and interests they respectively claimed in the 1,814*l.* 1*s.* 9*d.* and every part thereof; and on the 11th of January 1850, upon a motion by the plaintiffs, an order was made, under which the 1,814*l.* 1*s.* 9*d.* was paid into court and invested.

Mr. Roupell and *Mr. Piggott*, for the plaintiffs, contended that the facts stated in the bill entitled the plaintiffs to the decree asked for—

Crawshay v. Thornton, 2 Myl. & Cr. 1; s. c. 6 Law J. Rep. (N.S.) Chanc. 179.

Jew v. Wood, Cr. & Ph. 185, 190; s. c. 3 Beav. 579; 10 Law J. Rep. (N.S.) Chanc. 261.

The MASTER OF THE ROLLS.—Does any party ask that the bill may be dismissed?

Mr. Roupell.—No.

Mr. R. Palmer and *Mr. W. S. Ferrars*, for Messrs. Reid, Irvine & Co., contended that the plaintiffs had parted with one-third of the freight, and as the plaintiffs had filed this bill the decree ought to do justice, and they could not escape bringing in the entire freight. Messrs. Reid, Irvine & Co. accepted the bills, believing that Messrs. Saunders, May, Fordyce & Co. were the sole owners of the ship and freight, and the plaintiffs gave Messrs. Reid, Irvine & Co. their personal undertaking to pay the freight to them. It was, therefore, improper to make a decree except upon terms which would enable the Court to deal fully with the entire freight. Messrs. Reid, Irvine & Co. did not desire to receive the money, but that it should be applied to discharge the bills of exchange which have been drawn. It was laid down that, if at the hearing the question between the defendants was ripe for decision, this Court would make a decree, and if such was not the case it would direct an action, an issue or a reference to the Master

to bring the matter to a determination—*Mitford's Pleadings*, 142, 4th ed., *Duke of Bolton v. Williams* (1), *Angell v. Hadden* (2). The answers of the co-defendants might be read against each other—*Bowyer v. Pritchard* (3), and Reid, Irvine & Co. could claim the benefit of any question which arose upon the answers of the opposite parties. It was, however, clear that the plaintiffs had no right to file this bill, and if any decree was made it must be upon equitable terms—*Crawshaw v. Thornton* (4), *Mitchell v. Hayne* (5). The case made on the bill was against the plaintiffs. The bill of exchange was accepted against all the freight, and Reid, Irvine & Co. had a claim against it all, and not against two-thirds only. Being consignees they had taken an undertaking from the plaintiffs which was authorized by both the Messrs. Palmer—*The East and West India Dock Company v. Littledale* (6), *Horton v. the Earl of Devon* (7), *In re Gledstones* (8), *Burn v. Carvalho* (9). It might, therefore, be considered settled that the undertaking given was not revocable, even if it was wished, since notice of the appropriation was given. The plaintiffs also might be sued at law, and could not be discharged from the liability they had incurred. The case of *Mitchell v. Hayne* arose upon motion, and there it appeared that the amount proposed to be paid was less than the entire sum demanded. By what right did the plaintiffs part with the third of the fund when they accepted the duty of collecting, and knew that the parties trusting them expected to receive the whole? It was, therefore, clear from the bill and answers that the defendants' claim extended beyond this amount. The position of Reid, Irvine & Co. was not altered by the bankruptcy—*Ex parte Waring* (10), *Laycock v. Johnson* (11). They only claimed the

fund on account of the holders of the bills, and they had always insisted on its being so applied. Messrs. Reid & Co. therefore asked for a reference to the Master, to inquire into the circumstances and to take an account of the freight, and by whom received, and how discharges had been obtained for it, who was entitled to it, and in what shares and proportions.

Mr. Walpole and *Mr. Selwyn*, for Messrs. Henderson, insisted that the whole amount of the freight was applicable to the payment of the bills of exchange.

Mr. Lloyd and *Mr. Busk*, for George Palmer the younger and John Cochrane, raised no question upon the one-third of the freight paid to George Palmer the elder. This suit was properly an interpleader suit: were it not it would be multifarious. It was proper that the right to the fund should be tried in an action at law by Reid, Irvine & Co. against the plaintiffs.

Mr. Busk tendered some evidence to prove that the defendants had notice at whose expense the ship *Punjaub* was built, and also of certain accounts.

Mr. R. Palmer objected to its being read—*The Thames and Medway Canal Company v. Nash* (12), *The Duke of Bolton v. Williams* (13).

Mr. Roupell.—The practice is novel, but on behalf of the plaintiffs I refuse to notice it.

THE MASTER OF THE ROLLS.—I am not disposed to introduce anything at variance with the practice. As the plaintiffs do not object, the evidence may be entered against them, but I cannot admit it against the co-defendants.

Mr. Roupell, in reply, referred to *Stevenson v. Anderson* (14), *Hyde v. Warren* (15) and *Jones v. Gilham* (16), and argued that this was strictly an interpleader suit. The money had been brought into court in the presence of the defendants: they could not agree who was entitled to it, and they were brought here to settle their differences.

(1) 2 Ves. jun. 138; a. c. 4 Bro. C.C. 297.
 (2) 16 Ves. 202.
 (3) 11 Price, 103.
 (4) 7 Sim. 391.
 (5) 2 Sim. & S. 63.
 (6) 7 Hare, 57.
 (7) 19 Law J. Rep. (N.S.) Exch. 52.
 (8) 3 Mont. D. & D. 109.
 (9) 4 Myl. & Cr. 690; a. c. 9 Law J. Rep. (N.S.) Chanc. 65.
 (10) 19 Ves. 345, 349.
 (11) 6 Hare, 199; a. c. 16 Law J. Rep. (N.S.) Chanc. 350.

(12) 5 Sim. 280.
 (13) 4 Bro. C.C. 297.
 (14) 2 Ves. & B. 407.
 (15) 19 Ves. 322.
 (16) G. Cooper, 49.

Reid, Irvine & Co. insisted that the defendants had bound themselves to account to them, but at the same time they disclaimed any personal interest. The objection that too little was to be paid into court should have been taken when application was made to pay it in. It was impossible for the plaintiffs to bring G. Palmer the younger here if an account was asked against him. This suit was not analogous to one between trustee and *cestui que trust*; the plaintiffs, however, were not trustees, but mere depositaries. The defendants could not therefore ask to convert this into a bill for relief; and according to the practice in cases of interpleader, the plaintiffs were entitled to their costs.

THE MASTER OF THE ROLLS.—I am of opinion that the defendants may submit at the hearing that the suit is not proper, and that they are not precluded by not taking the objection by demurrer, or on the motion to pay the money into court. In *Hyde v. Warren*, Lord Eldon said, it was not competent for parties to demur to a bill of interpleader, but it was not right to say that it was not proper for them to interplead. If no objection could be taken at the hearing, the plaintiff might make a garbled statement sufficient to entitle him to a decree of interpleader; it was not until the hearing that evidence could be brought forward; the defendant then might have the means of proving his case, and supposing the plaintiff suppressed a document, that could only be brought forward by a cross bill; but if the argument of the plaintiffs was correct, the defendant would be precluded from bringing his case forward. The suit would have been proper had it related to the 1,814*l.* 1*s.* 9*d.* only; but if the plaintiff seeks to protect himself against the 907*l.* 0*s.* 10*d.* he has paid over, I am inclined to think it is not proper. Upon this I shall take time to consider; should I make a decree it will be in the ordinary form, but if I do not, then I shall have to consider whether I can make any decree against the plaintiffs, or whether I can use the pressure of the Court and say, if you do not consent to a decree for the whole I shall dismiss the bill with costs.

Dec. 2.—**THE MASTER OF THE ROLLS.**—

This suit was instituted by Messrs. Toulmin, the brokers and agents of Reid, Irvine & Co., the consignees of a ship called the *Punjab*. The bill prays that the defendants may interplead as to their rights to a sum of 1,814*l.* 1*s.* 9*d.* received by the plaintiffs for freight. By an order made in this cause on the 11th of January 1850, this sum has been paid into court and invested. Several of the defendants contend that it is not a proper case for interpleader, but none of them on that or any other ground ask that the bill may be dismissed; on the contrary, they all appear to consider that the dispute can best be settled by the matter being put in such a course of inquiry as will enable the Court to determine the questions between the parties; but they insist upon this objection to the bill to induce the Court to make, instead of the usual interpleading decree, one keeping the plaintiffs before the Court and making them liable to a general account. The defendants call upon me to make such a decree as will effect complete justice between the parties, and not merely to enable me hereafter to determine the right to this 1,814*l.* 1*s.* 9*d.*, but also to determine the rights and settle the disputed questions that may arise, or have arisen, between all the parties.

The ship *Punjab* sailed in the beginning of March 1847 from Calcutta to England; one-third belonged to George Palmer the elder, and one-third to George Palmer the younger, but was mortgaged by him to Messrs. Saunders, May & Co. at Calcutta, to whom the remaining one-third of the ship belonged. The ship and cargo were consigned to Reid, Irvine & Co., the agents of the Calcutta house. Messrs. Toulmin were duly appointed the ship's brokers by the Messrs. Palmer and by Reid, Irvine & Co. as the agents of the Calcutta house. The plaintiffs duly received the freight, amounting, as they alleged, after making such deductions as they were entitled to make, to the sum of 2,721*l.* 2*s.* 7½*d.*; they have paid one-third, amounting to 907*l.* 0*s.* 10*d.*, to George Palmer the elder, and hold in their hands the remaining sum of 1,814*l.* 1*s.* 9*d.* to be paid to the persons entitled; but as conflicting claims have arisen, and actions have been brought against them in respect of it, they have filed this bill, paid the money into court, and now ask for the

usual interpleading decree. In the first place, Reid, Irvine & Co. claim to be entitled to the entire freight, by virtue of an express authority given on the 21st of July 1847, by the Messrs. Palmer to the plaintiffs, directing them to pay the produce of the freight to Reid, Irvine & Co., which authority was followed by an undertaking in writing of the 26th of July 1847, entered into by the plaintiffs, to pay the freight to Reid, Irvine & Co. Relying on this, Reid, Irvine & Co. contend that the payment of the one-third of the freight to G. Palmer the elder is wholly unauthorized and incorrect; that the plaintiffs are liable to pay the whole to them, and that the letters of the 21st and 26th of July constituted, at law, a legal appropriation of the money arising from the freight, or that if it had not this effect, that it constituted at least a valid assignment thereof in equity. And these defendants, not asking me to dismiss the bill, although contending that in this state of circumstances this is not a proper case for interpleader, ask for a decree compelling the plaintiffs to account generally for the one-third, as well as for the two-thirds of the freight: or if the Court cannot directly do this, to arrive at it by dismissing the bill with costs, unless the plaintiffs will, as a consideration for obtaining a decree, consent voluntarily so to account. Another class of claimants on this fund are the Messrs. Henderson, who are *bond fide* holders for value of bills drawn by the Calcutta house against this freight, and which, after having been accepted by Reid, Irvine & Co., have not been paid, that house having stopped payment in the month of September following this transaction, and having since continued to carry on business under a deed of inspection. The Messrs. Henderson have obtained an attachment in the Lord Mayor's Court on the fund, in an action against Reid, Irvine & Co., and urged similar arguments with them. And between Messrs. Henderson and Reid, Irvine & Co. there is not really any contest, as Reid, Irvine & Co. do not dispute, if they succeed, that the fund must be distributed amongst the holders of the bills drawn specifically against this freight and accepted, but not paid by them.

The defendants, Messrs. Henderson,

however, expressly contend that the plaintiffs ought not merely to account for the one-third of the freight paid to George Palmer the elder, but ought also to account for the gross amount of freight received by them, and ought not to be allowed the deductions which they have made thereout, but that the propriety thereof ought to be adjudicated upon under the decree to be made in this cause. The defendant Cochrane is the official assignee of the Calcutta house, Saunders, May & Co. They stopped payment, and after carrying on business for some time under a deed of trust, have ceased altogether to carry on business, and the partners composing that firm have become insolvent. Mr. Cochrane claims only the two-thirds of the freight; he does not contend that the plaintiffs ought to account for more than the 1,814*l.* 1*s.* 9*d.* paid into court, nor does he resist the decree of interpleader, but he contends, that the questions at issue between the defendants can best be determined by an action at law, and that complete justice could be done in an action in which Cochrane was plaintiff, against the Messrs. Toulmin as defendants at law, provided that such action were defended by the firm of Reid, Irvine & Co.

In my opinion, it is not competent for the Court, in cases of this description, to make any hostile decree against the plaintiffs, compelling them to account in respect of the various matters stated in the bill. No point is better established than that a defendant cannot have active relief against a plaintiff unless he himself file a bill for that purpose. It is true that there are many cases in which the mere failure of the plaintiff operates to give relief to the defendant, as in the case of a bill to redeem; so, also, it is true there are many cases, to several of which I was referred, where the plaintiff, an accounting party, who files a bill for taking the account, and for the administration of the fund, is treated by the Court as having thereby undertaken to account as the Court might direct; yet these cases do not weaken and will not affect or form any exception to the rule I have already stated, nor will they, in my opinion, enable the Court, in an interpleading suit, to make a decree against the plaintiff, in the same manner in which it

might have done if one of the defendants had instituted a suit for the purpose sought, and made the plaintiffs defendants thereto. I cannot, therefore, make the decree required by Reid, Irvine & Co. and the Messrs. Henderson, unless it is by consent, and, adversely, I am compelled either to dismiss the bill with or without costs, or to make such a decree as may enable the questions arising between the interpleading defendants to be most speedily and satisfactorily disposed of.

With respect to the dismissal of the bill, it is not wished by any one, but it is desired, that the Court should use its power of dismissing it, and of leaving the plaintiffs open to the litigation with which they have been threatened, for the purpose of compelling them to consent to such a decree, as will enable the Court not merely to settle the question in dispute as between the co-defendants, but to determine those also which exist between the plaintiffs and the defendants. In answer to this, it was argued by the plaintiffs that it was too late to contend at the hearing that this was not an interpleader suit, and that the objection must be taken by demurrer, or in opposition to the motion to pay the money into court, or not at all. I disposed of that objection at the time. The objection, however, is now only taken conditionally, and professedly with a view to compel the plaintiffs to consent to the decree, which, unless by their consent, I have stated my inability to make. I am, however, of opinion that I cannot properly use the power of the Court for this purpose, and that not being able directly to impose such a decree on the plaintiffs, I am not at liberty to extort their consent to it by threatening to do that which, in substance, is not desired by any party in the cause.

In this state of circumstances, I am of opinion that I must make the usual interpleader decree. So far as the plaintiffs are concerned, this will do no more than protect them from legal proceedings in respect of the particular sum paid by them into court, but they will remain liable to all such proceedings, if any, as the defendants may think fit to institute against them, either at law or in equity, in respect of other matters; in other words, the defendants, by interpleading as to this 1,814*l.*

1*s.* 9*d.*, will not be thereby held to admit that the plaintiffs are entitled to all or any of the deductions they have claimed and retained out of the gross amount of freight received by them, and they will not thereby escape the necessity of rendering an account of their receipts and payments in respect of such freight, if called upon so to do by competent authority. All that they obtain by this decree is, that they will have discharged themselves of this sum of 1,814*l.* 1*s.* 9*d.*; and in respect of that sum of money the Court will not permit any future suit or action to be instituted against the plaintiffs by the defendants to this record, but beyond that, the decree of interpleader will not afford them any protection.

As regards the question between the co-defendants, I have arrived at the conclusion that the course suggested of the action by Mr. Cochrane against the plaintiffs, to be defended by Reid, Irvine & Co., would not finally determine the questions at issue between them and the defendants Reid, Irvine & Co. and Messrs. Henderson; both the latter classes of defendants contend that the letters of the 21st and 27th of July 1847 constituted a legal appropriation of the freight in the hands of the plaintiffs, and this question might, no doubt, be tried in the action; but if they fail in that, they contend that these letters constitute a good assignment in equity of the money received for the freight. There are many cases in the books of this double remedy, and in several, as in *Burn v. Carvalho*, the circumstance that no remedy exists at law has been held to give a right to relief in equity.

I cannot, in the present stage of the case, form any surmise as to whether this is or is not a case of that description, but the possibility of its being so shews that an action at law could not finally conclude the question between the co-defendants. I must, therefore, refer it to the Master, to ascertain whether the defendants, or any and which of them, are or is entitled to this sum of 1,814*l.* 1*s.* 9*d.* or to any and what part thereof, in any and what proportions; with liberty to state any circumstances specially.

KINDERSLEY, V.C. } ARCHIBALD v. HART-
Jan. 24. } LEY.

*Will—Dividends—Legacy—Securities—
Balance at a Banker's.*

A testatrix directed her trustees to pay the dividends arising from her personal estate invested at her decease in or upon any stocks, funds, or securities whatsoever, yielding interest, to certain persons mentioned in her will. The testatrix, at her death, left a balance in the hands of her banker, who was in the habit of allowing his customers interest upon the amount standing to their credit on a particular day in the year:—Held, that this balance did not come within the terms used by the testatrix, but was undisposed of by the will.

This was a special case, agreed upon between the parties, pursuant to the statute 13 & 14 Vict. c. 35, for diminishing the delay and expenses of proceedings in the Court of Chancery. It was stated that Jane Strickland, a widow, by her will, dated the 8th of December 1846, appointed T. Dixon and the defendant Philip Hartley, trustees and executors of her will, and devised all her real estate unto and to the use of the said trustees and their heirs, upon trust for the plaintiff Bridget Archibald, during her life, and after her decease in trust for her children, who being a son should attain the age of twenty-one years, or being a daughter should attain that age or marry, as tenants in common, with a power to the trustees to apply the income towards the maintenance of such children during minority; and the said will then continued as follows:—

“I empower my said trustees to permit my personal estate invested at my decease in or upon any stocks, funds, or securities whatsoever yielding interest, to continue in the same state of investment so long as they shall think fit, with power from time to time to vary and transpose such investments for any other stocks, funds, or securities, or any real securities in England, upon trust to pay or permit my said daughter to receive the interest or dividends arising therefrom for and during her life, and subject thereto, upon trusts corresponding as nearly as may be with the limitations herein contained of my real estate.”

That the said will contained no other disposition of any personal estate than such as was thereinbefore set forth; that the testatrix died on the 19th of April 1848, leaving the plaintiff Bridget Archibald her only child and sole next-of-kin, according to the Statute of Distributions; that the testatrix was, at the time of her death, entitled to various sums of personal estate, including the sum of 1,099*l.* 17*s.* due from Messrs. Petty & Postlethwaite, bankers, at Ulverstone; that the testatrix had for several years a banking account with these bankers, and that it was the custom of the said bankers on the 31st of December in every year to allow to their customers interest in respect of their deposits left in the hands of the said bankers during the past year, and that on that day the bankers credited the testatrix with a sum in respect of interest at the rate of 2*l.* 10*s.* per cent.; that the testatrix had stock in the funds and she had 1,000*l.* at her bankers; that the plaintiffs Bridget Archibald and her husband claimed that the said balance of money was undisposed of by the said will, and that the plaintiffs, in right of the said Bridget Archibald, as the sole next-of-kin of the testatrix, were entitled thereto.

For the defendant, the infant child of Bridget Archibald, it was contended that the balance of monies at the bankers was included under the bequest of “any stock,” &c. The prayer was, that the Court would put a construction on the words “my personal estate invested at my decease in or upon any stocks, funds, or securities whatsoever yielding interest,” contained in the said will, and that it would determine whether the said balance of monies at the testatrix's bankers passed under such bequest, and whether the same was undisposed of by the said will, and belonged to the plaintiffs in right of the said plaintiff Bridget Archibald, as the sole next-of-kin of the testatrix, and to make such order as to the Court should seem just.

Mr. Murray appeared for the plaintiffs.

Mr. Shapter, for the infant defendant; and

Mr. Chapman, for the trustees.

The following cases were cited:—

Vaisey v. Reynolds, 5 Russ. 12.

Foley v. Hill, 1 Ph. 399.

Pott v. Clegg, 16 Mec. & W. 321.

Devaynes v. Noble, 1 Mer. 529.

Carr v. Carr, 1 Mer. 541, n.

Parker v. Marchant, 1 Ph. 356.

KINDERSLEY, V.C.—This will contains very little in any other part to assist in the construction of the clause in question. If I were to indulge in conjecture, I should imagine that the testatrix meant to give all her personal estate, but that is not the effect of the language she has used. She has given no estate to the trustees; she has appointed two persons trustees and executors of her will, and she directs payment of all debts and expenses, and then she devises her real estate in a particular manner. As to the personal estate, the only clause is that which is set forth in the case. Now, that the balance at the bankers is a debt is not in controversy, but it is a debt in this sense, that it is an engagement that the cheques of the customer will be honoured from time to time; and in this particular case, as to country bankers, an amount of interest is allowed on money which may have remained for a given time. According to the facts stated it appears that the bankers were in the habit, on the last day of each year, to allow interest on deposits left in their hands during the past year, and they credited her with a certain amount every year. Now, it does not appear that the testatrix was not entitled to draw out the money from time to time as she pleased. There was no contract to leave any sums for any given time, and according to the statement in the case, as to the amount of balance in the hands of these bankers, it was very fluctuating. How, then, can this be called personal estate invested in or upon any stocks, funds, or securities yielding interest? Is it stock? Certainly not. I should apprehend any balance at a banker's is not the same as stock or funds, because "stock" or "funds" have acquired a meaning as government securities, or funds of that nature. Then, the only definition under which it could come would be securities yielding interest. Now, in one sense, it is not a security, because a banker gives no security. The money stands only upon the credit of the bankers or upon their solvency. Therefore, in fact, there is no security taken. It is true that the money yields interest, but that does not make it a secu-

urity. It is personal estate due from the bankers, yielding interest, but not personal estate invested on any security. The term "investment" implies investment for a given term, but that cannot be applied to a balance in the bankers' hands, using it in a technical or popular sense. You cannot say an investment of a balance at the bankers, although the bankers allowed interest upon such sums as remained in their hands. Therefore, my opinion is, that the balance at the bankers will not come within the terms used by the testatrix; and as there is no residuary bequest, it will belong to the next-of-kin.

TURNER, V.C. }
Jan. 31.

PARSONS v. HARDY.

Supplemental Answer—Replication.

A supplemental answer may by consent be filed after replication, without withdrawing the replication already filed.

This was a motion that J. R. Walker, one of the defendants in the cause, might be at liberty to file a supplemental answer in respect of an erroneous statement in the original answer as to the execution of a certain mortgage deed mentioned in the bill; and that the replication already filed in the cause might be ordered to be taken as replication to the supplemental answer; or, if necessary, that the present replication might be withdrawn, and new replication filed. No evidence had been yet taken, but a commission to take evidence was about to be issued immediately.

Mr. Boys, for the motion, cited *Jackson v. Parish* (1).

Mr. Selwyn and *Mr. E. R. Turner*, for the plaintiff, did not oppose the motion.

TURNER, V.C. said he thought it would have been more regular to withdraw the present, and file a new replication; but he would make the order as asked by the notice of motion, on the authority of the cited case.

Order according to that in *Jackson v. Parish*.

LORDS JUSTICES.
 1852. } BLENKINSOPP v. BLENKINSOPP.
 Feb. 17, 18. }

Deed to defeat Process of Ecclesiastical Court—Privy Council—Suit to enforce Proceedings before the Privy Council—Alimony—Costs.

A deed executed by a husband, pending proceedings in the Ecclesiastical Court, for the purpose of preventing the suit, if successful, from affecting his property, declared void, and all arrears of alimony directed to be paid; but as to future payments, quære.

Where a Court of Appeal agrees with the main part of the relief granted in the court below, it will not depart from its adjudication of the costs, excepting in a very strong and clear case.

The facts of this case, which are very fully reported, together with the arguments, 19 *Law J. Rep.* (N.S.) Chanc. 425, may, in effect, be very briefly stated thus:—Mrs. Blenkinsopp, in March 1841, instituted a suit against her husband, Mr. G. T. L. Blenkinsopp, for a divorce, by reason of cruelty and adultery. Pending this suit, Mr. Blenkinsopp conveyed his real and personal estate to trustees, upon trust, out of the income to pay off certain mortgages affecting the real estate and certain bond creditors specified in a schedule to the deed; then to pay an annuity to himself, an annuity to his sons, and then an annuity of 100*l.* a year to his wife, if she abandoned the proceedings in the Ecclesiastical Court against him, and did not prosecute any other; and then to invest the residue and accumulate the same and the resulting income. Mr. Blenkinsopp went to Scotland, and resided in the precincts of Holyrood Palace. Mrs. Blenkinsopp prosecuted her suit and obtained a decree, and the same was affirmed by the Judicial Committee of the Privy Council, and 300*l.* a year alimony was awarded her. Writs of sequestration were issued against him for the alimony and arrears, and the costs of suit; but by reason of the conveyance the sequestrators were unable to recover the money. Mrs. Blenkinsopp filed her bill to set aside the deed as fraudulent, excepting as to *bond fide* creditors, and the same was decreed, together with a declara-

tion that the trustees of the deed were trustees for her as to the arrears and costs, and for all monies to become due to her for alimony. From the whole of this decree Mr. Blenkinsopp appealed.

Mr. Bethell, Mr. Glasse, and Mr. J. V. Prior, for Mrs. Blenkinsopp; and

Mr. Willcock, Mr. Robson, and Mr. W. R. Ellis, for other parties, having stated the case, the Court called on

Mr. Dickinson, who appeared for the appellant, Mr. Blenkinsopp.

The cases cited in support of the view taken on behalf of the defendant in the court below, the appellant here, are also set forth in the report in the *Law Journal Reports* before referred to.

LORD JUSTICE KNIGHT BRUCE.—We are of opinion that the fraud of the deed against the plaintiff is clearly established, and that she was entitled to be relieved against it. It appears to have been executed pending a suit in the Ecclesiastical Court against the defendant who executed it, which suit, according to the law as it then stood, might, if successful, have ended in a kind of execution against his property. We consider it to be established by the evidence that the deed was executed with a fraudulent intention of preventing the suit, if successful, from affecting his property. It can make no difference at all that, by subsequent improvement or alteration in the law, a better or more effectual mode of affecting the property by way of execution in such suit has been created, or that the lady has resorted to the process which she has resorted to rather than to the mode of execution which was alone in force when the deed was executed. We are of opinion that that is of no manner of importance. She had issued execution in the suit before she filed this bill, and therefore it is not necessary to consider or give any opinion upon the question, whether, to the success of this kind of suit it was necessary that any execution at all should issue before the filing of the bill. It has been suggested that the lady, the plaintiff, might have obtained relief in another court or in another mode: that, also, we think immaterial, according to the established law of the country. Wherever else, if anywhere

else, she might have obtained a remedy, she still was entitled to come to a court of equity for the purpose of delivering herself from a deed fraudulently obtained for the purpose of interfering with her just rights. The only doubt that we have,—the only point, rather, on which we are not satisfied,—is, whether the decree does or does not go beyond the proper functions of a decree in such a suit; and upon that point we wish to be satisfied. The decree was right in setting aside the deed, so far as it was set aside, and in giving the costs. It may be considered, for the sake of the argument, that it was questionable whether some less costs than are given might not have been given against the plaintiff; but if the Court agrees with the main relief given, it requires a very strong and clear case indeed to render it right for the Court, at the rehearing of the cause, to depart from the adjudication of the former Court as to the costs. No such clear or strong ground has been shewn to us here; and therefore we think that the only question to be considered is, whether, as I have already stated, the decree has or has not gone beyond the proper limits of a decree in such a suit.

Mr. Bethell addressed a few observations to the Court on the question of costs, and

LORD JUSTICE KNIGHT BRUCE said:—We propose to dismiss the petition of appeal, with costs, without prejudice to the question what ought to be done in the event of the payment to the plaintiff of all the arrears of her alimony up to the date of the Master's general report, and with such other costs as the plaintiff is now entitled to, and with liberty in that event, as well as otherwise, to apply from time to time. We reserve to ourselves the faculty of altering the decree in any respect in which it may appear to us to go beyond the strictly proper functions of the Court, if there be such limits. That will relieve the case, I think, from a position of some little difficulty; but still a more extended and deep consideration of the subject may possibly relieve it from all difficulty. The difficulty may be only apparent.

KINDERSLEY, V. C. } *In re TOOKY'S TRUST.*
Feb. 20. } *In re THE BUCKS RAIL-*
March 4. } *WAY COMPANY.*

Devise—Vesting of Shares—"Having" or "leaving" Issue.

A testator devised an estate to his daughter for life, and after her decease to all and every the children of the body of his daughter lawfully begotten (in case she should leave more than one child), their heirs and assigns for ever, as tenants in common; but in case his daughter should have only one child, then he devised the estate to such one child in fee; but in case his daughter should die without leaving any issue of her body, then he devised the estate to all such children of his body as he should leave or have living at the decease of his daughter, in fee. The testator's daughter had two children, both of whom died during her life:—Held, that the two children of the testator's daughter took absolute and devisable estates in remainder under the will, and their devisees were consequently entitled.

This was a petition presented under the following circumstances.—

A piece of land had been taken by the Bucks Railway Company, but a question having been raised as to the title, under the construction of the will of Thomas Prentice, the last owner by purchase of the property, the railway company paid the amount of the purchase-money into court, under the 76th section of the Lands Clauses Consolidation Act, and the present petition asked for payment of the money out of court to certain persons claiming to be entitled under the will. The petitioners were the Rev. J. Hooper and Frances his wife, and the petition stated that Thomas Prentice, by his will, dated the 26th of September 1775, gave and devised unto his daughter Henrietta Prentice all his copyhold messuage, tenement, or farm-house in the parish of Little Horwood, in the following terms:—"To hold the same unto and to the use of my said daughter Henrietta Prentice and her assigns, for and during the term of her natural life; and from and immediately after her decease I give and devise the said messuage, tenement, or farmhouse, closes, pieces or parcels of

arable, meadow and pasture ground, with their and every of their rights, members and appurtenances, unto and to the use of all and every the children of the body of my daughter Henrietta Prentice lawfully begotten (in case she shall leave more than one child), their heirs and assigns for ever, as tenants in common and not as joint tenants. But in case my said daughter Henrietta Prentice shall have only one child of her body lawfully begotten, then I give and devise the said messuage, tenement or farmhouse, closes, pieces or parcels of arable, meadow, and pasture ground, with their and every of their appurtenances, unto and to the use of such one child, his or her heirs and assigns for ever. But in case my said daughter Henrietta Prentice shall happen to die without leaving any issue of her body lawfully begotten, then I give and devise the said messuage, tenement or farmhouse, closes, pieces or parcels of arable, meadow, and pasture-ground with their and every of their appurtenances unto and to the use of all and every such child or children of my body lawfully begotten as I shall leave or have living at the time of the decease of my said daughter Henrietta Prentice, and to their heirs and assigns for ever as tenants in common;" and the will contained specific devises, in similar terms, of other parts of the said testator's copyhold estates and his freehold estates, to his son Thomas Eagles Prentice and his daughter Mary Ann Prentice, but there was no residuary or general devise of his estates contained in the testator's will.

The testator died in November 1779, leaving three children: first, Thomas Eagles Prentice, his only son, who was his customary heir, and who died in December 1836, having made his will and thereby devised all his real estates whatsoever, in reversion, remainder, or expectancy, to his wife Ann Prentice; second, Mary Ann Prentice who died on the 4th of January 1847, without having been married, and, third, Henrietta Prentice.

The petition also stated that in September 1796 the said Henrietta Prentice, the daughter of the testator, married John Tookey, who died in 1818, leaving his widow surviving, and there was issue of the marriage two children, John Tookey and

Henrietta Tookey; that the said J. Tookey, the son, married the petitioner Frances Hooper, and there was issue of that marriage one child, Joseph Tookey, who was still living and under twenty-one years of age; that J. Tookey, the son, by his will dated in February 1828, gave and devised all his copyhold estates whatsoever and wheresoever to hold the same unto the petitioner Frances Hooper, her heirs and assigns for ever; that the petitioner Frances Hooper intermarried with the petitioner J. Hooper; that Henrietta Tookey, the daughter, died in the lifetime of her mother, having devised her estates to her mother; that the said Henrietta Tookey the widow died in March 1847, having by her will devised all her copyhold estates to the petitioner J. Hooper and W. B. Eagles upon certain trusts therein mentioned.

The question raised upon the petition was, whether J. Tookey the son, and Henrietta Tookey the daughter of Henrietta Prentice, afterwards Tookey, took absolute and devisable estates in remainder in this property, under the will of Thomas Prentice, they having died in the lifetime of their mother Henrietta Tookey. The petitioners submitted that this was the true construction of the will, and that the petitioner J. Hooper was entitled to one moiety of the property in right of his wife, the said Frances Hooper, the devisee of J. Tookey the son, and that the petitioner, J. Hooper, and W. B. Eagles were entitled to the other moiety as trustees under the will of Henrietta Tookey, the widow, who was the devisee of her daughter Henrietta Tookey.

On the other hand, it was contended that J. Tookey the son and Henrietta Tookey the daughter did not take absolute and devisable estates in remainder, and that the property descended to the customary heir of the testator, Thomas Prentice, there having been no child of his living at the death of Henrietta Tookey his daughter.

Mr. Toller, in support of the petition, cited—

Marshall v. Hill, 2 M. & S. 608.

Maitland v. Chalie, 6 Madd. 243.

Harrison v. Foreman, 5 Ves. 207.

Sturges v. Pearson, 4 Madd. 411, and
Jarman on Wills, vol. 2. p. 277.

Mr. Dickinson, contra, cited—

Tarbut v. Tarbut, 2 Jarman on Wills,
375.

Doe d. Cadogan v. Ewart, 7 Ad. & E.
636; s. c. 7 Law J. Rep. (N.S.) Q.B.
177.

Doe d. Simpson v. Simpson, 4 Bing.
N.C. 333; s. c. 7 Law J. Rep. (N.S.)
C.P. 156;

Daintry v. Daintry, 6 Term Rep. 307.

KINDERSLEY, V.C. — This case came before me upon a petition, and the order to be made must depend upon the construction of the will of Thomas Prentice, who devised certain copyhold property for the benefit of his daughter Henrietta Prentice and her children; and the question is, whether two children which she had took vested interests in the property. The words of the devise are these.— [His Honour here read the clause in the will already set forth in the statement of the case.]—Besides the devise in favour of Henrietta Prentice, the will contains two devises of other portions of the real estate, one in favour of another of the testator's daughters, Mary Ann Prentice, and the other in favour of his son Thomas Eagles Prentice; therefore, in all there are three devises—to Henrietta, to Mary Ann, and to Thomas Eagles Prentice, the three children of the testator, which devises are precisely in the same language, with one single exception of one word in one of the devises. Now that variation, although not conclusive, is not without its significance.

I will first consider the devise to Henrietta. It begins by a devise which, beyond all doubt, gave her an estate for life; and from and after her decease, then the devise is unto and to the use of all and every the children of her body in fee. Now, if it had stopped there, there would have been no doubt, and every child would have taken a vested interest in equal shares of the property; but these words are added in a parenthesis "in case she shall leave more than one child." Then comes a direction that, in case she shall have only one child then the whole shall go to that one child, his or her heirs and assigns for ever. Passing on to the limitation over, which

follows that devise, I have no doubt that in the limitation over the testator used the words "in case my said daughter Henrietta shall happen to die without leaving any issue of her body lawfully begotten," meaning at her death, because the limitation in that event is, "to all and every such child or children of my body lawfully begotten as I shall leave or have living at the time of the decease of my said daughter Henrietta Prentice"; that is, in case she shall die without leaving any issue, not children only, living at the time of her death; and not that in the event of his leaving a grandchild only it should not take effect. Now what happened? Why Henrietta Prentice had two children, which both pre-deceased her; both were married, and one grandchild has survived her. It appears to me that the testator in that part of the devise has used the word "leave" in the sense of "have," and the meaning of the word "leave" has been applied to it in other cases, and I have not the least doubt that that was the meaning of the testator here, and he had regard to the natural course of events that the children might survive the parent, but not a condition that they should do so. At all events, it gives a reasonable construction to the will; for if that were not the construction, the testator would have died intestate from and after the death of Henrietta Prentice. I do not mean to say that is a conclusive reason for a forced construction of the words, but it is one which helps the construction, and has weight in confirming the view I take of the devise itself.

Then, as to the two other devises to two other children. In the devise to the son Thomas Eagles Prentice, instead of saying "unto and to the use of all the children which he shall leave," as are the words of the other devises, he uses the word "have,"—in other respects the two subsequent devises are precisely in the same words. Now, that change in the word, though it might have been inadvertent, may be used to shew the meaning of the testator, as pointing out that the condition was not as to there being children living at the death, but as to her having more than one child. I think, therefore, that the two children of Henrietta Prentice took vested interests as

tenants in common in fee. One of them, it appears, made a will devising his residuary share; and the order must be in accordance with the devise. I have only to declare who are the persons entitled. The costs must be paid by the railway company.

LORDS JUSTICES.

1852.

March 4, 5.

GUNDRY v. FINNIGER.

Will—Construction—Legacy to Next-of-Kin ex parte Maternâ.

A testatrix bequeathed a fund to trustees in trust for A. B. for life, with remainder to her children at twenty-one; but in case she died without issue, then to pay or assign and transfer the fund to C. D, if then living, but if then dead, then unto his next-of-kin in a legal course of distribution ex parte maternâ. C. D. died in the lifetime of A. B. A. B. died without issue. At the death of C. D, A. B. was his sole next-of-kin ex parte paternâ, and also his sole next-of-kin ex parte maternâ; at the death of A. B, the then next-of-kin ex parte maternâ of C. D. claimed the fund:—Held, affirming the decision of the Court below, that the next-of-kin were to be ascertained at the death of C. D, and not at that of A. B, and that A. B, as next-of-kin ex parte paternâ, was not excluded because she also filled the character of next-of-kin ex parte paternâ; and, therefore, her representatives were entitled to the fund.

“Next-of-kin” means next-of-kin at the death of the party whose next-of-kin are spoken of.

The testatrix in this cause, by her will, dated in the year 1808, gave the residue of her stock in the Consolidated Bank Annuities to trustees, for the benefit of her grandniece, Mary Lucy Ponting, with a bequest over to Nicholas T. S. Ponting, in case Mary Lucy Ponting died before she should attain the age of twenty-six or should marry. In June 1810 the testatrix made a codicil to her will, whereby, after reciting that Mary Lucy Ponting had since married John Tuckey, upon which event no separate provision had been made for her or her issue, she revoked the be-

quest of her stock, then consisting of 4,316*l.* 3*l.* per cent. consols, and gave the same to trustees in trust for her grandniece, Mary Lucy Tuckey, for life, with remainder in trust for her children who should attain the age of twenty-one; but in case she should die without issue, or they should all die before their shares became payable, then upon trust, after the decease of the said Mary Lucy Tuckey, to pay or assign and transfer the said stock unto her the testatrix's grand-nephew Nicholas T. S. Ponting, if he should be then living; but if he should be then dead, then unto the next-of-kin of her said grand-nephew, in a legal course of distribution, *ex parte maternâ*. The testatrix died in 1836, and Nicholas T. S. Ponting died in the same year, leaving his sister Mary Lucy Tuckey, and some first cousins once removed, *ex parte maternâ*, of the name of Ashe, surviving. Mary Lucy Tuckey died without issue in 1849, at which period the Ashes were the next-of-kin of Nicholas T. S. Ponting. Upon the death of Mary Lucy Tuckey, the Ashes claimed the fund, and the representatives of Mary Lucy Tuckey also claimed it; whereupon the trustees and executors of the will instituted this suit, with a view to take the opinion of the Court whether the persons to take under the will as next-of-kin of Nicholas T. S. Ponting were to be ascertained at the period of his death in 1836, or at the death of the tenant for life, Mary Lucy Tuckey, in 1849, that being the period for the distribution of the fund; and, secondly, whether, supposing the next-of-kin were to be ascertained at the death of Nicholas T. S. Ponting, Mary Lucy Tuckey was, and her representatives in her right were, entitled to take under the description of next-of-kin *ex parte maternâ*, notwithstanding she was next-of-kin *ex parte paternâ*, or whether the Ashes were exclusively entitled as coming within the description of next-of-kin *ex parte paternâ* alone.

At the hearing, before the present Master of the Rolls, he held that Mary Lucy Tuckey became entitled to the fund as next-of-kin *ex parte maternâ* of Nicholas T. S. Ponting, notwithstanding she was also his next-of-kin *ex parte paternâ*—20 *Law J. Rep. (N.S.)* Chanc. 635.

From this decree the Ashes, who were defendants, appealed.

Mr. Hobhouse appeared for the plaintiffs, the trustees and executors of the testatrix.

Sir W. P. Wood and *Mr. J. V. Prior*, for the appellants, cited the following cases—

Viner v. Francis, 2 Cox, 190.

Knight v. Gould, 2 Myl. & K. 295.

Gould v. Kemp, Ibid. 304; s. c. 1 Law J. Rep. (n.s.) Chanc. 176.

Clapton v. Bulmer, 10 Sim. 426; s. c. 5 Myl. & Cr. 108; 9 Law J. Rep. (n.s.) Chanc. 261.

Beck v. Burn, 7 Beav. 492; s. c. 13 Law J. Rep. (n.s.) Chanc. 319.

Say v. Creed, 5 Hare, 580; s. c. 16 Law J. Rep. (n.s.) Chanc. 361.

Mr. Bethell and *Mr. Lloyd*, in support of the decree, cited—

Urquhart v. Urquhart, 13 Sim. 613.

Ware v. Rowland, 15 Ibid. 587; s. c. 17 Law J. Rep. (n.s.) Chanc. 147.

Booth v. Vicars, 1 Coll. 6; s. c. 13 Law J. Rep. (n.s.) Chanc. 147.

Bird v. Wood, 2 Sim. & S. 400; s. c. 4 Law J. Rep. Chanc. 86.

Leeming v. Sherratt, 2 Hare, 14; s. c. 11 Law J. Rep. (n.s.) Chanc. 423.

[LORD JUSTICE KNIGHT BRUCE.—In *Tolderoy v. Colt* (1), Mr. Baron Parke said it appeared to him that the best language in which the rule that a Court is not at liberty to depart from the grammatical and proper construction of the language used in an instrument, unless required by evident necessity resulting from the apparent intention, was expressed in the words of Mr. Justice Burton, in *Warburton v. Loveland* (2).]

(1) 1 Mee. & W. 264; s. c. 1 You. & C. Exch. 621; 5 Law J. Rep. (n.s.) Exch. Eq. 25.

(2) 1 Hudson & Brooke's Irish Q.B. Rep. 648. The passage is as follows:—"I apprehend it is a rule in the construction of statutes, that in the first instance the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or any declared purpose of the statute; or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended, or abridged so far as to avoid such an inconvenience, but no further."

LORD JUSTICE LORD CRANWORTH.—Neither of us entertains any doubt—that is, any judicial doubt—that the Master of the Rolls has come to a right conclusion on the construction of this will. It is very difficult, as has been observed in the course of the argument, if not impossible, to reconcile all the cases on the subject; but the view that I take is, that with all this difference there is a great cardinal rule to be observed in the construction of instruments, as laid down by Mr. Justice Burton in *Warburton v. Loveland*, with regard to the construction of statutes, namely, to adhere as closely as possible to the literal meaning of the words used. If we depart from this, we launch into a sea of difficulties which it is not easy to fathom. In the course of the argument I have been putting to myself various combinations of circumstances, as to which, if we could ask the testatrix in her grave what she intended, she would probably say that she had not contemplated them, but would, nevertheless, wish the words she had used to be adhered to. It is, however, useless to speculate on these matters. The conclusion at which I arrive is, that the words "next-of-kin" mean next-of-kin at the death of the party whose next-of-kin are spoken of, and there is nothing in the will to make this construction absurd.

LORD JUSTICE KNIGHT BRUCE.—I cannot go so far as to say that I entertain no doubt, but I think that the decision of the Master of the Rolls is correct.

LOKDS JUSTICES.
1852.
March 5, 6. }

WHICKER v. HUME.*

Charitable Bequest—"Education and Learning"—*Mortmain Act*—*Colony of New South Wales*.

A testator possessed of lands in New South Wales, of leasehold property in Scotland, and of pure personality, devised and bequeathed all to trustees, upon trust, for

* This case, upon questions of domicile of succession, domicile of origin, change of domicile, &c. is reported at length 20 Law J. Rep. (n.s.) Chanc. 369.

absolute conversion, and after various bequests gave the residue to trustees to apply the same at their absolute and uncontrouled discretion for the benefit and advancement and propagation of education and learning in every part of the world, so far as circumstances would permit:—Held, that the words "education and learning" were to be read "education in learning," and that there was a good charitable bequest.

Held, also, that the statute 9 Geo. 4. c. 83, which provides, that all laws and statutes of the realm shall be enforced in the administration of justice so far as the same can be applied, means "reasonably applied," and that the statute 9 Geo. 2. c. 36. is inapplicable to lands in New South Wales.

Dr. John Borthwick Gilchrist, by his will, dated the 8th of December 1840, gave, devised and bequeathed all his residuary real and personal estate to certain trustees upon trust for sale, and to invest the residue of the produce after payment of the expense of sale in their names in the parliamentary stocks or public funds, stocks and securities of the colonies or of any foreign state, or on mortgage of land in Scotland or Ireland, or in the colonies, or in the stock of any commercial company, but so that no investment should be made which could not by law be disposed of by will to a charity. The testator then directed the trustees to stand possessed of such stocks and securities and monies upon trust to pay certain annuities; and as to the residue, upon such trusts as he should declare by his codicil. On the same day the testator executed the following codicil:—

"This is a codicil to the last will and testament of me, John Borthwick Gilchrist, which will bears even date with, but was executed previously to this codicil. I hereby direct and appoint that the trustees or trustee for the time being of my said will do and shall stand possessed of and interested in the residue or surplus of the trust monies and securities thereby to them bequeathed, in trust to appropriate the same in such manner as they, my said trustees or trustee, shall in their absolute and uncontrouled discretion think proper and expedient for the benefit and advancement and propagation of education and

learning in every part of the world, so far as circumstances will permit."

From the Master's report it appeared that the estate of the testator at the time of his death consisted of pure personalty, and of real estate in New South Wales, and of a leasehold house in Scotland.

At the hearing of the cause, before the present Master of the Rolls, questions were raised whether the bequest was not void for uncertainty, and if not, whether, so far as regarded the proceeds of real estate in New South Wales, the same was not void as being obnoxious to the provisions of the statute 9 Geo. 2. c. 36. (the Mortmain Act). His Honour held, that there was a good and valid charitable bequest, and that the Mortmain Act did not apply. The next-of-kin now appealed.

Mr. Bethell, Mr. Rolfe and Mr. Springall Thompson, for the appeal.—The words of the bequest of this testator are sufficiently large to admit of the property being applied to purposes other than charitable, in the sense in which that word is understood by this Court. There is nothing in them to controul the application of the fund to the distribution of works upon scientific and literary subjects among the learned and wealthy members of the community; nothing to prevent the establishment of circulating libraries, or even for the fitting out of ships for voyages of discovery. No words are used which would controul the application of the funds to purposes of religion, or for the education of youth, or for the benefit of the poor. The only difficulty is to fix a limit beyond which the words could not be carried, so as to apply the fund in a way not charitable, as that expression is understood by this Court. It is plain, therefore, that the trust is too vague and too indefinite to be supported—*Browne v. Yeall* (1), *Morice v. the Bishop of Durham* (2), *James v. Allen* (3), *Ommanney v. Butcher* (4), *Williams v. Kershaw* (5), *Ellis v. Selby* (6) and

(1) 7 Ves. 50, n.

(2) 9 Ibid. 400; a. c. 10 Ves. 532.

(3) 3 Mer. 17.

(4) Turn. & Russ. 260.

(5) 1 Keen, 232, n.; a. c. 5 Law J. Rep. (n.s.) Chanc. 84.

(6) 7 Sim. 352; a. c. 5 Law J. Rep. (n.s.) Chanc. 214.

Kendall v. Granger (7). If for no other reason, this bequest must be void, because there is no class to whom the benefits can be confined. It is not like the case of *Nightingale v. Goulburn* (8), where the class was of all the inhabitants of Great Britain, and the trust was upheld. Here the whole world are included, and the Court cannot devise a scheme for the execution of the trust. But even supposing the Court should hold that a valid charitable trust were otherwise created, it is obnoxious to the provisions of the statute relating to mortmain (9 Geo. 2. c. 36). That that statute extends to the colonies is abundantly clear from the wording of the statute 9 Geo. 4. c. 83 (9), by the 24th

section of which the law of England is constituted the law of the colonies, the 11th section of the same act having conferred on the supreme court the same jurisdiction both at common law and in equity as is exercised by the Lord Chancellor in this country. The case of *The Attorney General v. Stewart* (10), where the colony of Grenada was held to be exempt from the operation of the Mortmain Act, does not govern this, for there the French law was held and recognized as the law in civil matters, on the ground that that law prevailed at the time the island was acquired by conquest for the crown of England.

[LORD JUSTICE KNIGHT BRUCE.—According to the construction contended for, any quantity of land in New South Wales may be given to Eton, Winchester or Westminster, while a single acre cannot be given for the benefit of similar institutions in the colony.]

That objection is met by the provisions of the 9 Geo. 4. c. 83, the latter part of the 24th section of which enables the governor of the colony for the time being by ordinance to modify the law introduced into the colony as he shall deem expedient, and as no such modification has taken place regarding the Mortmain Act, it is clear that that statute is in full operation in New South Wales. The same policy, namely, that land shall not be withdrawn from circulation, as much applies there as here. In the Mortmain Act, land in Scotland is excepted; and had the legislature intended to exclude lands acquired by colonization from the operation of that statute, some expression to the same effect as is found relating to Scotland would have appeared. The absence of any such expression is another argument in favour of the position that the Mortmain Act does apply to this colony.

Mr. Roundell Palmer, Mr. Anderson, Mr. Bagshawe, Mr. W. M. James, Mr. Beavan, and Mr. W. Morris appeared for the respondents, but were not called on.

the trial of any information or action, or upon any other proceeding before them, to adjudge and decide as to the application of any such laws or statutes in the said colonies respectively."

(10) 2 Mer. 148.

(7) 5 Beav. 300; a. c. 11 Law J. Rep. (N.S.) Chanc. 405.

(8) 5 Hare, 484; a. c. 17 Law J. Rep. (N.S.) Chanc. 296.

(9) The material sections of this statute are the 11th and 24th which are as follows:—

Section 11. enacts, "That the said supreme courts respectively shall be courts of equity in New South Wales and Van Diemen's Land, and the dependencies thereof respectively, and shall have power and authority to administer justice, and to do, exercise, and perform, all such acts, matters, and things necessary for the due execution of such equitable jurisdiction, as the Lord High Chancellor of Great Britain can or lawfully may within the realm of England, and all such acts, matters, and things as can or may be done by the said Lord High Chancellor within the realm of England, in the exercise of the common law jurisdiction to him belonging."

Section 24. enacts, "That all laws and statutes in force within the realm of England at the time of the passing of this act, (not being inconsistent herewith, or with any charter or letters patent or order in council which may be issued in pursuance hereof,) shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies; and as often as any doubt shall arise as to the application of any such laws or statutes in the said colonies respectively, it shall be lawful for the governors of the said colonies respectively, by and with the advice of the legislative councils of the said colonies respectively, by ordinances to be by them for that purpose made, to declare whether such laws or statutes shall be deemed to extend to such colonies, and to be in force within the same, or to make and establish such limitations and modifications of any such laws and statutes within the said colonies respectively as may be deemed expedient in that behalf: Provided always, that in the mean time and before any such ordinances shall be actually made, it shall be the duty of the said supreme courts, as often as any such doubts shall arise upon

LORD JUSTICE KNIGHT BRUCE.—The appeal in this case raises three questions: the first of which, namely, that the bequest is too indefinite to be performed, is involved in the second, and which need not therefore be considered separately from it. The second question is whether, independently of the statute 9 Geo. 2. c. 36, called the Mortmain Act, and on the assumption that the gift does not affect property obnoxious to that statute, there is a good trust for what this Court considers as charitable purposes, created by these words in the codicil disposing of the residue,—"I hereby direct and appoint that the trustees or trustee for the time being of my said will, do and shall stand possessed of and interested in the residue or surplus of the trust monies and securities to them bequeathed, in trust to appropriate the same in such manner as they my said trustees or trustee shall in their absolute and uncontrouled discretion think proper and expedient for the benefit and advancement and propagation of education and learning in every part of the world, so far as circumstances will admit." I apprehend that the only difficulty in the way of the Court on this part of the case has been created by the introduction of two words, "and learning," coming after the word "education," because a trust for education would be good notwithstanding what this testator has said, effectually or ineffectually, of the uncontrouled discretion of the trustees. This is clear, and is not doubted; indeed, it has not been so even in the argument. The argument was confined to what was the force and effect of the words "and learning" added to the words "of education." Now, my impression of the true construction is this, that either the words "and learning" add nothing whatever to the idea represented by the term "education," or if they do, that the phrase "learning" is only to be considered as explanatory of the word "education"; and that it is the same as if the testator had said "education in learning" as distinguished from education in other subjects or matters, to which the term education might have been applied. I repeat, therefore, that in my judgment those words either do not add to the meaning of the sentence or add only the explanation of that to which I

have referred. I apprehend, then, that the introduction of the expression does not render that a bad and ineffectual gift to a charity which would, in my judgment, have been good and effectual without it.

The next question is as to the property comprised in the bequest, and it has been said that the real property in New South Wales is ineffectually given, as it falls within the provisions of 9 Geo. 2. c. 36, by reason that the 24th section of 9 Geo. 4. c. 83. provides, "that all laws and statutes in force within the realm of England at the time of the passing of this act (not being inconsistent herewith, or with any charter or letters patent or order in council, which may be issued in pursuance hereof,) shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies." Taking, however, the whole of the section together, I am of opinion that the words "can be applied" have reference only to those statutes which "can be reasonably applied." This lets in all those considerations which presented themselves to Sir William Grant's mind in the case of *The Attorney General v. Stewart*, and which are there discussed by him. This case, indeed, differs in respect to the colony; but it is impossible to read that case without seeing that the opinion expressed by Sir William Grant applies to a case of the present description. He there supposes various reasons against the application of such a statute as that of 9 Geo. 2. c. 36. to a colony, unless the legislature has expressly extended it to the colony of New South Wales, with or without modification. My opinion is against holding the statute applicable in the present case. In the first place, it is to my mind doubtful, or more than doubtful, whether there could be an enrolment, such as is required by the act. Jurisdiction is, indeed, conferred upon the supreme court analogous to the equitable and common law jurisdiction exercised by the Court of Chancery here; but with regard to the particular enrolment which the statute requires, I doubt very much, to say the least, whether enrolments in the courts in the colonies could satisfy the words of the act 9 Geo. 2. In the second place, in

addition to all this, the exceptional privileges granted to certain institutions and places of education in this country would not apply to a colony where, similar establishments not existing, people cannot be thought to have any particular attachment to those institutions. For these particular reasons, and the reasons given by Sir William Grant, as well as for the general reason arising out of the construction of the 9 Geo. 4. c. 83, I am of opinion that it ought to be held that the statute of 9 Geo. 2. is inapplicable to the colony, within the sense and meaning of the act of Geo. 4. There can be no objection to that declaration being made here, but whether it will be binding upon the colonial court where the land is situated I know not. That is quite a different question. But as we have jurisdiction, it will be binding *in personam* upon the parties within the jurisdiction. We may and do declare the law on the subject according to the best interpretation we can put upon it. The decree, therefore, of the Master of the Rolls is right, and the appeal must be dismissed, without costs.

LORD JUSTICE LORD CRANWORTH stated his entire concurrence in the view thus taken.

KINDERSLEY, V.C. }
Jan. 19. } NELSON v. HOPKINS.

Devise — Construction — Leaseholds — Misdescription.

A testator gave and devised all his freehold and copyhold messuages, farms, lands, tenements, hereditaments, and real estate situate at Market Rasen, to his wife for life, and then to his son, his heirs and assigns for ever. The testator had no property at Market Rasen except a leasehold estate held for 1,000 years:—Held, that the leasehold estate passed under the above clause.

George Nelson, by his will, dated the 9th of April 1842, after directing the payment of his debts, funeral and testamentary expenses, and bequeathing divers legacies to a considerable amount, proceeded in the terms following, that is to say—

“ I give and devise all and every my freehold and copyhold messuages, cottages,

closes, farms, lands, tenements, hereditaments, and real estate situate at Market Rasen, in the county of Lincoln, and also all my messuage or dwelling-house, with the garden, outbuildings, and appurtenances thereto belonging, situate in Albion Street, in the parish of Sculcoates, unto my dear wife, Elizabeth Nelson, and her assigns, for and during the term of her natural life, and I also give to her the rents which may be due for the same at my decease; and from and immediately after her decease, I give and devise the same last-mentioned real estates, hereditaments, and premises, unto and to the use of my son, Thomas Sherlock Nelson, his heirs and assigns for ever.”

The testator's wife died in his lifetime, and he died in November 1848. By an indenture of mortgage, dated the 23rd of March 1827, certain messuages, closes, farms and lands situate in Market Rasen aforesaid, were demised to the testator, for the term of 1,000 years. Subsequently to the date of the mortgage, J. J. Clark became a bankrupt, and the mortgage money being unpaid, the testator filed a bill in this court against his assignees to foreclose the equity of redemption in the mortgaged premises, and on the 5th of June 1834 he obtained an order absolute for foreclosure of the equity of redemption. The testator, up to the day of his death, continued to be entitled to all the said messuages, lands, and premises in Market Rasen, comprised in the said mortgage; but he had not, at the date of his will, or at any time thenceforward up to the day of his death, any freehold or copyhold messuages, cottages, closes, farms, lands, tenements, hereditaments, or real estate whatsoever situate at Market Rasen, or near or adjoining thereto, nor any other property at Market Rasen besides the messuages and premises comprised in the mortgage to which the description contained in the clause of his will could apply.

The bill was filed by Thomas Sherlock Nelson, the son of the testator, against his executors, and it prayed that it might be declared that, according to the proper construction of the said will, the plaintiff was entitled to all the said messuages, hereditaments and premises situate at Market Rasen aforesaid, for the residue of the said

term of 1,000 years, and for all such other estate and interest therein as the testator was entitled to.

Mr. Bethell and *Mr. Follett* appeared in support of the bill, and cited *Rose v. Bartlett* (1), *Day v. Trig* (2), and *Doe d. Dunning v. Lord Cranstoun* (3), in which leaseholds had been held to pass under the word "freehold," &c.

Mr. Bacon and *Mr. Prior*, for the executors, said they were not desirous of raising any objection to the plaintiff's demand, but submitted the question to the Court, and contended that as by the 24th section of the Wills Act, which was passed previously to the date of the testator's will, a will was to speak from the death of a testator, the reason for the former decisions had ceased; and the reason having ceased to exist, the question was, whether the Court would now carry out the principle laid down in the cases cited. The Courts had always declined to follow the rule whenever there was any property, however small, to which the devise could apply. No intention ought to be carried out except what the testator had plainly expressed by his will.

KINDERSLEY, V.C.—The rule is clearly laid down in the authorities which have been cited. It is evident from the words of this will that the testator intended to pass to the plaintiff the property which he possessed at Market Rasen. The effect is, that the plaintiff is specific legatee of these leaseholds. The declaration must, therefore, be, that the property at Market Rasen passed to the plaintiff under and by virtue of the devise contained in the will.

M.R. }
March 27. } **BELL v. BARCHARD.**

Lease—Restrictive Covenants—Contract—Previous Lease.

In carrying an informal contract for a lease into effect, the Master will be directed to regard previous leases containing special covenants.

(1) Cro. Car. 292.

(2) 1 P. Wms. 286.

(3) 9 Law J. Rep. (N.S.) Exch. 294.

A landlord, by memorandum, agreed to cancel a lease for fourteen years containing special covenants, and to grant a new lease for twenty-eight years at a reduced rent. After the decease of the landlord, the solicitors of the devisee and tenant, to avoid a suit, agreed that the term should be reduced to twenty-one years; but upon the draft being sent, the lessor refused to forego a covenant not to assign the lease without consent. Upon a claim by the tenant,—Held, that he was entitled to a specific performance, and though the letter of proposed arrangement by the tenant said, "the lease to contain all covenants usual and ordinary in farming leases," it was referred to the Master, who, in settling the lease, was to have regard to the lease previously held by the tenant.

William Hilton, by a lease, dated the 13th of November 1840, demised a messuage and farm called Dunningford Wood House, consisting of about 100 acres of land, to George Martin Bell, for fourteen years, at the rent of 212*l.* a year.

W. Hilton, on the 15th of September 1846, agreed to cancel the lease, and he thereby agreed to grant to G. M. Bell a new lease for the term of twenty-eight years from Michaelmas next, at the reduced rent of 100*l.* per annum; he also authorized Mr. Bell to build a house and cartshed, and deduct the amount from the rent, the outlay not to be more than 400*l.*, and he said, "I do this as a reward for the great improvement he has made in the estate, and as an encouragement for his general industry." Under his will and codicil these hereditaments were devised to his sister E. Barchard, the wife of Joseph Henry Barchard, in fee.

The testator died about the 25th of December 1849. After his decease G. M. Bell filed his bill against Mr. and Mrs. Barchard, praying that they might grant the lease according to the agreement entered into, but at the request of Messrs. Currie, Woodgate & Williams, the solicitors of Mr. and Mrs. Barchard, all proceedings were stayed, and they afterwards made a proposition stating that if the term could be shortened, a lease would be granted at the reduced rent of 100*l.* per annum, and the 400*l.* laid out in the improvement of the premises.

Mr. W. H. Clifton, the solicitor of Mr. Bell, after an interview with Mr. Woodgate, wrote to him, "I believe the following are the terms to which you assent on behalf of your client, viz., a lease for twenty-one years to be granted to Mr. Bell from Michaelmas next at the reduced rent of 100*l.* per annum, 'the lease to contain all covenants usual and ordinary in farming leases,' 400*l.* to be laid out by your client, say within six months, in the erection of a farm house upon the estate; Mr. Bell to erect at his own expense the cart-shed, and such other outbuildings as he may require, and keep the same, together with the house, in proper repair, and so deliver up at the expiration of the lease."

On the 27th of January 1851 Mr. Woodgate wrote, "As regards the length of lease, the proposal was that the term of twenty-eight years mentioned in the agreement should be shortened to twenty-one: this will make the term of twenty-one years run from Michaelmas 1846, and I thought we so understood each other. This point being arranged, I give an assent to the other terms."

On the 28th of January 1851, Mr. Clifton wrote to Mr. Woodgate, "I fully thought the term agreed on was to run from the present year, and so informed Mr. Bell, and it was upon this understanding he instructed me to arrange the suit. In the hope of carrying out the arrangement, I will take upon myself to propose that the term should commence from Michaelmas 1850, but less than this I feel sure Mr. Bell will not accept. I trust the negotiation for an amicable settlement may not be broken off upon a difference of four years only in the term."

In answer, Mr. Woodgate wrote, "I certainly concluded, as expressed in my former note, that the term was to run from Michaelmas 1846: however, let it be as you propose, that is, from Michaelmas 1850."

Mr. Woodgate afterwards wrote to Mr. Clifton, and also to Mr. Bell, stating that as the terms of the lease had been agreed on, he was ready to receive the rent.

On the 2nd of August 1851, Messrs. Currie, Woodgate & Williams sent the draft lease of the farm to be executed, in pursuance of the agreement, containing a covenant not to assign the term to be

granted, or to underlet or part with the possession of the farm without the consent of the defendants, all which were expunged from the draft by Mr. Clifton, on behalf of Mr. Bell, as being contrary to the express and plain terms of the agreement.

On the 8th of January 1852, Messrs. Currie returned the draft, stating that they had found it necessary to restore it to its original state corresponding with the former leases, and according to the agreement.

On the 12th of January 1852, Mr. Clifton proposed a reference to a conveyancer to settle the draft, having reference to the agreement under which the suit was to be compromised.

No reply was returned, upon which the plaintiff filed this claim, asking a specific performance of the agreement for the compromise of the suit which had been instituted, and for the costs of the claim.

Mr. Woodgate by his affidavit said, that the farm had been let in 1826 for 200*l.* a year, and again in 1840 to the plaintiff at 212*l.*, upon each of which occasions the lease contained covenants restricting the lessee from assigning or under-letting the farm without the consent of the lessor; that in the correspondence entered into, the idea of altering the covenants in the old lease was never entertained, except such farming covenants as the present improved state of husbandry might render desirable, and that his desire only was to get the term shortened. That at the interviews between himself and Mr. Clifton no mention was made respecting any covenant to under-let or assign; and that it was understood that farming covenants, having reference to the lease and to the present improved mode of husbandry, should be inserted, and that upon inquiry a covenant against assigning or sub-letting was usual in leases in the county of Essex.

Mr. Kenyon Parker and Mr. Jolliffe, in support of the claim. — The agreement made by the testator entirely destroyed the existing lease, and created a new contract, certain as to term and rent, but inconclusive as to the covenants. This contract the plaintiff had filed a bill to enforce, and the plaintiff had consented to shorten the term upon having a lease with the usual covenants; a restriction, however, upon

dealing with the property was an unusual covenant, and one which the Court would not sanction, unless specially contracted for. Now, in the dealing with Mr. Woodgate he never pretended that the lease was existing, or had any reference to the agreement; the contract was the basis of the letting. The plaintiff agreed to forego a portion of the benefit secured to him upon having an immediate settlement upon the terms specified in these letters. These letters contained the terms, which had no reference to any restriction upon the alienation of the term, and this Court would not insert it in their absence, it being specially contracted for.

Church v. Brown, 15 Ves. 258.

Van v. Corpe, 3 Myl. & K. 269; s.c. 6 Law J. Rep. (N.S.) Chanc. 208.

Henderson v. Hay, 3 Bro. C.C. 632.

Mr. R. Palmer and Mr. Burdon, contra. —Nothing would be more unfair than to suppose that the defendants intended to deprive themselves of controul over the tenancy of their own estate. The bill filed by Mr. Bell was to obtain performance of the agreement with reference to the covenants contained in his previous lease; and if the contract subsequently entered into was a surprise upon the lessor, the Court will be satisfied if it is carried into effect strictly, and it will not enforce a specific performance merely, without the general covenants for the protection of the lessors being inserted in the lease, and parol evidence will be admitted to explain the transaction in cases of mistake and surprise, the same as in cases of fraud—*The Marquis of Townshend v. Stangroom* (1). A binding contract might be entered into by letters, but it could only be considered with reference to a more formal document—*Thomas v. Dering* (2). If the plaintiff is entitled to a specific performance of the contract entered into by the letters, the Master ought to settle the lease, and in making such an order he ought to have regard to the agreement of the 15th of September 1846; that was the question raised by the bill, and nothing passed between the solicitors to shew that the

covenants in the former lease were to be varied. Mr. Woodgate was not dealing for a new agreement, but merely to shorten the term. The owner of the estate was a married woman, and if any compromise was made, it was the act of the husband alone, and ought not to be enforced to her detriment.

Mr. Kenyon Parker, in reply, cited *Neale v. Mackenzie* (3).

THE MASTER OF THE ROLLS.—These letters form a contract, and I must declare that the plaintiff is entitled to a specific performance, and must also refer it to the Master to settle the terms of the lease, but with respect to them I think it necessary to make a special direction. The construction of this agreement turns upon the circumstances which existed between these parties before the first of these letters was written, and differs materially from what it would have been had there been no previous dealings. Had the transaction begun with the first of these letters, it would have been for the Master to say what covenants should be inserted in the lease. But the testator had granted a lease of the farm to the plaintiff in 1840, which, amongst others, contained a clause against assignment. In 1846 he agreed to cancel this lease, and grant a new lease for twenty-one years at a lower rent, and in addition he authorized the lessee to lay out 400*l.* in farm buildings, which was to be deducted from the rent, and he said that he did it as a reward for the improvements he had made on the estate, and as an encouragement for his general industry. Had there been nothing further, I should have had little hesitation in saying that the testator, if it was a binding contract, or a contract sought to be enforced, intended to have a covenant inserted in the lease to confine the possession of the farm to the lessee. Why should he give him this beneficial lease, and allow him to under-let the farm to persons who might not keep it in that repair and state of improvement which the testator evidently considered valuable, and as a reward for which the lease was given, as well as for encouragement to his general industry? These expressions must have

(1) 6 Ves. 328.

(2) 1 Keen, 729; s.c. 6 Law J. Rep. (N.S.) Chanc. 267.

(3) 1 Keen, 474.

had relation not only to the estate, but the improvements upon it. I think, therefore, it would have been quite inconsistent with the contract that the lessee should have had so beneficial a lease with a power of under-letting it to other persons.

About three years afterwards the testator died, without having executed the lease, and then, after some transactions with the defendants, who both at law and in equity represent the testator, the plaintiff filed a bill for the specific performance of the contract made with the testator. Proposals for a compromise were entertained, in which the defendants said, "If you will reduce the lease to a reasonable term of years, we will not resist your having such a lease." That is agreed to, and the last two letters alone refer to a variation of the terms; but Mr. Woodgate gives way, and they agree that the lease shall be for twenty-one years, to contain "all covenants usual and ordinary in farming leases." Now, I am called upon to say that the true construction of these words is, that the lease to be granted is not to contain the provisions in the lease under which the lessees held; but I cannot consider that a proper construction of the contract: on the contrary, the agreement is cumulative, and is to contain all the covenants usual and ordinary in farming leases if they were not there. But having relation to the lease under which the lessee held, or now holds, the farm, and the contract between the parties, it required an express agreement to say that any of those covenants which were beneficial to the lessor were to be omitted; and as that is not the case, I am of opinion that he is bound by it. But while expressing that opinion, I do not wish to fetter the Master further than to refer it to him to settle the lease, having regard to the covenants contained in the lease of 1840. The farm is situate at Romford, in Essex, and there may be an ordinary custom with respect to farming leases in that county; if so, the Master will probably and properly have regard to that on the terms contained in the letter.

With respect to the lease itself, I shall say nothing further than that this is a contract simply by the husband which binds him only for twenty-one years. The case of *Neale v. Mackenzie* was not similar; there, a man

having a life interest in an estate contracted that his trustee, who had a power to lease, should grant a lease of the property, and became insolvent, so that the contract could not be enforced against him; but it was sought to be enforced against the trustee; and the Court, thinking that the trustee had authorized the insolvent to enter into the contract, and made him his agent, compelled the trustee to convey as much as he could without committing a breach of trust: but that is different from the equities that there would be against the husband himself. So, in the case of *Thomas v. Dering*, it was a distinct case, and Lord Langdale said, "You are endeavouring to enforce a different contract altogether." It was, in fact, a contract by the husband that the trustees, who had a power of sale, should convey to the plaintiff; and the plaintiff sought to enforce the contract against the trustees, and the trustees, in their discretion, did not choose to execute any such contract, as they had never entered into it, and had never authorized the defendant as their agent to enter into any such contract, and therefore the Court said that the contract could not be entered into, and it would not allow you to substitute a fresh contract in the place of that which could not be specifically performed. I am of opinion that the Master must settle the lease, and have regard to the covenants contained in the lease of 1840; but further than that I shall only declare that the agreement is to be specifically performed.

[See *Vere v. Loveden*, 12 Ves. 179, and *Jones v. Jones*, 12 Ves. 186.]

M.R. }
May 8. } ZULUETA v. VINENT.

Attachment—Irregularity.

An attachment for want of an answer, returnable immediately, against a defendant resident out of the jurisdiction, is irregular.

The defendant, Antonio Vinent, who resided in Cuba, had made default in putting in his answer to the amended bill, and on the 17th of April the plaintiff sued

out a writ of attachment, directed to the sheriff of London, and made returnable immediately.

Mr. Lloyd, Mr. Willcock, and Mr. Babington now appeared in support of a motion that the writ of attachment might be set aside for irregularity, the practice of the Court not allowing a writ of attachment returnable immediately to be issued against a defendant resident abroad—*Boschetti v. Power* (1).

Mr. Roupell and Mr. Shadwell, for the plaintiff.—The writ of attachment has been regularly obtained. An order has been made for substituting service of the subpoena upon the defendant's solicitors in London: the attachment, therefore, was properly directed to the place at which the substituted service of process was to be made. This case differs altogether from that cited, which was not to restrain an action at law. In that case, also, no order had been made for the substitution of service—*Yearsley v. Budgett* (2).

The MASTER OF THE ROLLS.—I can only decide this case according to the strict practice. The case of *Boschetti v. Power* is clearly applicable to the present case, and determines that when a party out of the jurisdiction makes default in putting in his answer, you cannot issue an attachment returnable immediately to a place where it is known he cannot be found. The case of *Boschetti v. Power* was decided after inquiries into the practice had been made. My opinion therefore is, that the attachment must be discharged, and with costs.

M.R. }
May 8. } ZULUETA v. VINENT.

Bill—Pro confesso—78th General Order of the 8th of May 1845.

The defendant had never been in this country, and there was doubt as to the information given him:—Held, that he could not be deemed to have absconded to avoid answering, or to have refused to obey the order of

the Court: and an application to take the bill pro confesso, as against him, was refused.

This was a motion on behalf of the plaintiff, under the 77th and 78th General Orders of the Court of the 8th of May 1845 (1), that the bill might be taken *pro confesso*.

The defendant resided in Cuba, and upon the amended bill being filed, the plaintiff applied to this Court for an injunction, but the application was refused. From this decision the plaintiff appealed, and while the appeal was pending he did not press for an answer.

After the appeal had been disposed of, the defendant obtained time to answer, but when the last application for further time was made, it was refused, and the defendant was now in default for want of an answer.

In opposition to this application, an affidavit was made by the defendant's solicitor that the defendant had always been ready and willing to put in his answer, but that he could not do so until the same was prepared and forwarded to Cuba, in March; and that the delay was attributable to him, as solicitor, who had refrained from preparing and forwarding the answer under the impression that if the plaintiff failed in obtaining an injunction restraining the action at law, the plaintiff would not require an answer, and from a *bond fide* desire to save unnecessary expense.

Mr. Roupell and Mr. Shadwell, for the plaintiff.

Mr. Lloyd, Mr. Willcock, and Mr. Babington, for the defendant, were not heard.

The MASTER OF THE ROLLS.—It is clear that the 78th General Order gives the Court a large discretion; and if it thought proper, it might order the bill to be taken *pro confesso* against the defendant; but then the Court must be satisfied that the defendant has really absconded to evade the service of process, or has refused to obey the process of the Court. It is manifest that the defendant in the present case has not absconded, since he has never been in this country, and so far from desiring to evade the process of the Court, he ap-

(1) 8 Beav. 180; s. c. 14 Law J. Rep. (N.S.) Chanc. 175.

(2) 11 Beav. 144.

(1) Ord. Can. 312; 14 Law J. Rep. (N.S.) Chanc. 291.

peares anxious to come to this country to meet the case. He has apparently been misled as to the time allowed for putting in his answer, and, had correct information been given to him, he probably would have put in his answer six or seven months back. Under the circumstances, therefore, it is impossible to grant the application, and the motion must be refused, but without costs.

LORDS JUSTICES.
1852.
March 25.

{ *Ex parte* MANWARING, in
re THE EASTERN COUNT-
IES JUNCTION AND
SOUTHEND RAILWAY
COMPANY.*

*Company—Winding-up Acts—Provisional
Committee-man—"Reservation of Shares"
—Contributory.*

The secretary of a provisionally registered railway company informed A. B. by letter, dated the 6th of October, that he was entitled, as a provisional committeeman, to 100 shares, provided he signified on or before the 9th instant what number he desired to take. A. B.'s wife, on the 7th, asked that the shares might be reserved a few days longer. A. B., on the 9th, wrote saying, "I should wish to have 100 shares reserved for me." On the 21st of November, the secretary required payment of the deposit on the 100 shares "accepted" by A. B. On the 27th, A. B. wrote, saying, "Inform me whether a sufficient amount of deposits has been paid up to enable the company to go to parliament this session, and if all the provisional committee have paid their deposits; should that be the case, I shall not hesitate to pay also, that is, upon being clearly satisfied on these points." The Master placed the name of A. B. on the list of contributories, as having accepted shares, and that decision was affirmed by the Vice Chancellor, but upon appeal to the Lords Justices, it was held that there had been no absolute and unqualified, but only a conditional, ac-

* Besides the point reported, there was, both in the court below and in this court, a point as to the variation of the scheme originally proposed, by the formation of branch lines. The judgment, however, turns on "acceptance" or "non-acceptance," and, therefore, the report is confined to that question.

ceptance, and as the condition had not been, and could not be, performed, A. B.'s name must be removed from the list.

This case came before the Court, on an appeal from a decision of Vice Chancellor Parker, made on the 10th of February last. The motion on that occasion was made on behalf of Mr. John Manwaring, that the certificate of Sir William Horne, dated the 9th of July 1851, whereby it was ordered or directed that the name of the said John Manwaring should be placed or retained on the list of contributories of the above-named company, might be discharged or varied, and that the name of the said John Manwaring might be struck out from the list of contributories to the said company, and that the costs of the said John Manwaring might be paid by the official manager either personally or out of the funds of the said company.

The facts were as follows:—The Eastern Counties Junction and Southend Railway Company was provisionally registered in May 1845, "to make a railway, commencing at the Romford Station of the Eastern Counties Railway, with branches to Southend, Essex." In September 1845, a prospectus was issued, in which Mr. Manwaring's name appeared as one of the provisional committee. On the 6th of October 1845 the following letter was sent by the secretary to Mr. Manwaring:—

"Eastern Counties Junction and Southend Railway Company Office, 33, Broad Street Buildings, London.

"October 6, 1845.

"Sir,—I am instructed by the committee of management to inform you that by a resolution passed by them, you are, as a member of the provisional committee, entitled to 100 shares in this company or any less number you may wish, provided you signify, in writing, on or before the 9th inst., the number you are desirous of taking.

"(Signed) R. H. Causton,

"Secretary.

"John Manwaring, Esq."

Mr. Manwaring being from home, Mrs. Manwaring wrote a letter on the 7th, in which she stated that as he was from home, she could not state whether he would accept the shares or not, but that he would write when he returned, and added an expression

of a wish that the shares should be reserved for a few days longer.

Two days later, the following letter was sent to the secretary :—

“Eagle Hall, October 9, 1845.

“Sir,—My absence from home prevented me sooner replying to yours of the 6th inst. I should wish to have 100 shares reserved for me.—Yours obediently,

“John Manwaring.

“R. H. Causton, Esq.”

No further correspondence appeared to have taken place until the following month, when Mr. Manwaring was by the secretary addressed thus, (the letter of allotment mentioned in the postscript, however, not being produced):—

“Eastern Counties Junction and Southend Railway Company Office, 33, Broad Street Buildings, London.

“November 21, 1845.

“Sir,—The plans and sections of the Eastern Counties Junction and Southend Railway being nearly ready for deposit on the 29th inst., agreeably to the standing orders of the House of Commons, the committee of management are of opinion that the payment of the deposit money should be no longer delayed. They, therefore, request you will be so good as to pay forthwith the deposit on the 100 shares accepted by you as a member of the provisional committee, agreeably to your letter of the 9th ultimo.—I have the honour to be, Sir, your obedient servant,

“R. H. Causton, Secretary.

“John Manwaring, Esq.”

“P.S.—Your letter of allotment has already been forwarded, and the bankers of the company are directed to receive the amount.”

In reply to this application, Mr. Manwaring wrote as follows :—

“Eagle Hall, Ripon, November 27, 1845.

“Sir,—In reply to your letter of the 21st inst., calling upon me to pay the deposit on 100 shares in the Eastern Counties Junction and Southend Railway, I must beg that you will have the goodness to inform me whether a sufficient amount of deposits has been paid up to enable the company to go to parliament this session, and if all the other members of the provisional committee have paid their deposits; should that be the case, I shall not hesitate

to pay also, that is, upon being clearly satisfied on these points.—I am, Sir, your most obedient servant, John Manwaring.

“R. H. Causton, Esq.”

Upon these materials, the Vice Chancellor affirmed the decision of Sir William Horne, and dismissed the appeal, but said he did not consider it a case for costs (1). On that occasion the cases of *Hutton v. Upfill* (2), *Onions' case* (3), and *Conway's case* (4) were cited, in addition to which on

(1) In delivering judgment, his Honour observed that “he did not think the present case was distinguishable from *Upfill's case*. The point decided in that case was, that a person whose name was on the list of provisional committeemen, and to whom shares had been allotted, was a contributory. The first question, then, was whether Mr. Manwaring's name was on the provisional committee. It was in the printed list, but it was suggested that there was nothing to shew that it was there with his consent. However, there were two letters written to him in the character of a provisional committeeman, and his answers to them, and in those answers he did not repudiate the character in which the letters were addressed to him. Then the next question was, did he accept shares in the concern? In his answer to the letter offering him shares, he says, ‘I should wish to have 100 shares reserved for me.’ If it had stopped there, the circumstances would have been the same as in *Onions' case*, in which Lord Cranworth said, that his acquaintance with mercantile language was not sufficient to enable him to decide that Mr. Onions had accepted the shares, by requesting that they might be ‘reserved’ for him; and that he should direct an issue, in order that the question might be determined by a jury. In this case, that was followed up by a letter from the secretary, referring to the letter from Mr. Manwaring, and saying, ‘You will be so good as to pay forthwith the deposit on the 100 shares accepted by you as a member of the provisional committee.’ The answer of Mr. Manwaring to that letter did not say ‘You have mistaken my letter,’ but it was put on quite different grounds. Whatever doubt there might be upon the mere word ‘reserved,’ there was this further fact, that both parties had treated that letter in which it occurred as an acceptance of shares. *Conway's case* has been referred to; in that case there was an offer and an acceptance of shares, and nothing more was done, and he (Sir J. Parker) had considered that those facts did not bring it within the law of *Upfill's case*. Here there had been an offer of shares and an acceptance, and then a communication to Mr. Manwaring that shares had been allotted to him, and calling upon him to pay a deposit, thus supplying what was wanted in *Conway's case*. This case was, therefore, clearly distinguishable from *Conway's*, because the acceptance of the shares was followed up by what was tantamount to an allotment.”

(2) 2 House of Lords Cases, 674.

(3) 1 Sim. N.S. 394.

(4) 18 Law Times, 169.

the present appeal *Ex parte Cooke* (5) was relied on.

Mr. Lee and *Mr. F. S. Williams*, for the appellant, argued that there had not been any unconditional acceptance of shares, and therefore *Upfill's case* did not govern the present: nor was there any evidence that there had been an allotment of shares, for the alleged letter of allotment alluded to in the postscript to the letter of the 21st of November was not forthcoming; nor could it be proved to have been sent; besides this, it was tolerably clear that there were no means of allotment, the directors having nothing to allot. The argument then proceeded on the second point, namely, that there had been a variation of the scheme.

Mr. W. T. S. Daniel and *Mr. Wordsworth* appeared for the official manager.

Mr. Lee was not called upon to reply.

LORD JUSTICE LORD CRANWORTH.—We think this does not come within *Upfill's case*, as we are of opinion that there has been no acceptance of shares. Assuming that there has been no substantial variation of the scheme, that is, of the line as originally proposed, the way the case stands is this:—*Mr. Manwaring's* name is put on the provisional committee on the 30th of September 1845 for the first time. On the 6th of October the first meeting of the committee of management took place, and on that day *Mr. Causton*, one of the promoters of the scheme, was appointed secretary; and on the same day, but I suppose after that appointment, he writes a letter to *Mr. Manwaring*, telling him that he was, as a member of the provisional committee, entitled to 100 shares or any less number, provided he signified in writing on or before the 9th inst. the number he was desirous of taking. In answer to that letter *Mrs. Manwaring* wrote on the 7th of October, saying that her husband was from home and that she could not say whether he would take the shares, but that he would write when he returned home; but she asks that 100 shares might be "reserved" for a few days longer. When *Mr. Manwaring* returned home on the 9th

of October he thus writes: "My absence from home prevented me sooner replying to yours of the 6th inst. I should wish to have the 100 shares reserved for me." I expressed an opinion in *Onions' case*, to which I still adhere, that I was not satisfied that that mode of expression was tantamount to an acceptance; and I am borne out in that here, where in the other letters acceptance and reservation seem to be spoken of as different acts. If that be so, there is no evidence of acceptance of shares on the 9th of October, and the Vice Chancellor seems to have been of the same opinion. Of that opinion are both my learned Brother and myself. We both think that the expression used does not mean "I accept the shares," because the acceptance and the reservation of the shares were considered by the writer, as I have before said, as different things.

Then, there being no evidence of acceptance on the 9th of October, matters go to sleep for a long time. On the 21st of November a letter was written by *Mr. Causton* to *Mr. Manwaring*, in which he says, "The plans and sections of the Eastern Counties Junction and Southend Railway being nearly ready for deposit on the 29th inst., agreeably to the standing orders of the House of Commons, the committee of management are of opinion that the payment of the deposit money should be no longer delayed; they therefore request you will be so good as to pay forthwith the deposit on the 100 shares accepted by you as a member of the provisional committee, agreeably to your letter of the 9th ult." Thus he admits that there was no acceptance unless he considered the direction to reserve shares in the letter of the 9th of October to be one, but which we do not consider to be an acceptance. The postscript of the letter adds, "Your letter of allotment has already been forwarded, and the bankers of the company are directed to receive the amount." On the 27th, *Mr. Manwaring* writes in answer, "I must beg that you will have the goodness to inform me whether a sufficient amount of deposits has been paid up to enable the company to go to parliament this session, and if all the other members of the provisional committee have paid their deposits; should that be the case, I shall not hesitate to pay

also, that is, upon being clearly satisfied upon these points."

Now, what we think is the fair inference from that, is no more than this, "I do not accede to your interpretation of my conduct, and to pay upon what I have before accepted," but "I accept subject to those qualifications;" and there is no evidence that those qualifications have been complied with; on the contrary, the evidence clearly shews that they had not been complied with and never could be complied with. Therefore, it amounts to no more than this: the secretary writes, saying: "You did accept on the 9th of October, and we call on you to pay the deposit." Upon which Mr. Manwaring, in substance, says, "I do not trouble myself as to what may be the legal effect of what I have already done; satisfy me that sufficient deposits have been paid to carry the concern into effect, and I will accept the shares and pay my deposits." So that there was not an absolute and unqualified acceptance. This case does not seem to me to come within *Upsill's case*. I give no opinion upon the other point, whether there has been a substantial variation between the scheme originally proposed and that subsequently engaged in by the company. For the reasons I have stated, I am of opinion that this gentleman's name should be removed from the list of contributories.

LORD JUSTICE KNIGHT BRUCE. — Considering the case as it would stand if the letters of the 21st and 27th of November were out of it, there is not only, in my opinion, a total absence of evidence of allotment, but strong reason to believe affirmatively the contrary; but whether arising from the fact suggested at the bar, namely, that they had not wherewithal to allot, or otherwise, that is my view independently of those letters. Then, upon those letters, how is this case varied on this point by them? It was argued by the counsel for the respondents that the postscript of the letter of the 21st of November, speaking of the letter of allotment, refers to nothing or to a letter not produced; the consequence, therefore, must be, that, in substance, that letter of the 21st of November must be considered rather in the nature of a proposal than of

anything else, as I view it; and if that proposal had been unconditionally accepted the case might have stood more favourably for the respondents. But the letter of the 27th is a conditional acceptance only of the proposal made by the letter of the 21st, and the condition was one which was never fulfilled. I come, therefore, to the same conclusion as Lord Cranworth, and substantially on the same ground, namely, that sufficient evidence is not produced to justify putting this gentleman's name upon the list of contributories. We are glad to think the Vice Chancellor had not this matter brought so fully before him as it has been presented to us, or probably he would have taken the same course as we have. What we now do is to be without prejudice to the production of additional evidence by the official manager, in order that Mr. Manwaring's name may, if right, be placed on the list of contributories. The costs of all parties will be paid out of the estate.

LORDS JUSTICES. }
 1852. } DAVIES v. DAVIES.
 March 12, 29. } *In re DAVIES.*

Lunacy—Person of unsound Mind—Application of Capital for Maintenance.

A person of unsound mind, not found lunatic by inquisition, was entitled to sums of stock in court, the income of which was not sufficient for her maintenance. The Court directed that a part of one of the funds should be invested in the purchase of a Government annuity, in the name of the lunatic and for her life, to be paid to her brother until the further order of the Court, he undertaking to apply the same towards her maintenance.

One of the defendants in the suit of *Davies v. Davies*, namely, Sophia Frances D'Arly Davies, spinster, was a person of unsound mind, not so found by inquisition. Mary Davies, her mother, was appointed her guardian *ad litem*. Her income being insufficient for her support, a petition was presented by her, by her mother, and by another defendant Henry Philip Davies, her brother, intituled in the cause and in the above-mentioned matter, for the purpose of obtaining an order by which it might be

augmented. The petition contained the following statements.—That the said petitioner S. F. D'Arly Davies will be forty-seven years of age in December 1852; that for the whole of the period of seventeen years and upwards last past, she has been and she still is of unsound mind and incapable of taking care of her affairs; that during the whole of that period (with the exception of four days) she has been and still is under the care of Dr. Edward Thomas Monro, at Brooke House, Clapton; that the expenses of maintaining and keeping her there have amounted, and still amount, to 50*l.* per annum, or thereabouts, and the same, besides 10*l.* for clothing, have been defrayed and paid for some time partly, and so far as the same would extend, out of the dividends of the sum of 600*l.* 3*l.* per cent. reduced Bank annuities hereinafter mentioned, the deficiency of such dividends to meet the said expenses being defrayed and paid by her said mother and her brothers and sisters, but that of late the deficiency had been made up by her mother alone; that upon the death of one Timothy Davies, the son, in April 1850, and under an order made in the above-mentioned causes, dated the 6th of December 1850, the said petitioner S. F. D'Arly Davies has become and is absolutely entitled to the sum of 762*l.* 16*s.* 3*l.* per cent. consolidated Bank annuities, which, under the said order, has been carried over in trust and to the credit of the said first-mentioned cause to an account intituled "The account of the petitioner S. F. D'Arly Davies;" and that she is also entitled to the sum of 41*l.* 19*s.* 5*d.* cash, standing to the same account; that she is also absolutely entitled to one equal seventh part of 3,600*l.* 3*l.* per cent. consolidated Bank annuities, which, under the said order of the 6th of December 1850, has been carried over and is now standing to the credit of the said first-mentioned cause to an account intituled "The life account of Sarah Davies, widow," subject to an interest for life therein of the said Sarah Davies, who is now of the age of forty-two years, or thereabouts; that she is also entitled for her life to the dividends of 600*l.* 3*l.* per cent. reduced Bank annuities, standing in the names, &c., and is also absolutely entitled to an equal seventh part of the reversion of the same sum; that except as herein stated

she is not possessed of or entitled to any estate, property or effects whatsoever; that her said mother is now seventy-nine years old, or thereabouts, and of infirm health; that the income of her said mother is derived solely from a life estate which will expire at her death, and she has not the power nor the means of making provision for her said daughter after her decease, and that it will be expedient and for her benefit that some permanent provision should be made for her maintenance out of her estate and effects; that the yearly income of her property does not exceed the sum of 40*l.* 17*s.* 8*d.*, and the sum is greatly insufficient for her suitable maintenance; that the sum of 762*l.* 16*s.* 3*l.* per cent. consols at the present value thereof, would purchase a Government annuity for her life of 43*l.* 4*s.* 9*d.*, or thereabouts, and that it is desirable and will be for her benefit, that the same should be so applied, and such Government annuity be applied in or towards her maintenance.

The petition then prayed that such sum of 762*l.* 16*s.* 3*l.* per cent. consols. might be applied to the purchase of an annuity for her life, pursuant to the statute 48 Geo. 3. c. 142, in the joint names of the said petitioners Mary Davies and H. P. Davies, to be by them, or the survivor of them, applied to her maintenance, or otherwise that the said dividends already accrued, and from time to time to accrue due on the said sum of 762*l.* 16*s.* 3*l.* per cent. consols. might be paid, after the payment of the costs, charges, and expenses therein mentioned, to the other petitioners, or the survivor of them, for her maintenance.

Mr. T. Stevens appeared in support of the petition, which was entirely unopposed. He stated that the matter had been mentioned to one of the Vice Chancellors, who thought it had better be brought before this Court.

LORD JUSTICE KNIGHT BRUCE.—As the petition is in a cause, the Vice Chancellors have as much jurisdiction as we have, but it having been set down before us, in order to save expense, we will hear it. We require in the outset to know whether anything so strong has been done as to deal with capital? The circumstances stated in the petition make the compliance with its

prayer reasonable, and the only question is, whether the Court ought to deal with the principal money.

LORD JUSTICE LORD CRANWORTH.—It would in such a case be a very wholesome jurisdiction to exercise. I, for my part, wish very much to do what is asked; but I do not recollect anything so strong being done. It is true it would only be carrying one step further what this Court is continually in the habit of doing with reference to applying part of the capital of an infant for payment of an apprenticeship fee when the fund is small. I think 600*l.* of this particular fund might be applied, leaving a small balance in case of necessity.

LORD JUSTICE KNIGHT BRUCE.—Of course the name of a lady of seventy-nine cannot be used, nor would that of the broker be correct, who would be most probably the survivor, and he moreover appearing to be in trade. The annuity, at any rate, must be bought in the name of the lunatic, or perhaps it may be purchased in the name of the Accountant General. The case can be mentioned again.

March 29.—Mr. Leach, the Registrar, stated to the Court that the Accountant General did not consider himself authorized to become the purchaser of the annuity, or to allow it to be purchased in his name. There were many difficulties of form, and also some serious objections to that course under the statute authorizing the purchase of life annuities. It was not clear that penalties might not be incurred. He also stated that he was informed by the solicitor of the petitioner, that he (the solicitor) had shewn the minutes of the order to the officer of the Commissioners, and was informed that they would act upon it (1).

(1) The order made was dated the 29th of March 1852, and was as follows:—"Let the petitioner Henry Philip Davies be at liberty to enter into a contract with the Commissioners for the Reduction of the National Debt, for the purchase, in the name and on the life of the petitioner Sophia Frances D'Arly Davies, spinster, a person of unsound mind, of such a Government annuity as can be purchased by a transfer to the said Commissioners of 600*l.* Bank 3*l.* per cent. annuities. And let 600*l.* Bank, &c. part of 762*l.* 16*s.* like annuities standing, &c. in trust in the cause "Davies v. Timothy Davies," the account of the Petitioner S. F. D'Arly Davies, be transferred to the Commissioners, &c. as the consideration for the purchase of such annuity. And let the said

LORDS JUSTICES. }
1852. }
Feb. 16. }

MILLER v. PRIDDON.

New Trustees — Appointment — Settlement.

A settlement contained a proviso that in case either of the trustees should die or become unwilling to act, the acting trustees or trustee, or the executors or administrators of any surviving trustee, might nominate a fit person or persons in his or their place. On the death of one trustee, the survivor executed a deed, by which, after reciting that he was desirous of retiring from the trust, and that he had appointed another person to be a trustee in his place, he conveyed the estate to the new trustee upon the trusts:—Held, that the surviving trustee had power to nominate a sole trustee to act in his place, and that the appointment by recital was good.

Held, also, that a receipt signed by more persons than one, that one having power to give receipts, was a valid receipt by that one.

This case and the particular facts of it are fully stated in 18 *Law J. Rep.* (N.S.) Chanc. 226. The appeal to this Court was made by the plaintiffs, for whom

Mr. Malins and Mr. Borton appeared.

Mr. Stuart and Mr. Shapter were for the principal respondent.

Mr. Roll, Mr. Lloyd, Mr. J. Bailly, Mr. Freeling, Mr. Selwyn, and Mr. Vesey Dawson appeared for other parties.

Their LORDSHIPS were of opinion that the decision of the Vice Chancellor was correct, —LORD CRANWORTH, who delivered the

Commissioners pay the said annuity to the petitioner H. P. Davies until the further order of this Court, he undertaking duly to apply the same towards the maintenance of the said petitioner S. F. D'Arly Davies. And let the interest to accrue due on 162*l.* 16*s.* Bank, &c., residue of the said 762*l.* 16*s.* like annuities after the transfer hereby directed, be from time to time as the same shall become due paid to the said petitioner H. P. Davies during the life of the said S. F. D'Arly Davies, or until the further order of this Court, upon the like undertaking." The costs of and relating to this application and consequent thereon were then directed to be taxed and be paid out of a sum of cash in court, and the rest be paid to H. P. Davies upon the like undertaking. But if the cash should not be sufficient, then the whole was to be paid to the solicitor for his costs, he consenting to receive the same in full discharge of the same costs. Liberty to apply.

judgment of the Court, observing, that if the appointment of Cooke alone was valid, the subsequent appointment of Holmes with him was equally so; and even if the appointment of Cooke alone was not valid, then the subsequent appointment would be good, because the latter came within the very letter of the power of appointment. The receipt of the purchase-money being given by the two, must, *quâcunque viâ*, be good also. The appeal must be dismissed.

LORDS JUSTICES. 1851. Dec. 19, 20, 22. 1852. March 19, 20.	}	TURNER v. TURNER.
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Feme Covert — Consent — Petition for Re-hearing.

A testator, by his will, devised his real estate for the benefit of the children of his heiress-at-law, a married woman. A bill was filed, on behalf of the children, to have the trusts of the will executed. The heiress-at-law entered a caveat against probate, but did not proceed. She and her husband, who were defendants to the suit, admitted, in their joint answer, the due execution of the will. She and her husband, in her right as heiress, brought an action of ejectment against the trustees of the will, but afterwards discontinued it, and were ordered to pay the costs. At the hearing of the cause in Chancery, an issue devisavit vel non was, on her application, granted, her adult children being directed to be plaintiffs. The record was withdrawn by them just before the time of the trial, and the trustees were then directed to be plaintiffs. The heiress and her husband appealed from this order unsuccessfully, their petition being dismissed. Just before the time for the trial of the issue, the heiress-at-law and her husband petitioned, alleging that the testator was unduly influenced against them in making his will, and that they had not tried the issue at the earnest solicitation of their adult children, and praying that the orders relating to the proceeding to the trial of the issue might be discharged, the petitioners undertaking to admit the validity of the will, and submitting to the execution of the trusts

of the same, and praying that all the costs of and relating to such orders might be costs in the cause. The cause and this petition came on for hearing together, and on the 14th of February 1833 a decree establishing the will was made, and on the petition an order was made, "the heiress-at-law, by her counsel, consenting," in conformity with the prayer of the petition. Further proceedings were afterwards taken by her and her husband, both in the ecclesiastical court and at common law, which failed, and she was enjoined by this Court from taking any further proceedings for the recovery of the real estate. On the 13th of January 1851 she obtained leave to present a petition of re-hearing of the decree or order of the 14th of February 1833, and on the 29th of January she obtained an order for setting it down. On the 29th of May the order of the 13th of January for a re-hearing was discharged, on the ground of the acquiescence of the heiress in the former proceedings, and the petition was ordered to be taken off the file. From this last order she appealed. Held, that the heiress-at-law being a married woman could not contract not to have the cause re-heard, nor could she by her conduct be in any way bound, nor could her consent inserted in the order of the 14th of February 1833 in any way prejudice her right.

Held, also, that the petition of re-hearing must be restored to the file.

Held, further (on the re-hearing), that the decree of the 14th of February 1833 must be varied by striking out the consent of the heiress-at-law, and adding words reserving to her, if she should survive her husband, and to her heirs if she should die in his lifetime, the right to dispute the will; but

Held, also, that although the decree was inoperative against the heiress-at-law to bind her inheritance, it was conclusive as against the husband as tenant by the courtesy to the extent of his estate; the decree being, in fact, a bargain that all his and his wife's costs, to which he was alone liable, should be costs in the cause, he agreeing that they would no longer dispute the will.

The suit in this case was instituted, on the 3rd of October 1829, by the children of Mrs. Mary Ann Meryweather, all of whom were then infants, by their next friend,

against the trustees of the will of Mr. William Turner, that lady's father, and against that lady and Mr. William S. Meryweather her husband, which, after alleging her to be heiress-at-law and customary heiress, prayed that the same will might be established and the trusts carried into execution under the decree of the Court. During the litigation a great variety of proceedings were taken in different jurisdictions, but the facts chronologically arranged may be stated in a moderate compass. The testator's will was dated on the 19th of September 1829, and by it he devised and bequeathed his real and personal estate to certain trustees for the benefit of the children of Mrs. Meryweather, his daughter and only child. He bequeathed to her a sum of 500*l.* and an annuity of 500*l.* a year during the joint lives of herself and her husband, and an annuity of 1,000*l.* in lieu of it if she should survive him. The testator also affected to deal with the guardianship of his daughter's children, by directing their removal from the care of their father and mother, and he gave peculiar directions as to the mode of payment of the annuity to her. He appointed the trustees his executors.

A *caveat* was immediately entered on behalf of Mrs. Meryweather; but no further proceedings being taken, probate passed of the will and a codicil on the same day as the original bill was filed. Mr. and Mrs. Meryweather appeared and answered jointly, admitting the due execution of the will and codicil. The trustees, on her application, paid the legacy of 500*l.* She and her husband presented a petition in the cause for payment of the annuity of 500*l.* a year, and the same was ordered accordingly and paid. With a view to dispute the validity of the will on the ground of the testator's insanity, Mr. and Mrs. Meryweather, in her right as heiress-at-law, in Michaelmas term, 1829, brought an action of ejectment against the trustees, and after appearance and notice of trial, and countermand of it, the action was discontinued and the plaintiffs were ordered to pay the costs.

The cause came on for hearing on the 25th of January 1832, when, on the application of Mrs. Meryweather, an issue *devisavit vel non* was directed, the adult

plaintiffs to be plaintiffs at law, and the heiress-at-law and her husband to be defendants. Leave was also given to the trustees to attend by counsel and examine witnesses in support of the will, although they were not directed to be parties on the record. The plaintiffs withdrew the record just on the eve of the trial, and the trustees applied to the Court, and on the 27th of November 1832 an order was made substituting them as plaintiffs in the action, and the trial was appointed for the 19th of February 1833. The next important step taken by the heiress-at-law and her husband was a petition of appeal from this order, presented in December 1832, praying that the adult plaintiffs might be continued plaintiffs at law, and that the petitioners might have leave to examine them, but the petition was dismissed. Before the trial, and on the 5th of February 1833, a petition (the groundwork of the present application) was presented in the cause by Mr. and Mrs. Meryweather, which alleged that the testator was at the time of the execution of his will and codicil under the influence of persons hostile to his daughter and her husband, who, taking advantage of his impaired state of mind, compelled him to make such will and codicil, and "that your petitioners have been guided throughout the before-mentioned proceedings in opposing the said will and codicil from a deep sense of injury, and from the conviction of the necessity for your petitioners to clear their characters from the imputations conveyed by the said will and codicil, more particularly as the said testator has therein directed that the guardianship of your petitioners' children shall be removed from them; that your petitioners' said children have always lived on terms of the greatest affection; that the said testator has directed the payment of the said annuity of 500*l.* to your petitioner Mary Ann Meryweather in a way degrading to the feelings of herself and her said husband; that your petitioners have at the urgent request of the said (the three adult children and plaintiffs) consented and agreed to withdraw all further opposition to the said will and codicil, the said (adult children and plaintiffs) being willing and desirous that the expenses hitherto incurred by your petitioners in preparing for the said trial should be allowed to your

petitioners as costs in the cause." This petition then prayed that the order of the 25th of January 1832, directing the issue *devisavit vel non*, and the order of the 27th of November 1832, substituting the trustees as plaintiffs in the issue might be discharged, and that the costs of and relating to the issue, and of the said application, and consequent thereupon, might be costs in the cause as between solicitor and client, the "petitioners hereby undertaking to admit the validity of the said will and codicil of the said testator, and submitting to have the trusts thereof performed and carried into effect under the direction of this honourable Court."

This petition came on for hearing, together with the cause, upon further directions, on the 14th of February 1833, when a decree or order was made in the cause and on the petition, which was prefaced by the words "the said Mary Ann Meryweather, the heiress-at-law and customary heiress of the said testator, by counsel, consenting that the said orders of the 25th of January and the 27th of November 1832 be discharged," the same were ordered to be discharged accordingly; and it was declared that the will and codicil were well proved, and it was declared that they be established, and the trusts thereof be performed and carried into execution. The costs were then ordered, as prayed by the petition, to be taxed, and when taxed to be paid in the manner therein mentioned. Matters remained in this state for ten years; when, in March 1843, Mr. and Mrs. Meryweather cited the executors to prove the will in the Prerogative Court of Canterbury, but the executors were dismissed from further attendance, that Court being of opinion that the conduct of the heiress-at-law and her husband in the proceedings in Chancery had barred them from such proceeding, but the costs were ordered to be paid out of the estate. The executors were again cited in the same court by one of the daughters of Mrs. Meryweather in April 1844, and subsequently the will and codicil were, on the 10th of March 1846, pronounced duly proved, all proceedings against the executors having been abandoned. An act of parliament was, in 1845, applied for to enable the granting of building leases, the petition for which was signed

by Mrs. Meryweather, and the same was passed with a saving clause extending to the rights of that lady and her heirs. In 1846 and in 1849 she and her husband brought other actions of ejectment against the trustees, and in March 1850 an injunction was granted by the Vice Chancellor of England to restrain them from proceeding with any action already commenced or prosecuting any other action of ejectment for the recovery of any part of the real estate of the testator devised to the trustees, or from in any manner litigating or disputing the validity of the will and codicil. The late Master of the Rolls, Lord Langdale, on the 13th of January 1851 (reported 20 *Law J. Rep.* (N.S.) Chanc. 112), gave Mrs. Meryweather leave to present by her next friend a petition of re-hearing of the decree or order of the 14th of February 1833, and on the 29th of the same month of January she obtained an order for setting the same down. The trustees on the 29th of May following moved, before the present Master of the Rolls, Sir John Romilly, to discharge the order of the 13th of January 1851, and that the petition of re-hearing might be taken off the file. His Honour (1) granted the

(1) The judgment of the Master of the Rolls was partly as follows:—"This is a motion made by the trustees of the will of Mr. Turner, deceased, to discharge an order made by Lord Langdale on the 13th of January 1851, permitting a petition of re-hearing to be presented, to re-hear an order pronounced on the 14th of February 1833; and the motion also asks that the petition presented in consequence of that permission should be taken off the file, and that the costs of the motion should be paid by the petitioner or her next friend. * * Although there are a great number of cases in which undoubtedly the wife is not bound by the proceedings that take place by her husband, yet I think upon the present occasion there is no such state of affairs, and she is not at liberty to make use of that argument. She might have proceeded, as she now proceeds, as soon as she had notice of the order, to seek to re-hear that order, if she said she was not bound by it. She does not dispute that she had notice of the order from the time when it was made; she says she did not understand the effect of it; but the effect of it was express, the order stating that the heiress-at-law admits the will and that the will is to be carried into effect, and the trusts of it duly executed. There is no technical or legal language difficult of comprehension there, nothing which is not obvious to any person's understanding. Any person endowed with ordinary common sense must know, that admitting a will, submitting to perform its trusts, and to have the trusts of it carried into execution, is inconsistent with the contest-

motion on the ground of the acquiescence of Mrs. Meryweather in the decree or order of the 14th of February 1833, and the petition was accordingly taken off the file.

Mrs. Meryweather now appealed from this last order, and on the hearing of that appeal the Lords Justices offered, in order to save expense, that if they should be of opinion that the petition of re-hearing should be restored to the file, they would themselves hear and dispose of it, instead of the same being sent again to some other branch of the Court,—an offer which was at

ing or setting aside that will. I think it must be taken as if she had knowledge of the proceeding. If she was not bound by the petition, she might have taken the step which she now proposes to take. * * Now, considering the lapse of time that has occurred, and the loss of evidence that may possibly arise in so great a length of time, particularly on a subject of so much difficulty as the sanity of a testator, it would be under very peculiar circumstances that I should think myself justified in allowing an heiress-at-law, who had not acted upon a permission to contest first given so long since as twenty years ago, to obtain the assistance of the Court for doing that which ought to have been done so long before; especially, when I find an order expressly made directing the will to be established, and declaring that the costs of all parties by a species of arrangement should be paid at that time upon the footing and upon the apparent understanding that there was to be no further litigation on the subject. That has been acted upon ever since. This lady must have been aware of the effect of that order, and of the consequences of it, and any steps that were proper to be taken ought to have been taken long ago. Taking all these things into consideration I am satisfied I could not do a worse act than allow the matter to be re-heard on the present occasion. It is said that the matter for re-hearing is for error patent on the face of the decree. I do not think that makes any substantial variation with respect to the particular matter alleged; nor am I satisfied that it is so, for the error, if any, is, that counsel appeared and consented that the order should be discharged, when, in fact, no such counsel did appear; at least that is the most favourable way for the petitioner to state that matter. I am not satisfied, nor is there anything to shew me, what actually took place on the occasion. It is possible, that upon that occasion the Court might have said that it was necessary that counsel should appear, and consent that the order should be discharged, and that thereupon one of the counsel might have been instructed, and might have given such consent. I think in that case it would have been sufficient. I am of opinion that I ought not to permit the petition to be re-heard. I think that the motion must be granted to the extent of ordering the order made by Lord Langdale to be discharged, and taking the petition off the file."

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once accepted. As this report is confined to the important question whether a married woman, heiress-at-law, can by contract, or conduct, or consent, bind herself and her heirs in a suit relating to her inheritance, it may be as well here to mention that at the hearing of the appeal to discharge the order of the 29th of May 1851, several objections were taken to the petition, and among them that it was not properly entitled; but an offer being made to reform it in that respect, and it being shewn that the objection was not taken at the Rolls, it was held to be immaterial. It was also objected that the petition stated too much; but it being shewn that no relief was grounded on that fact, the Court overruled the objection, considering that the only way it could be material would be on the question of costs if the petition should be heard; and it was further objected that the petition in referring to the act of parliament as to the building leases did not state enough, but both their Lordships concurred in thinking that the title of the statute being stated was sufficient to give the Court cognizance of its contents, and all parties were agreed that, whatever might be the decision on the appeal, what had been done under the act of parliament was to stand. Upon these several points the case of *Wood v. Griffith* (2) was cited, and commented on.

Mr. Bethell and *Mr. Villiers* appeared for Mrs. Meryweather.

Mr. Rolfe, *Mr. Roundell Palmer*, *Mr. Wright*, *Mr. Hardy*, and *Mr. J. V. Prior*, for the other parties.

Davenport v. Stafford (3) and several of the cases there collected, *Hargrave v. Hargrave* (4), and *Gwynne v. Edwards* (5) were cited and relied on in opposition.

Upon the hearing of the motion to discharge the order of the Master of the Rolls removing the petition of re-hearing from the file, their Lordships delivered judgment, which was, save only as to the points before adverted to, as follows:—

(2) 1 Mer. 35.

(3) 8 Beav. 503; s.c. 14 Law J. Rep. (N.S.) Chanc. 414.

(4) 8 Beav. 289; s.c. 14 Law J. Rep. (N.S.) Chanc. 250.

(5) 9 Beav. 22; s.c. 15 Law J. Rep. (N.S.) Chanc. 84.

LORD JUSTICE KNIGHT BRUCE.—A bill was filed in this case, among other purposes, to establish a will, against the heiress-at-law, who was a married woman. It came on to be heard, and then the only decree, if it was a decree, was to direct an issue. An order was subsequently made, upon the application of the trustees of the will, that they should be made parties to the issue, as I understand, in the place of some children of the lady who were to have been parties. That I understand to have been the nature of the order. Before that was tried, a petition was presented by the husband of the lady, in the names of himself and his wife, which is, in some respects, very remarkable, for it does not state the conviction either of the husband or of the wife that the will was a good one; it states that they had been induced to abandon the opposition to a bad will at the request of the children, and for a pecuniary consideration, namely, the payment of certain costs, in which alone the husband could be interested, and not the wife. This was in effect a money payment to him. That petition having been filed came on with the cause, and thereupon a decree, or decretal order, was made in conformity with that application, and which, I suppose, provides that the costs may be paid in the same way—the way I have mentioned—that is, that the bargain may be performed. If that is not a sale by the husband of the wife's right I do not know what it is. With regard to this lady's consent by counsel, it may be said that the consent of a married woman by her counsel, distinct from her husband, she having been defended with him and by him, and not separately, is matter of mere nonsense, and perhaps it is. Perhaps it is utterly without meaning; but if it has any meaning, it is wrong, because she could not so consent; she is entitled, therefore, to have the matter set right, because it is contrary to the law of the country. She has a right, whether the words inserted in the decree are mere nonsense or not, to have them struck out, as being contrary to the known and established law of the country. The words intimating her consent by counsel were inserted in the order, I am convinced, without the knowledge of the learned Judge whose order it pur-

ports to be, and without having his attention called to it. This is not the first instance in my experience in which parties have drawn down great mischief on themselves by altering the order according to their own fashion and views without the knowledge of the Court. But assume the order to be all that it seems, then the case comes to this, that the husband abandons the right to have an issue to try the validity of the will as to the freehold estates in fee simple of his wife's ancestors. It has been said that the husband is *dominus litis*; that he has the entire conduct of the cause; and that the wife is bound effectually, and for ever, by what the husband has done. Now that undoubtedly is a most serious proposition, considering the guard with which the law in this country in general surrounds a married woman as to her real estate. It is not, however, for me to deny that there may be cases in which the husband, by his manner of conducting a cause, may so bind the right of his wife as to her real estate. There may be such cases; but is this one? It is not one in which the husband has said, "I conduct this cause for myself, I feel that I have no defence, and I give it up." He says, "There is no will at all; my children, or some of them, wish me to give up the suit; I am offered certain money terms for the purpose, and, therefore, I give it up." What is that more or less than a sale? It is so in other words, and in mere words; but, substantially, I do not observe the difference. Then, if all these considerations were otherwise, is this a kind of point to be decided, not on a re-hearing—not in the ordinary way in which important questions are decided by the Court—but on an application to prevent a petition of re-hearing from being heard,—the closing of the doors of the court against the wife because something has been done which the Court decides is an answer to her claim? There may be cases in which it is right to do so. There have been, indeed, cases in which Judges of the highest authority have directed petitions of re-hearing to be taken off the file. Undoubtedly such cases may occur. The case ought to be very clear for that purpose, and not, as I think, with great deference, in a case of this description, where there is so much

to be argued. Without, therefore, giving any opinion whether the issue will, if directed, succeed; or whether the issue will be directed at all; whether there is any foundation, or a total absence of foundation, for the petition of re-hearing, my impression is, that everything that is to be said against the petition of re-hearing ought to be said when it shall come on as a cause, either on the materials existing in the cause and on the petition of re-hearing alone, or upon that proceeding, coupled with such other proceeding, if any, as those opposed to it may think fit to institute. Although, therefore, the Master of the Rolls, in stopping the proceeding *in limine*, has done that which is substantially the best thing in the world for all parties concerned, I am of opinion, with great deference to him, that the matter must be discussed at a later stage; and, therefore, I think the petition of re-hearing should be restored to the file.

LORD JUSTICE LORD CRANWORTH. — I am of the same opinion. I give no opinion as to what will be the result of the re-hearing of the petition, either with reference to the particular facts of this case or the general question, as to how far the husband, conducting his wife's defence, by his act has bound her inheritance, which is a very important question, and upon which, I repeat, I express no opinion at all. What his Honour the Master of the Rolls seems to have done, and I think, with all respect for him, erroneously done, is, that he considered this as a point to be discussed on the preliminary question whether the parties should be allowed to re-hear or not. The authorities which it would seem his Honour mainly relied upon were two or three cases before Lord Langdale, which I think proceeded on totally different principles. I allude particularly to *Davenport v. Stafford*, *Hargrave v. Hargrave*, and *Gwynne v. Edwards*; all which cases proceeded on this ground:—"Assume," it was said, "that the re-hearing is a matter of right upon the certificate of counsel, or so much a matter of right that, *prima facie*, the right is admitted; yet a party, after a decree, may so conduct himself that this Court will say, 'It is inequitable to let you present a petition of re-hearing at all.'" For instance, suppose a decree

were made that gave benefits to each party, and that after that decree was made, one of those parties, A, says to B, the other party, "Let me have no more disputes about it, I will execute a release to you of all claims whatsoever." It is done for valuable consideration. And if afterwards that party giving that release were to ask to have the matters re-heard, the principles on which Lord Langdale proceeded would apply. They went to this extent: "There is injustice, and you have precluded yourself from any right of re-hearing; just as if you had done that before the original hearing, you would have afforded ground of defence, and it is not just that you should now be allowed to re-hear." I have put the case of a party to a release, or by contract, which would be the same thing, actually debarring himself. This extends that doctrine somewhat further, but not further than principle requires and renders just. Lord Langdale said, "If, by your conduct, you have so dealt that the parties might infer that you never meant to question that decree, you shall not afterwards be allowed to have it re-heard." That was the principle on which his Lordship went in those cases. Now, suppose that doctrine to be most correct, that a party may by his conduct prevent himself from the right to re-hear, how does that apply to the case of a married woman, who cannot contract, and, therefore, cannot by contract conduct herself in such a way as that? Is she to be dealt with as if she had contracted? In my opinion, it is impossible for a married woman by contract to prevent herself from having the right to have her cause re-heard; so neither can she do so by her conduct. It appears to me that the distinction was not sufficiently directed to the attention of his Honour in dealing with this case. From the very short note that was handed up, it appears that his Honour relied upon those cases, and dwelt very much upon the knowledge that must have been in the mind of Mrs. Meryweather as to what had been done, and that therefore she ought to be bound. Assume her knowledge to have been as perfect as possible—assume that she had had a copy of the decree, and released all further demands, in my opinion it would have been an act perfectly inopera-

tive; and I do not think that her conduct could have put her in a different situation. It appears to me that the cases relied upon did not warrant the judgment of his Honour, and that as there is nothing to take this case out of the ordinary rule that a party to a cause has a right to have the same re-heard, this petition must be restored to the file. The order of the Master of the Rolls will be reversed, but all costs will be reserved until after the re-hearing or until further order, and all parties will have liberty to apply.

The petition of re-hearing having been argued, by the same counsel, for Mrs. Meryweather, the following opinion was stated by—

LORD JUSTICE KNIGHT BRUCE.—This case comes before the Court under very peculiar, indeed, under very extraordinary, circumstances. It is not necessary to say whether, where there is an adjudication of the validity of a will of freehold estate in a case where the heiress is a married woman, that adjudication can be questioned by her on the ground that she was a married woman at the time, or by her heir on that ground, after the coverture shall have determined, where there has been or where there has not been a trial at law. Cases of that description we desire to leave totally untouched, considering that this is not one of them. Subject to any observation upon that point which those who oppose the present application are desirous of making, we consider at present that this is a case in which there has not been substantially an adjudication of the will, inasmuch as that point was retired from by the husband when he had charge of the case. He, for himself and his wife, retired, not on the ground that the will was good—not on the ground that if the contest proceeded the result would be favourable to the will—but on the ground that, though the will was a bad one, there were reasons and inducements which led him, the husband, having the conduct of the cause, to think it was better that the will, though a bad will, should be established. We are at present, therefore, disposed to think, subject to what we may hear, that it ought to be left open to the wife or her heirs, hereafter to make what she can of that point, but that,

during the life of the husband, the estate is effectually bound; so that during his life, he being tenant by the courtesy, there cannot be a trial; and, therefore, subject to dealing with this case more unfavourably to those who support the application, after hearing those who oppose it, if they still desire to be heard, what we at present purpose to do is, to vary the decree or order of the 14th of February 1833 by striking out “and the consent of Mary Ann Meryweather,” and inserting at the end of it the following words—“That this decree or order is to be without prejudice to any suit or question which may be instituted or raised as to the validity of the said will, and accordingly the said Mary Ann Meryweather, her heirs and assigns, are to be at liberty to institute, prosecute, or make any suit, proceeding, or application which they may be advised after the death of the said William Stevens Meryweather, for the purpose of recovering the real estate of the said testator, on the ground that he left the said Mary Ann Meryweather his heiress-at-law, and of disputing the validity, as to the real estate devised, of the said will.”

Mr. Roundell Palmer, Mr. Rolt, Mr. J. V. Prior, and Mr. Hardy, were then heard in opposition, and cited *Jackson v. Barry* (6).

Mr. Villiers was heard in reply.

LORD JUSTICE LORD CRANWORTH.—This is a case which though we believe practically to be of no importance at all, opens a number of very difficult and somewhat curious questions, namely, as to the rights of a husband as *dominus litis* in a suit in which his wife's inheritance is interested. There seems to be very great authority for saying (and all convenience and all analogy to the old proceeding in respect of real actions would seem to shew, by reasoning *à priori*, that this is the state of the law) that if there is a suit against the husband and wife in respect of the wife's inheritance, and the wife does not, or the husband and wife do not, at the time desire to have an issue, the Court may declare the will to be proved

just as if she was not a married woman. All convenience, I say, seems to require it. I cannot remember any case having come under my own experience, but if I had been asked the question I should have said it was just the same with a married woman as with any one else, and that if she does not claim she must be bound by it. Mr. Walker, who is a Registrar of very great experience, states it as his impression, that it is very frequently done. He has brought us a note of two cases, and one was distinctly a case (7) in which that has been done; but on looking at the Registrar's book, singularly enough, the decree does not seem to have been entered; but, although the decree was not entered, there was an order made afterwards reciting it, and some directions given upon some interlocutory order about costs. If it had been absolutely necessary to decide that, for myself I should probably have wished more time to make some further search. But even assuming it to be the law that if the wife, or the husband acting for the wife, does not claim an issue at the time the cause comes to a hearing, the wife is bound, in this case an issue was directed.

Then arises the dry question—an issue having under these circumstances been directed, the husband afterwards presents a petition to vary that order and to get rid of the issue—can he do that? Now, in my opinion, he cannot; that is a different proceeding altogether. He did not think fit to claim an issue; and the wife having obtained the benefit of an issue, he thinks fit afterwards, on her behalf, to compromise the suit. The result of this matter appears to me to be that the husband could not by his petition get rid of the right that the wife had acquired in 1832. If the husband could not do it by his own petition alone, he could not make it at all better by joining the wife as co-petitioner, still less can it be entered on the decree that she had consented. It is merely a superfluity of words that mean nothing. It is in truth the husband's petition. What is the effect of the order that was made on that petition of the husband joining the wife with him? I believe we both are of opinion that

although inoperative in binding the inheritance as against the wife, it must be conclusive as against the husband. Indeed, it is hardly necessary to determine that, because he was a party afterwards to an order which expressly proceeded on that footing, and the consequence of that is, that he is for ever bound. He being tenant by the courtesy, and therefore entitled *sub modo* during his own life, he has bound that inheritance, whether there was or was not a good will. He is bound to act on the footing of its being a valid will so long as he lives. Then the question arises whether we ought not to provide that the wife, or those who come after her, shall not be precluded from disputing that will after the husband's death. We think that we ought to make such a provision, that if, upon his death, Mrs. Meryweather, if she should then be alive, or her heir if she should be then dead, should be minded to dispute this will, they should not be prejudiced by the act of the husband in having got rid of the order that was made in 1832 for the trial of an issue as to the validity of that will, but that they ought to have the same right as if the order of 1833 had never been made. I think the course we ought to pursue is that proposed originally by my learned Brother, namely, to vary the order of 1833 by striking out that it was by the consent of Mary Ann Meryweather, and inserting a provision that it is to be without prejudice to any suit or proceeding by her after the death of her husband, if she should survive him, and if she should not survive him, then her heir-at-law, if he should think fit to dispute the validity of the will (8).

(8) March 20.—The order finally made was as follows:—"Vary the decree or order of the 14th of February 1833 by striking out the consent of Mary Ann Meryweather, and inserting at the end of it the following words—'That the decree or order is to be without prejudice to any suit or question which, after the death of the said William Stevens Meryweather, may be instituted or raised by the said Mary Ann Meryweather, her heirs or assigns, as to the validity of the will and codicil, or either of them: and accordingly the said Mary Ann Meryweather, her heirs and assigns, are to be at liberty to institute, prosecute, or make any suit, proceeding, or application that they may be advised after the death of the said William Stevens Meryweather, for the purpose of recovering the real

(7) *Barker v. Anderton* in 1839.

M.R. }
Feb. 9, 12. } *In re* GEDYE.

Taxation—Order of Course—Practice—What Statements necessary—Order at Law on Terms, Non-compliance with—Action on Bills—Judgment.

The non-compliance with an order, made upon terms at law, to tax a solicitor's bill of costs, and the failure of other proceedings at law to obtain renewed orders, are facts which ought to have been stated when applying for an order of course to tax a solicitor's bills of costs in equity; and the omission to state those facts is a ground for discharging the order, though the party might be entitled to an order upon a special application.

How far a judgment signed at law for default will prevent the obtaining an order of course in this court: and whether such order, if granted, will not stay execution on such judgment—quære.

This was a motion, by Mr. Gedye, to discharge an order of course, dated the 24th of January 1852, for the taxation of five bills of costs, on the ground that the question had already been adjudicated upon by a Court of competent jurisdiction, and because the order had been obtained upon a suppression of facts.

The governors and guardians of the poor of St. Mary, Newington, in the county of Surrey, had employed Mr. Gedye as their solicitor in several matters, and in getting an act of parliament relating to Walworth Common, 14 & 15 Vict. c. vii. The facts stated upon the affidavit were, that on the 13th of January 1852, Mr. Gedye brought an action against the governors and guardians of the poor of St. Mary, Newington, to recover 1,017*l.* 19*s.* 7*d.* the balance due upon five bills delivered, and which was indorsed upon the writ of summons.

On the 14th of June 1851 Mr. Gedye delivered his bill of costs for parliamentary

estates of the said testator, on the ground that he left the said Mary Ann Meryweather his heiress-at-law, and of disputing the validity, as to real estate, of the said will and codicil or either of them. The costs of all parties consequent upon the petition of re-hearing, including the costs of the trustees' motion at the Rolls, to take the petition off the file &c. and of the appeal to discharge the order of the Master of the Rolls thereon, to be costs in the cause."

business, which was sent to the taxing officer of the House of Commons, who certified such bill at the sum of 1,185*l.* 8*s.* 4*d.* That the bill, including the parliamentary agent's costs, and adding thereto the costs allowed for taxing the same, was less only by 12*l.* 5*s.* 10*d.*

On the 19th of November 1851 Mr. Gedye delivered five other bills of costs, amounting to 755*l.* 13*s.* 4*d.*, with a cash account giving credit for sums received, which shewed the balance of 1,017*l.* 19*s.* 7*d.*

On the 27th of November 1851 the board passed a resolution to tax the bills.

On the 16th of December 1851 a summons was taken out in the Court of Queen's Bench, and served on Mr. Gedye to tax the whole of his bills of costs.

On the 18th of December 1851 this summons was attended before Mr. Justice Coleridge, who ordered that on payment, without prejudice, of 500*l.* to Mr. Gedye in a fortnight, his bills of fees and disbursements in the causes and matters delivered to the governors and guardians be referred to the Master to be taxed, and that Mr. Gedye give credit for all sums of money by him received from or on account of the governors and guardians, and that Mr. Gedye do refund what, if anything, he might on such taxation appear to have been over-paid; the Master to be at liberty to adopt the taxation of the officer of the House of Commons to the bill of 1,185*l.* 8*s.* 4*d.*, and the taxation not to extend to any bill paid. And he further ordered the Master to tax the costs of the reference, and certify what should be found due to or from either party in respect of such bill and demand, and the costs of such reference to be paid according to the event of such taxation, pursuant to the statute; and that Mr. Gedye be restrained from commencing or prosecuting any action or suit touching such demand pending such reference. And he further ordered that upon payment by the governors and guardians of what (if anything) might appear to be due, Mr. Gedye should deliver to the governors and guardians, or their attorney, all deeds, books, papers and writings in his possession, custody, or power belonging to them.

One of the bills ordered to be taxed was indorsed "General Bill," and was the bill

mentioned in the summons taken out in the Court of Exchequer, and served upon Mr. Gedye on the 9th of January 1852.

The 500*l.* was not paid in compliance with the order, and on the 3rd of January 1852 Mr. Gedye wrote requesting payment of his bill.

On the 9th of January 1852 a summons was taken out in the Court of Exchequer to tax the bill of costs indorsed "General Bill"; but, on the 12th of January 1852, it was dismissed, by Mr. Baron Platt, with costs, upon the ground of the existence of the previous order of Mr. Justice Coleridge.

On the 13th of January 1852 Mr. Gedye issued a writ of summons, and served it on the clerk of the guardians.

On the 16th of January 1852 the governors and guardians caused a summons for particulars of demand to be issued and served upon Mr. Gedye, which, on the 19th of January 1852, was dismissed, by Mr. Justice Talfourd, with 6*s.* 8*d.* costs.

On the 27th of January 1852 no pleas having been filed to the declaration in the action, final judgment was signed by Mr. Gedye for the amount of his demand in the action of debt. At that time the order obtained on the 24th of January 1852 in this court to tax the several bills had not been served.

On the 27th of January 1852 the governors and guardians obtained a rule to plead several matters.

The judgment signed by Mr. Gedye recovered a sum of 262*l.* 6*s.* 3*d.* beyond the amount of the several bills of costs set out in the order of the 24th of January, the aggregate amount of which bills was 755*l.* 13*s.* 4*d.*

Mr. Stuart, Mr. Welford and Mr. R. P. Collier, in support of the motion.

In re Carven, 8 Beav. 436; s. c. 14

Law J. Rep. (N.S.) Chanc. 372.

Holland v. Gwynne, 8 Beav. 124.

Mr. Roupell and Mr. Hardy, for the respondents.

THE MASTER OF THE ROLLS. — The grounds stated for this application are twofold: first, that there had been in fact a judgment obtained at law for the amount of the bill at the time when the order to

tax was obtained; and, second, that the omission to state that three several applications had been made to the courts of common law for the purpose, one of which had been granted upon terms and the other two refused: the one granted upon terms abandoned, and two subsequent ones applied for afterwards, or rather I may say, one applied for since and refused, was a reason why the order of course should not have been obtained. The rules and principles on which orders of course are obtained, originally appear to have been a little unsettled, but were finally settled by Lord Langdale; and I have adopted the rule he laid down, that in applying for an order of course it is incumbent on the party who applies to adopt the same rule that would be acted upon if he were asking the Court to grant an injunction *ex parte*; that he must state every fact to the officer to whom he applies, which can be material to the matter, in order to enable the officer to judge whether it really is a proper case for an order of course: if he do not do so, and there are special matters affecting the question whether he ought to have an order of course or not, and those are not mentioned, the Court will not stay to inquire whether, in fact, if a special application had been made, he would have been allowed to have an order to tax the bill; but if it be a matter of sufficient moment and sufficient importance to require grave consideration or discussion, then the officer would not have granted the order of course; it would have been necessary to have made a special application, and the Court would then have decided on the propriety of taxing the bill. And where there is a matter of that description not stated, and by reason of the non-statement of it, the applicant has obtained an order of course, which he could not have obtained except by the non-statement—I do not use the word "suppression" in any harsh sense, but by the suppression—of that fact, in all those cases, even though on a special application he might be entitled to the order, the Court will not allow the order of course to stand. I have so decided on more than one occasion, and I am satisfied it is the rule that ought to prevail. I have, therefore, now to consider whether the facts suppressed were of sufficient moment and importance

to warrant the Court in saying that they ought to have been gravely discussed.

The first which I shall mention is the fact of a judgment having been obtained. I am of opinion that the judgment having been obtained in the manner it was obtained here, was not a matter to make it necessary. It might be proper to mention it, but I have no doubt that the officer would have granted the order of course, although there had been the judgment, for this reason, the 6 & 7 Vict. c. 73. is precise on this point; it says, there shall be an order of course to tax within twelve months after the delivery of the bill. The order is different within one month and within the remaining eleven months, but still it is an order of course to tax within twelve months after the delivery of the bill; and then it states "provided always that no such reference shall be directed after a verdict shall have been obtained, or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor." Consequently, the 6 & 7 Vict. c. 73. provides that this order of course shall go in every case where there has either not been a verdict or not been a writ of inquiry, but the verdict of course is in those cases where there is a contested action; but when the judgment goes by default, in every case there is a writ of inquiry to assess the amount of damages; consequently it is, I apprehend, perfectly clear that the words "writ of inquiry executed" were put in for the purpose of shewing that a mere judgment obtained by the party was not to prevent the party obtaining the order of course.

Mr. Roupell.—The judgment was after the date of the order.

The MASTER OF THE ROLLS.—I understand that; but I have decided in your favour on this part of the case. The date of the order was on Saturday, the 24th of January, and the judgment was, in fact, signed on Tuesday, the 27th of January; but I am of opinion, that even if the judgment had previously been obtained, it was not a matter of moment. The order was served on the day, a short time after the judgment had been signed, but it was a judgment by default for want of a plea; and I am of opinion that as there was no

writ of inquiry executed, nor could there have been, which must take place in every case of judgment by default, the mere circumstance of the judgment, if the other circumstances are the same, is not a sufficient reason for withholding the order of course. I explain this rather the more fully because the word "judgment" appears in some of the cases, where it is evident that the word "judgment" is used as the judgment obtained subsequent to a verdict. The verdict for an amount of damages on a solicitor's bill of costs precedes the judgment; the judgment is only obtained in consequence of that.

Mr. Collier.—Will your Honour allow me to say that the judgment in an action of debt is final: there is no writ of inquiry in the case.

The MASTER OF THE ROLLS.—There may be no writ of inquiry at all.

Mr. Collier.—Not in an action of debt; the judgment is final at once.

The MASTER OF THE ROLLS.—I certainly have considered that in every case where judgment went by default (having made inquiries on the subject), there would have been a writ of inquiry executed. Still I should not, on that ground, have considered that the fact of judgment having gone by default would have rendered the order of course that was obtained improper, the fact being that there had been no inquiry into the amount of the debt at this time, as there would have been in the case of a verdict or in the case of a writ of inquiry executed, which, I think, is what the clause meant to refer to.

With respect to the other part of the case, I am of opinion that it is a material circumstance, which ought to have been stated. I do not, at this moment, understand why the application was made to a court of common law which does not grant orders of course to tax, instead of coming to this court: nor do I exactly understand upon what grounds Mr. Justice Coleridge made an order that the taxation should only be allowed on payment of the sum of 500*l.*; undoubtedly, if there were nothing else in the matter prior to obtaining that order, the clients might have come here and obtained a taxation of Mr. Gedye's bill.

Now, the subsequent proceedings, before Mr. Baron Platt, proceeded solely upon the ground that an order had been made by Mr. Justice Coleridge, which had not been acted upon. I do not now inquire into whether that would be sufficient to induce this Court not to tax the bill. Upon that I particularly wish not only not to express an opinion, but to give no impression that I think would prevent the bill from being taxed; but I am satisfied that this was a matter of sufficient importance to have it mentioned to the officer that there had been an application made to a Court of competent jurisdiction to tax the bill, which taxation had been refused; and if that had been so named, the officer would not have given the ordinary order of course to tax the bill, but that it would have been necessary to come to the Court to make a special application for that purpose; and, therefore, on that, which in fact was the principal ground set forth, without, in the slightest degree, prejudicing any special application that may be made to tax this bill, I am of opinion that this order of course cannot stand, and that it must be discharged, with costs.

KINDERSLEY, V.C. } SEYMOUR v. VERNON.
March 6.

Fire Insurance — Remainder-man — Tenant in tail.

In a suit to administer the trusts of a will, the receiver was directed to pay all insurance monies and other outgoings in respect of a particular estate. Certain stables attached to the mansion-house were burned down, and as it was not thought desirable to rebuild them, the money received from the insurance office was paid into court:—Held, that the petitioner, who was afterwards declared by the Court to be tenant in tail of the estate, was entitled to the insurance money, and that it was not to be applied for the benefit of the estate generally.

This petition stated that under the will of Lord Harcourt, W. B. Harcourt was the first tenant in tail of a certain estate called St. Leonard's Hill; that the said W. B. Harcourt during his life insured the man-

sion-house and out-buildings; that upon his death, which happened in 1849, a suit was instituted to administer the trusts of the will of Lord Harcourt, and by a decree in the cause, dated in April 1849, it was directed that the receiver of the estate should pay out of the rents and profits all rates, taxes, insurance monies, and other outgoings due from time to time in respect of the mansion-house at St. Leonard's Hill; that under this order the receiver continued the insurance and paid the premiums; that in February 1850 the stables and an archway attached to the house were burned down, and the sum of 800*l.* as the value of such stables had been received from the insurance company and paid into court; that by a decree made on the hearing of the suit, it was declared that the St. Leonard's Hill estate was vested in the petitioner L. B. Harcourt, now an infant, as tenant in tail male; and that it had been decided that the stables so burned down should not be rebuilt.

The petition, therefore, prayed that the sum of 800*l.* so paid by the insurance company might be paid over to the account of L. B. Harcourt, the tenant in tail in possession.

Mr. Leach appeared in support of the petition, and contended that the first tenant in tail in possession was entitled to the money paid by the insurance company. The receiver was directed to keep up the insurance, and to pay the premiums out of the rents and profits. It had since been decided that the petitioner was entitled to these rents and profits. A tenant in tail was not bound to insure and was not liable for damage by fire. This insurance was for the benefit of the tenant in tail, and no one else. The premiums were paid out of his income, and he alone was entitled to receive the money.

Mr. Selwyn and *Mr. Messiter* opposed the petition, on behalf of the remainder-man, and submitted that the insurance money was paid for the benefit of the estate generally. If the stables had been rebuilt the estate would have been benefited by it, and not the tenant in tail. This sum ought, therefore, to be laid out for the improvement of the estate if it were not thought desirable to rebuild the stables.

The case of *Norris v. Harrison* (1) was cited in support of this argument.

KINDERSLEY, V.C.—It appears that by a decree of the Court the receiver was directed to pay the insurances and other outgoings out of the rents and profits of the estate. It is evident that this was done for the convenience of all parties. I think, also, that it must have been intended for the benefit of those parties who should turn out to be interested. The result of the decision of the Court has been, that the petitioner is declared entitled as tenant in tail male in possession. It appears to me that the fair construction to be put upon the transaction is, that the party for whose benefit the insurance was made is the tenant in tail; and the premiums being paid out of the income to which he was entitled, I think he ought to have this fund, and that the petition must be granted.

KINDERSLEY, V.C. } STAPLETON v. STAPLETON.
March 29. }

Will—"And" to be read "or"—Felled Timber—Apportionment of Rent.

A testator bequeathed all the rents and arrears of rent, with timber felled, and other annual profits due to him at the time of his decease, from his Berwick Hill estate, unto the person or persons who should be entitled to the freehold "and" inheritance of the same estate in possession at his decease. On the death of the testator, his brother became tenant for life of this estate:—Held, that the words "freehold and inheritance" must be read "freehold or inheritance," and that the tenant for life was entitled to the rents, &c. specified in the above clause.

Held, also, that the tenant for life was entitled under this bequest to the rents payable from the last quarter day up to the day of the testator's death, and also to certain bricks, tiles, and brick-earth being upon the estate at the death of the testator.

This was a special case, stated for the opinion of the Court, under Vice Chancellor Turner's Act.

(1) 2 Madd. 268.

It stated that by an indenture of release and settlement, dated the 7th of June 1826, a certain estate, called the Berwick Hill estate, was limited after the death of Thomas Stapleton the elder to the use of Thomas Stapleton the younger, for life, with remainder to his sons in tail male, with remainder to the plaintiff, Gilbert Stapleton, for life, with remainder to his sons in tail male, with divers remainders over. That Thomas Stapleton the elder died, and Thomas Stapleton the younger became entitled to the said Berwick Hill estate, and he entered into possession of the rents and profits thereof, and continued in such possession and receipt until his death. That the said Thomas Stapleton the younger, by his will, dated the 30th of January 1841, gave and bequeathed to his executor all his plate marked with the family arms, and all his books, manuscripts, and library, and all other his property of a like nature, in trust, to permit and suffer the same to be held, used, and enjoyed by the person or persons who, for the time being, should be entitled to the freehold or inheritance of the family estate of Stapleton in the county of York, as and in the nature of heir-looms; and the testator declared that no person or persons who should be tenant in tail or in tail male of the said family estate should be entitled to an absolute vested interest in the said legacy, unless he should live to attain the age of twenty-one, or die under that age, leaving issue, but so nevertheless that such tenant in tail should be entitled to the use and enjoyment of the said legacy during his or her minority. The testator then bequeathed his household furniture at his house called "The Grove," at Richmond, to his brother Gilbert Stapleton, absolutely, and other articles particularly specified to his brother John Stapleton, absolutely, and he directed the sum of 1,000*l.*, secured upon mortgage of the Berwick Hill and other estates, to sink into the freehold and inheritance of the said estates, so that they might be absolutely freed and discharged from the said mortgage debt and interest thereon, and the same mortgage and interest might merge in the freehold and inheritance of the said estates. The will then continued—"I bequeath all the rents and arrears of rent,

with timber felled and other annual profits due to me at the time of my decease from my Berwick Hill estate, unto the person or persons who shall be entitled to the freehold and inheritance of the same estate in possession on my decease. And as to all the rest, residue, and remainder of my personal estate, whatsoever and where-soever, I bequeath the same unto my brother Henry Stapleton, and the said John Stapleton, their executors, administrators, and assigns, for their absolute use and benefit. And, lastly, I do hereby appoint my brother, the said Gilbert Stapleton, sole executor of this my will."

The testator died a bachelor, in December 1849, and the said Gilbert Stapleton was his next brother, and was unmarried at the date of the will.

At the death of the testator, there was about 1,050*l.* due and owing to him for rent and arrears of rent from the Berwick Hill estate, and there was upon the said estate at the time of his decease a considerable quantity of tiles and bricks, which had been burnt in a kiln upon the estate about a year previously, and had been made of clay taken out of the estate; and also a certain quantity of prepared brick-earth, for the purpose of making bricks, dug out of the estate. The said Henry Stapleton died in the lifetime of the testator, and his will was proved by the plaintiff, Gilbert Stapleton.

The opinion of the Court was required, whether the plaintiff, Gilbert Stapleton, or the defendant, John Stapleton, was entitled to the said rents and arrears of rent of the said Berwick Hill estate, due and owing to the testator at his death, and to the rents from the quarter-day previous to the death of the testator, until his decease, and whether the plaintiff or defendant was entitled to the said bricks and tiles, and the brick-earth and clay.

Mr. Rolfe and *Mr. Fleming* appeared for the plaintiff, and contended that he was entitled to the arrears of rent due from the Berwick Hill estate, under the words "I bequeath all the rents and arrears of rent with timber felled, and other annual profits due to me at the time of my decease from my Berwick Hill estate, unto the person

or persons who shall be entitled to the freehold and inheritance of the same estate in possession on my decease." It was true that the plaintiff was only tenant for life, but the words "freehold and inheritance" ought to be read "freehold or inheritance," because if the words were taken as they stood, the word "freehold" would lose its effect, and would be mere surplusage, as the person entitled to the inheritance in possession would be entitled to the freehold—*Bell v. Phyn* (1). The bequest was to the person or persons who should be entitled to the freehold, which intimated no uncertainty in the testator's mind as to whether there might be any such person or not, which must have been the case if the bequest was to take effect only in favour of a person entitled to an estate of inheritance. It was also contended, that the plaintiff was entitled to an apportionable part of the rents due at the death of the testator from the previous rent-day, and that the plaintiff was entitled to the tiles, bricks, and brick-earth upon the estate at the death of the testator, as they ought to be considered as forming part of the annual profit. The tiles and bricks were only made in small quantities, sufficient for the use of the estate, and had never been sold by the testator. The following cases were also cited for the plaintiff—

Jackson v. Jackson, 1 Ves. sen. 217.

Maberly v. Strode, 3 Ves. 450.

Stubbs v. Sargon, 2 Keen, 255; s. c. 3 M. & C. 507; 6 Law J. Rep. (N.S.) Chanc. 254.

Wilson v. Bayly, 3 Bro. P.C. 195.

Hepworth v. Taylor, 1 Cox, 112.

Parkin v. Knight, 15 Sim. 83; s. c. 15 Law J. Rep. (N.S.) Chanc. 209.

Prebble v. Boghurst, 1 Swanst. 309.

Mr. Bates, for the defendant, contended that the gift of the rent and arrears of rent was void for uncertainty, the uncertainty consisting in this, that there was no person answering the description used by the testator, who was entitled to the freehold and inheritance in possession; the plaintiff, Gilbert Stapleton, being only tenant for

(1) 7 Ves. 458.

life of the estate, and that consequently the legacy lapsed: and that the accruing rents from the last rent-day on which they fell due up to the death of the testator were not apportionable, and if apportionable, then that they could not be considered as rents due at the time of the death of the testator, and therefore did not pass under the bequest.

KINDERSLEY, V.C.—The first question is, as to the meaning of the description of "person or persons entitled to the freehold and inheritance in possession of my Berwick Hill estate." Looking at the whole will, the testator seems to have intended portions of his property to go in different ways. He contemplated his own dying without issue, though no doubt he might have married and had issue. He made his will with reference to the existing state of circumstances at the date of the will. It appears that all his heirs were brothers, but there were also sisters; each of those persons would take a life estate, after which comes the ultimate limitation. First, as to the plate marked with the family arms; that he desires should go to the person or persons who for the time being should be entitled to the freehold or inheritance of the family estate: he states "for the time being," shewing that he meant the property to go in succession, but about that there is no question. Then, as to the furniture and all other effects; these he gives to his brother Gilbert, his executors, administrators, and assigns, and he gives other chattels to his brother John. Then he gives all his plate and plated articles to his brother John, who was the second in seniority. Then it appears there was a mortgage, which he directs to sink into the estate, in order that it might merge in the freehold and inheritance of the estate. Immediately after that follows the clause upon which the question arises, "I bequeath all the rents and arrears of rent, with timber felled and other annual profits due to me at the time of my decease from my Berwick Hill estate, unto the person or persons who shall be entitled to the freehold and inheritance of the same estate in possession on my decease." If the words "freehold and inheritance" are

to receive their natural interpretation, no one could take the rents and arrears of rent except some person who on the death of the testator became entitled in possession to the freehold and inheritance. The only instance in which a person in the singular number could, on the death of the testator, become entitled to the freehold and inheritance would be the case of a brother having died in the lifetime of the testator, leaving a son who would be first tenant in tail; such a person would be entitled to the freehold and inheritance. The only way in which persons in the plural number could be entitled to the freehold and inheritance would be in the event of all the brothers dying in the lifetime of the testator, not leaving issue, and the sisters under the ultimate limitation becoming entitled as tenants in common to the estate. That he might have contemplated either of these events is certainly within the limits of possibility, but it is impossible to say what he meant. The first event involves the fact of Gilbert's being dead at the death of the testator. Now, that is an event which he did not contemplate the possibility of, because he not only gives certain specific articles to him absolutely, but he appoints him his sole executor; and so, though I do not say he might not have made his will on the assumption of the possibility that he should survive Gilbert, still it is improbable that he should have contemplated Gilbert's not taking. It seems to me clear that he meant when he died that the rents which might probably remain due should go to the person who should succeed to the estate; and I am not going beyond the cases which have been cited in holding, that the word "and" should be read "or." It appears to me the error arises in this way; that in the passages preceding this, the words "freehold and inheritance" occurred, and were used correctly, and then continuing that expression to the sentence in question, he used the words by mere inadvertency, instead of using the more accurate language "freehold or inheritance." I think, therefore, that Gilbert Stapleton having survived the testator, is entitled to whatever ought to be held to pass under the description of "all the rents and arrears of

rent, with timber felled and other annual profits due to me at the time of my decease from my Berwick Hill estate."

The next question is, what passed under the description "rents and arrears of rent." Now, it appears there was not only some of the half-yearly rents due, but there was also rent on some of the demises accruing due for the current half-year in which the testator died. It is clear, under the Apportionment Act, that where rent is to be apportioned there the legal personal representatives of the testator are entitled to so much of the rent as accrued due from the last half-year; but the question is, whether it did not pass under this particular bequest. In one sense, undoubtedly, this portion of the rent was not due at the time of the testator's decease, but the act says that the executor shall be entitled to it as part of the testator's assets. I do not think, in this case, that it would be reasonable to adhere strictly to the words "due to me;" but I think it may fairly be considered to have been due to the testator when it constitutes part of his assets, and is applicable to his debts, &c. I think, therefore, that the apportioned part of the rent received, on the written instrument, not by parol, did pass under the bequest to the plaintiff.

The only remaining question is, as to the tiles and bricks laid on the soil of the estate and a certain quantity of brick-earth prepared for making bricks at the time of the testator's death. The question is, whether they come under the description of "annual profits." Now, the testator has given a key to the meaning he attributes to the words "annual profits," for he gives all rent and arrears of rent, with timber felled, and other annual profits. The felled timber is not necessarily a yearly profit, but the testator shews that he considers the felled timber was to pass as an annual profit. It appears to me, that there is a close analogy between the timber and the tiles and bricks, and that the plaintiff, who is tenant for life, is entitled to receive the rents annually accruing every year, and is also entitled in succeeding the testator to the bricks, tiles, and earth for making bricks now lying upon the estate.

PARKER, V.C. }
April 19. } *In re HOWARD.*

Trustee Act, 1850—Vesting Order—Uses to bar Dower.

Whether, under the 7th section of the Trustee Act, 1850, real estate can be ordered to go to uses to bar dower in favour of the cestui que trust—quære.

An estate had been conveyed to uses to bar dower in favour of a purchaser, the legal estate, however, being outstanding in an infant trustee. This was a petition presented under the Trustee Act, 1850, praying for a vesting order under the 7th section, for the purpose of vesting the legal estate in the purchaser.

Mr. Bigg, for the petition.

PARKER, V.C. said that he had no objection to make the order so that the legal estate should go to the purchaser in fee. He would not decide that under the section in question an estate could not be directed to go to uses to bar dower in favour of the purchaser, but he would not decide that it could without further consideration.

PARKER, V.C. }
April 19. } *In re WILLIAMS.*

Trustee Act, 1850—Vesting Order.

A mortgage in fee was made of real estate. The mortgagor died, having devised the estate to an infant. A claim of foreclosure was filed by the mortgagee against the infant, and an order for sale was made therein. A petition for a vesting order, under the 7th section of the Trustee Act, 1850, was dismissed, on the ground of its being unnecessary.

A mortgage in fee was made of real estate. The mortgagor died, having by his will devised the mortgaged property to an infant in tail, with divers remainders over. The mortgagee filed a claim of foreclosure against the infant devisee, and an order for the sale of the property was made in the claim, and the property was sold accordingly.

A petition was now presented, under the Trustee Act, 1850, praying that the infant's estate might be vested in the purchaser, under the 7th section.

Mr. Eddis, for the petitioner, referred to *Radcliffe v. Eccles* (1).

PARKER, V.C. said that he thought that, as the mortgagee had the legal estate, and as all the equitable interests were provided for by the order made in the claim, nothing further was required. He thought that the order prayed for would make the purchaser's title worse, instead of better. As the order was unnecessary, and, if granted, might throw a doubt on titles where, in similar cases, no such order had been made, he should refuse the prayer of the petition.

LORDS JUSTICES. }
 1852. } KENT v. JACKSON.
 Mar. 19, 20, 22. }

Foreign Railway—English Directors—Return of Deposits—Managing Committee—Purchase back of allotted Shares—Discharge.

A railway company in Belgium was established as a "société anonyme." There were English and foreign directors. Deposits on allotted shares were paid into the bankers. Disputes took place between the English and Belgian directors, in consequence of which all the former resigned. In the following month J. and G, two of the English directors, to whose account the deposits had been paid, returned the deposits to all the allottees who were willing to take them, and they also purchased back some shares, which had been allotted, for the benefit of the company. Accounts of all this were laid before the committee of management, and the balance remaining in the hands of the English directors was paid over, and the transactions were approved by a general meeting. A shareholder filed a bill on behalf of himself and all the other shareholders not defendants, against J, the assignees of G, and the committee of management, praying the repayment of the money returned to the

allottees, and for an account, but the bill was dismissed at the Rolls, and on appeal, the decree was affirmed; the Court holding that by the law of Belgium the plaintiff was not competent to sue for such a purpose, and by the law of England he had shewn no case for the suit against the English directors.

This was an appeal from a decree of the present Master of the Rolls, dismissing the bill. The plaintiff, Mr. John King Kent, the owner of ten shares in the Charleroi and Erquelines Railway Company (purchased very early in June 1848), filed his bill on the 24th of that month on behalf of himself and all other the shareholders of the above-named company (except such thereafter-named defendants as were shareholders of the same company), against Mr. Jackson and the assignees of Mr. Graham, and against the committee of management of the company who were out of the jurisdiction of the Court.

The bill stated that on the 28th of May 1845, by the Royal Commission of the King of the Belgians, a railway company was established as a *société anonyme*, for the formation of a line of railway in that country, and the same was formed under certain articles and rules subsequently duly confirmed by a royal ordinance; that the articles were (*inter alia*) as follows:—

"Article 3. The company takes the title of the Charleroi and Erquelines Railway Company; its seat is Brussels. Art. 15. The possession of, or subscription for, one or more *titres* carries with it the adhesion to the present statutes. Art. 16. The company shall be represented by a general meeting of shareholders; it shall be managed by a board. Art. 23. The board of directors is invested with the most extensive powers, as regards the construction and the working of the line, its branches and dependencies: it is authorized to contract for the whole or part of the works: it is authorized to pass, with third parties (but subject to the approval of the general meeting) all treaties advantageous to the company, even for railways in connexion with this one: it makes the regulations for management or internal order, and superintends their execution. Art. 26. As the members of the board act as represent-

(1) 1 Keen, 130.

ing the company, they contract, by virtue of their offices, no joint or personal liability: they are only answerable for the execution of the trust reposed in them under Art. 32. of the Code of Commerce. Art. 28. Judicial proceedings shall be carried on in the name of the board of directors, at the prosecution, and by the proceeding of the chairman, or of the person replacing him. Art. 31. The general meeting, regularly convened by a notice, shall represent the whole body of shareholders: it assembles every six months. Art. 38. At the meetings constituted according to the terms of Art. 31, the general meeting takes cognizance of the accounts and balances, and determines on them finally: the approval of the balances completely discharges the board of directors. Art. 39. The deliberations of the general meeting, taken in conformity with the above dispositions, bind the company. Art. 43. Every six months, at the half-yearly general meeting, the active and passive situation of the company shall be presented to the meeting, the accounts and balances shall be settled and approved. Art. 47. All disputes between members of the company, concerning the affairs of the company, shall be judged by arbitrators: the tribunal shall be composed of three arbitrators, in the choice of whom the parties shall be bound to agree within eight days: in default of which, the said arbitrators will be named by the president of the Tribunal of Commerce of Brussels, at the request of the first requirer: the arbitrators shall decide absolutely, as amicable compounders, without appeal, and without being bound by the forms and delays of legal proceedings: their decision cannot be reversed by appeal, civil petition, nor by recourse to cassation."

By a subsequent article, Mr. Jackson, Mr. Graham, and others in this country, were appointed the English board of directors, there being also a board formed in Belgium of directors called the *Conseil d'Administration*. Mr. Jackson and Mr. Graham were the acting directors in England. Shares were allotted in England, and deposits upon them to the amount of 12,680*l.* were paid to the joint account of Messrs. Jackson and Graham, into the bank of Messrs. Smith, Payne & Smith.

Differences of opinion arose as to the conduct of the undertaking between the English board and the *Conseil d'Administration* in Belgium, in consequence of which Mr. Jackson and Mr. Graham sent in their resignations, as directors, on the 26th of October 1848, which were soon afterwards accepted, and subsequently the other English directors resigned. In the following month Messrs. Jackson and Graham issued a circular, which was addressed and sent to the English allottees of shares, giving them the option either of taking scrip in exchange for the bankers' receipts or of having the amount of the deposits paid by them returned without interest. A great number of the allottees availed themselves of the former part of the offer, and received back their money to the amount of 8,280*l.*, which money they received by cheques, drawn by Messrs. Jackson and Graham on the bankers, and which were honoured out of the 12,628*l.* so paid in.

After setting forth these facts, the bill proceeded to allege that "the company, ever since it was established, carried on, and still continues to carry on and conduct their affairs on the footing of and in conformity with the said rules and regulations, and such rules and regulations have ever since constituted, and now constitute, the existing laws of the said company, and are binding on all persons who are or who have been at any time members or shareholders of or in the same, to the full extent of all their respective property or interest therein." It also alleged that Jackson and Graham determined to avail themselves of the legal controul they had over the English deposits for the purpose of indemnifying themselves against all liabilities which they had incurred as directors; and it charged and insisted that the return of the deposits amounted to a breach of trust and fraud on the shareholders, and that it had taken place against the protest of the committee of management or *Conseil d'Administration*, and that that body had no power to authorize the return of the deposits: and it charged that Mr. Graham had become bankrupt, and that other defendants were his assignees, and also that the shareholders were very numerous; and, lastly, that it would be impracticable to make them parties, and

it then prayed that it might be declared that Jackson and the assignees of Graham were liable to make good the 8,280*l.*, and that an account might be taken, and that the sum found due might be paid and secured in court for the benefit of the Charleroi and Erquelines Railway Company and all persons entitled to or interested in the funds thereof.

The defendant, Mr. Jackson, by his answer, said that the English directors had retired in consequence of the apparent impossibility of the company carrying its plans into effect, and that they had declined, after their retirement, to pay the English deposits to the committee of management or *Conseil d'Administration* in Belgium, and that they returned them to the English allottees with the sanction of Mr. Augustus Walter Arnold, the duly authorized solicitor of the committee of management or *Conseil d'Administration*, considering that such allottees were entitled to them on the failure of the undertaking; that after their retirement various negotiations took place between the defendants and the *Conseil d'Administration* in Belgium, and that finally, an account was rendered by them, the English directors, to the committee and settled, and the balance, after deducting the sum of 8,280*l.* and certain other payments, among which was a sum of 1,284*l.* 7*s.* 6*d.* for the purchase by Messrs. Jackson and Graham, with the like sanction of Mr. Arnold, of 300 shares from English allottees for the benefit of the company, was, on the 2nd of June 1846, paid over to such *Conseil d'Administration*, or committee of management, by means of a payment into the bank of Messrs. Snow, Strahan & Co. to their account. This account subsequently was, as appeared, although not very clearly, from the evidence, affirmed by the general meeting, or *assemblée générale* of the company.

On the part of the defendants, the evidence of two Belgian advocates was given upon the law of Belgium; one of those gentlemen stated in effect as follows:—“I say that a *société anonyme*, &c. can, in its own name, sue any other person or *société anonyme* in any of the tribunals of Belgium, in respect of the common rights or liabilities of such *société anonyme*. No individual member of a *société anonyme*

can institute, conduct or maintain, in or before the courts or tribunals of Belgium, any suit, claim, or demand, on behalf of such *société*, or the members thereof, otherwise than in the name of such *société*, for any right of such *société*, or any right common to the members thereof, against any other person or *société anonyme*, or other party, or against any other members or member of the same *société*. In a word, and according to the Belgian common law and statute law, *sociétés anonymes* are administered by directors and committees of administration. Directors alone can begin or maintain any suit in the name of *sociétés anonymes*. If shareholders individually had a like right, complications and great difficulties would be the natural consequence, as I think. I say that any differences between shareholders must be decided by arbitration, in virtue of the Article 47. of the statutes, which is in accordance with the terms of Article 1134 of the Civil Code, which makes the said Article 47. binding between shareholders. The Article 47. of the statutes is binding between shareholders, so that all differences arising between shareholders and relating to the *société*, must be judged by arbitration, and consequently, in my opinion, the courts and tribunals of Belgium would declare themselves incompetent in such cases.”

The case was argued before the Master of the Rolls, in July 1851, when he held that the transaction was one which could be sanctioned by a general meeting, and having been so sanctioned, could not be made the subject of a suit in this country against the retired English directors. His Honour was also of opinion that a bill on behalf of all the shareholders of the company, including those persons who were present at the general meetings, and sanctioned those proceedings, could not be supported, and he, therefore, dismissed the bill, with costs, without any reference to the foreign contract, which he did not consider it necessary to deal with. From this decree the plaintiff now appealed.

Mr. Roundell Palmer and *Mr. Shee*, for the plaintiff.—The English directors were the agents or trustees of the company, and they were not justified in returning the

deposits, or in buying up the 300 shares on behalf of the company. They had no authority to do either of those acts, and having committed a breach of trust in so doing, they are answerable to the company for the amount so improperly applied—*Natusch v. Irving* (1), *Salomons v. Laing* (2), *Bagshaw v. the Eastern Union Railway Company* (3), and *The Society for the Illustration of Practical Knowledge v. Abbott* (4). From these authorities it is clear that where corporate funds are applied in a manner contrary to the terms of the common contract, all parties concerned in such misappropriation are bound to refund. Then, particularly as to the purchase of the 300 shares, the case of *Ex parte Morgan* (5) decides that shares can only be purchased upon the terms of the deed of settlement. The plaintiff is perfectly right in suing in England; for it has long been settled that in point of remedy the parties are bound by the law of the country in which proceedings are taken. In this case, therefore, the law of England and not the law of Belgium must apply—*The British Linen Company v. Drummond* (6), *De la Vega v. Vianna* (7), *Huber v. Steiner* (8) *Don v. Lippmann* (9), *Wynne v. Jackson* (10). The form adopted by the plaintiff, of suing on behalf of himself and the other shareholders not defendants, is correct, as his object is to secure the refunding of property improperly applied, as appears from the cases of *Bromley v. Smith* (11) and *Gray v. Chaplin* (12), and no valid objection arises that some of the parties have acquiesced—*Preston v. the Grand Collier*

Dock Company (13) and *Colman v. the Eastern Counties Railway Company* (14).

Mr. Bethell, Mr. Willcock, and Mr. Amphlett, for the defendant, *Mr. Jackson*.—No shareholder in the company complains excepting the plaintiff, who has only just bought the shares, and doubtless with a view to this litigation. When Jackson and Graham ceased to be directors, they came to a settlement with the only parties with whom they could do so; namely, the committee of management. Having done so, there is a conclusive settlement binding on the company. No decisions relating to English companies have any bearing upon this case, which is a Belgian company, and governed by the laws of the country. The bill itself alleges that the company ever since its foundation was carried on in conformity with the rules; and on his own shewing, the plaintiff must be taken to admit that regular half-yearly meetings were held, and everything proper been done pursuant to the 31st article of those rules; that the accounts were duly passed according to article No. 38, and therefore that under article 39 the settlement of the account is binding on the company. *Mr. Arnold*, the solicitor of the committee of management, sanctioned on their behalf what was done, and under the same sanction the balance was paid to the bankers. Under any circumstances, as they stand, the plaintiff has no right to sue. This is a foreign railway company locally situate in Brussels, and the rights of its members are governed by the Belgian law—*Earl Nelson v. Lord Bridport* (15), *Warrender v. Warrender* (16); and as by article 28 all proceedings are to be taken by the chairman, the shareholders, and among them the plaintiff, are precluded from any manner of personal interference. The rules having prescribed arbitration as the means of settling differences is another objection. Unless some reason be shewn why the company does not originate such a proceeding, even by the

(1) 2 C. P. Cooper, 358, and Gow on Partnership, 398.

(2) 12 Beav. 382; s. c. 19 Law J. Rep. (N.S.) Chanc. 291.

(3) 7 Hare, 114; s. c. 19 Law J. Rep. (N.S.) Chanc. 410.

(4) 2 Beav. 559; s. c. 9 Law J. Rep. (N.S.) Chanc. 307.

(5) 1 Hall & Tw. 320; and 1 Mac. & Gor. 225; s. c. 18 Law J. Rep. (N.S.) Chanc. 266.

(6) 10 B. & C. 903; s. c. 9 Law J. Rep. K.B. 213.

(7) 1 B. & Ad. 234; s. c. 8 Law J. Rep. K.B. 388.

(8) 2 Bing. N.C. 202.

(9) 5 Cl. & F. 1.

(10) 2 Russ. 351; s. c. 5 Law J. Rep. Chanc. 55.

(11) 1 Sim. 8; s. c. 5 Law J. Rep. Chanc. 53.

(12) 2 Sim. & S. 267; s. c. 3 Law J. Rep. Chanc. 161.

(13) 11 Sim. 327; s. c. 10 Law J. Rep. (N.S.) Chanc. 73.

(14) 10 Beav. 1; s. c. 16 Law J. Rep. (N.S.) Chanc. 73.

(15) 8 Beav. 547.

(16) 2 Cl. & F. 488.

English law an individual member cannot sue; and, moreover, as the plaintiff sues on behalf of persons who have approved of the acts complained of, and who could not themselves have instituted the suit, and adds himself as a plaintiff with them, he has made a misjoinder—*The King of Spain v. Machado* (17) and *Graham v. the Birkenhead, Lancashire and Cheshire Junction Railway Company* (18).

Mr. Malins and Mr. W. J. Bovill, for the assignees of Mr. Graham.

Mr. Shee, in reply.—Mr. Arnold had not and could not have authority from the committee of management, because that committee had no authority to do the acts themselves. To say that the plaintiff has no right to sue, that the proceedings ought to be in the name of the company, and that the only relief is by arbitration, is the same as saying there shall be a denial of justice; for here the principal defendants live in England and are accessible, while it is clear that he has no means of suing those in Belgium. He is of necessity driven to appeal to English tribunals, and ought to have the aid he asks to repair the mischief done. The answer to the objection that the company should be a party is simple; namely, the chairman is made a party, and that is the only way in which the company can be represented, as appears from the 28th article of the rules.

LORD JUSTICE KNIGHT BRUCE.—Whether upon the question of right, or the question of remedy, the law of Belgium or the law of England is regarded, this suit seems to us ill founded. According to the law of Belgium the plaintiff is incompetent to sue for the purpose for which he has filed this bill; and by the law of England it is not proved, or even alleged, that he has a right to sue on behalf of himself and the other shareholders. He has shewn no case for suing the directors in the manner he has done, even if some suit be proper. The pleadings and evidence seem to us to shew that in the year 1847, more than a year before the plaintiff filed his bill, an account had been stated and settled between the *Conseil d'Administration*, or committee of

management in Belgium, who were authorized agents of the company, on the one hand, and Mr. Jackson and Mr. Graham on the other; which account, if fairly stated, must be considered destructive of the plaintiff's case. It appears to us to have been fairly and honestly stated and settled; that is, every fact was stated with full knowledge and without suppression, and the account so come to and stated was approved by the *Conseil d'Administration*, who were in our opinion competent to do so. If, possibly, on account of the existing trusteeship, if there was one, the confirmation by the *Conseil d'Administration* might have been insufficient, there must still be taken to have been a sufficient affirmance by the general meeting or *assemblée générale*. There is probably more than one other ground fatal to this case; but enough has been said to shew that this petition of appeal must be dismissed with costs.

LORD JUSTICE LORD CRANWORTH entirely concurred.

LORDS JUSTICES.

1852.

Feb. 13.

} *In re BROWNE.*

Costs, Taxation of—Attornies and Solicitors' Act—Protest—Alleged Pressure—Costs of Appeal.

A receiver in a suit assigned dividends to which she was entitled for life, to her sureties as security for their bond. The receiver paid the balance found due from her into court, and the recognizances were ordered to be vacated. The sureties refused to re-assign the dividends. The solicitors of the sureties delivered bills of costs incurred by them in the suit. The receiver had borrowed money for her support, and for the support of her children, and had executed a warrant of attorney, upon which judgment was entered up. The creditor threatened execution, and in order to obtain the dividends the receiver paid the bills of costs out of the dividends which had accumulated in the hands of the trustees of the settlement, but gave notice that she did so under protest, and without prejudice to her rights. A correspondence had taken place between the solicitors of the par-

(17) 4 Russ. 225; s. c. 6 Law J. Rep. Chanc. 61.

(18) 2 Hall & Tw. 450; s. c. 2 Mac. & Gor. 146; 20 Law J. Rep. (N.S.) Chanc. 446.

ties respecting taxation, which ended in the receiver agreeing to pay the costs of it. The payment was made on the 14th of August 1850, and on the 7th of June 1851 the receiver petitioned at the Rolls for an order under the statute 6 & 7 Vict. c. 73, for the taxation of the bill, alleging that it was paid under pressure, and with protest, but the petition was dismissed; and on appeal the decision below was affirmed, but without costs, the authorities being conflicting.

This was an appeal from a decision of the present Master of the Rolls.

Amongst a multiplicity of allegations, a very long correspondence, and many conflicting affidavits, the following appear to be the facts of the case. By a settlement, dated in 1839, trusts were declared in favour of Mrs. Jefferies for her life, for her separate use, of 2,000*l.* 3*l.* per cent. consols. In 1844, after the death of her husband, Mrs. Jefferies appointed a new trustee of the settlement. A suit was instituted for the administration of the estate of her late husband, and she was appointed receiver. She was entitled to dower out of the real estate. By a deed, dated in 1845, she assigned her dividends in the 2,000*l.* consols and her dower to A. P. Brown and F. Mead, her sureties, as a security to them, they having entered into the usual bond for her. Notice of this deed was given to G. J. Foulger and C. Biggs, the trustees of the settlement, who retained all the dividends as they accrued until the 22nd of August 1850. The Master, to whom the matters were referred in the suit of *Jefferies v. Jefferies*, reported that a particular sum was due from the receiver, but after petitions and other proceedings, and after he had reviewed his report, he found 74*l.* 18*s.* 9*d.* to be due from her, which report was confirmed, and by an order made on the 20th of December 1849, on the motion of Mrs. Jefferies, the same was directed to be paid into court, and her recognizances and those of her sureties were ordered to be vacated. This order was served on the sureties, and on the trustees, and the money was paid into court. Mrs. Jefferies required a re-assignment from her sureties of the property assigned to them, and payment from the trustees of the settlement of the dividends

which had accumulated in their hands; but this was refused, although the balance due from her as receiver had been paid into court, and the recognizances had been vacated. On the 12th of January 1850 the London agents for Mr. John William Browne, the solicitor of the sureties, delivered a bill of costs, and after an order had been made in the suit dated the 3rd of June 1850, (which, because of some dispute before the Registrar, was not drawn up) for the taxation of the sureties' costs, in that month an additional bill was delivered, making the whole 105*l.* or thereabouts. In order to enable her to live and support her two children, Mrs. Jefferies borrowed money of Mr. W. Johnson, and gave him a warrant of attorney to confess judgment, whereupon the same was immediately entered up. Upon that person pressing for payment, and threatening to issue execution, she, in order to obtain money, consented to pay the 105*l.* bills of costs. The evidence was of a very conflicting character as to the protest at the time of payment, but it was shewn that the solicitors were willing that there should be a taxation, but it must be at her expense. The payment was made on the 14th of August 1850, by the trustees, by her direction; and in May 1851 a correspondence was renewed about the taxation, which ultimately did not take place. On the 7th of June 1851, Mrs. Jefferies presented a petition at the Rolls under the provisions of the Attornies and Solicitors' Act, 6 & 7 Vict. c. 73, praying the taxation of these bills. The petition contained allegations that she was advised not to pay the same, "as well on account of the extravagant and improper charges which they contained, as that she was not liable at law or in equity to pay the same;" that the solicitors were informed of the whole transaction with Mr. Johnson; and that neither of the bills of costs had been taxed, and also that she would not have consented to the payment of them, or either of them, without taxation, except and in order that by at once obtaining a release of her dower and dividends she might save herself from being taken in execution at the suit of the said Mr. Johnson. The petition did not contain any statement of specific items of overcharge; the allegation in that respect being confined to the advice she

had received not to pay, on account of extravagant and improper charges contained in the bills. This petition having been dismissed, Mrs. Jefferies now appealed.

Mr. Roundell Palmer and Mr. Lovell.—That there was pressure in this case cannot reasonably be denied when the situation of the parties is considered, and although the pressure was not actively that of the solicitor himself, that gentleman must have been aware, even without the protest, that the payment was only made because the lady had no means of freeing herself from the difficulties in which she was placed, except by the money to be obtained from the Court, and that she could not obtain that money unless after payment of this bill of costs. In the case of *Ex parte Wilkinson* (1), before one of your Lordships, a firm of solicitors acted as solicitors for both mortgagor and mortgagee, and the bill of costs was presented for payment on the very eve of the completion of the conveyance of the estate, and then it was paid, as here, under protest. There it was laid down that protest combined with other circumstances might be a ground for a reference for taxation, and the bill was sent for taxation, without any regard to many of the items of the bill not being objected to. Lord Langdale, in *In re Tryon* (2), referred a bill for taxation, and there there had been payment under protest, that payment having been insisted on as a condition for parting with a deed necessary to complete a purchase. In those cases the principle was fully recognized, and the Court will, therefore, send this bill for taxation. On behalf of the appellant we offer to deposit a sufficient sum of money to abide the issue of the taxation.

Mr. Bird, in support of the order of the Court below.—In the first place, there was no pressure as this Court understands the term; and secondly, if there were, and moreover if the payment were made under protest, later cases have decided that unless there be specific items of overcharge alleged in the petition there will not be a reference for taxation. The late Master of the Rolls,

in *In re Thompson* (3), said, that amongst the special circumstances required by the act, "there must be a statement of some specific item which is erroneous, otherwise it is impossible to tell to what latitude the right of taxation after payment and settlement may be carried"; and His Lordship refers to the old practice, observing that he did not think the act of parliament had made any difference. In that case the question of pressure was only alluded to on the question of costs, and it would seem that had there been proof of pressure the petitioner, although he failed, might have had the costs of the petition. Then, in *In re Harrison* (4), a solicitor for the mortgagee refused to complete without full payment of his bill of costs, and although the mortgagee paid it under protest, Lord Langdale held that there should not be a reference for taxation, although there might be overcharges. His Lordship, in that case, denied the notion to be correct that a protest was sufficient, and said that protest by itself was of no value; and further, that the idea that if the bill contained items larger than a solicitor would be allowed on taxation that was a sufficient ground for a reference, was totally erroneous. For all these reasons, the order made by the Master of the Rolls was correct, and ought not to be disturbed; and the petition should be dismissed, with costs.

Mr. Roundell Palmer, in reply, observed that neither of the cases of *Ex parte Wilkinson*, nor *In re Tryon* appeared to have been cited in the cases of *In re Thompson* and *In re Harrison*. Even if the Court should not think the present a fit case to be sent for taxation, it could not make the appellant pay the costs of the appeal, considering that there were authorities from the same Judge differing from each other.

LORD JUSTICE LORD CRANWORTH.—I was about to say I regret that the order at the Rolls must be confirmed; though by saying I regret the conclusion to which I

(1) 2 Coll. 92.

(2) 7 Beav. 496.

(3) 8 Beav. 237; s. c. 14 Law J. Rep. (N.S.) Chanc. 137.

(4) 10 Beav. 57; s. c. 16 Law J. Rep. (N.S.) Chanc. 170.

have come, it is not as to the law of the case, but as a matter of feeling for the parties themselves, for I think the order was both on principle and authority right. I do not mean to controvert the proposition, that there may be a taxation of a paid bill on the ground of pressure, or to question the correctness of *Ex parte Wilkinson*, decided by my learned Brother, for I think that case was rightly decided. There there was pressure; namely, pressure of such a nature as I think gave a right to the party seeking relief; but the pressure in the present case is not of that kind. In the month of January 1850, the solicitors delivered to the petitioner a bill for 84*l.* odd, and the rest of the bill, 20*l.*, was incurred between that and June. At the end of June a bill with the subsequent amount was delivered. In the middle of August the compound bill was paid under protest. All the parties must be taken to have understood that the payment was made under protest. It seems to me that the protest was concurrent with the payment of this bill. I have already stated that I do not think that the pressure leading to the payment was such as would warrant a subsequent taxation as a matter of course; but even had it been so, I should have been reluctant to aid a party who, lying by for more than nine months, comes, then, before the Court for the first time. In the hope of avoiding expense a correspondence was entered into, but that correspondence did not begin till May 1851, nine months after the payment. By thus acting the petitioner was, I think, excluded from a right to tax the bill. The order obtained at the Rolls was right, and I say this, assuming it could not be shewn that the bill contained extravagant and improper charges, I doubt whether upon that ground alone the matter would not be defective, for the nature of those charges should have been very specifically stated, and there should be shewn to have been such an excess of charge as would, in the language of Lord Eldon, have furnished a ground of fraud; nevertheless, I think there is no excuse for their not having taxed the bill. The ground, however, on which I proceed is, that there is no excuse for the petitioner's delay after having made the payment under protest.

LORD JUSTICE KNIGHT BRUCE.—As it must be so, it is not necessary that I should enter fully into the grounds of the great doubts and difficulties that I happen to feel about this case—doubts and difficulties very probably ill-founded—inasmuch as there are such opinions as there are differing from me on the point. The 41st section of the Solicitors' Act provides that the payment of any such bill shall in no case preclude the Court to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall in its discretion appear to require the same, upon such conditions as to the Court shall seem right, provided the application for such reference be made within twelve months after payment. In the present case the application was made within twelve months after payment, though certainly not speedily. The question here is upon the special circumstances of the case. Now, the matter is such that I am clearly of opinion that it would not have been right to order taxation without making this lady deposit a sufficient sum to answer the costs of taxation. This deposit, as has been stated by her counsel, she is willing to make. If she had made that deposit originally, I am not satisfied that I should on have thought—the payment being made under pressure, though that pressure was not proceeding from the attorney himself, whose bill was paid, but he having notice of the pressure—the bill ought to be taxed. All the circumstances of the case taken together seem to me, according to my view, to justify the conclusion that it was the understanding between all parties that taxation should take place. This view, however, is, very probably, erroneous. I confess that I cannot regret that this will be the end of the litigation.

LORD JUSTICE LORD CRANWORTH.—I think the general rule (5), that the costs abide the result of the appeal, does not apply to the present case. There are conflicting authorities. The petition will be dismissed, but without costs.

(5) In re Clarke, *ante*, p. 20.

PARKER, V.C. }
March 18, 19. } NEDBY v. NEDBY.

Baron and Feme—Deed of Gift by a Wife to her Husband—Practice—Master's Report—Affidavits.

Deeds of gift by a wife to her husband of property over which she has a power of appointment are regarded by the Court with jealousy, and inquiries will be directed as to the circumstances under which they were executed.

Where a wife makes a deed of gift to her husband of property over which she has a power of appointment, and the deed is afterwards impeached by her, the burden lies on her of shewing that the circumstances were such as ought to invalidate it, and the burden does not lie on the husband of shewing that the circumstances were such that it ought to be supported.

Property was settled on A, a married woman, for her life, with remainder to such uses as she should by deed appoint. A, by deed, dated in 1821, appointed the reversion to B, her husband; and in 1836 filed a bill to have the deed set aside. The circumstances relied on by A. were, that the deed had been prepared by B.'s solicitor, that it had not been read over at the time of the execution, and the evidence of one of the attesting witnesses that she was agitated and distressed at the time of the execution, and signed it in a reluctant manner:—Held, that these circumstances were not such as to invalidate the deed.

An inquiry was directed to be made by the Master; the Master made his report, which was not excepted to. The parties were held to be at liberty, at the hearing of the cause for further directions, to refer to the affidavits and other materials used before the Master on his inquiry.

James Keegan, by his will, dated the 1st of July 1820, bequeathed his personal estate to William Nedby and Thomas Anns, on the usual trust for sale; and directed them to invest the purchase-moneys, and to pay one-half of the income to his wife for her life, for her separate use. The will then proceeded as follows:—

“And my will and meaning is that my wife shall have full power by any will, testament, or instrument in writing, to be

by her duly executed, to bequeath and dispose of one half moiety of the monies so to be invested by my said executors and trustees, in manner and for the purposes aforesaid.” The testator appointed W. Nedby and T. Anns, and his wife, his executors and executrix, and died on the 7th of July 1820.

On the 7th of October 1820, Mrs. Keegan married William Nedby. By an indenture, dated the 9th of January 1821, and made between Mrs. Nedby of the one part, and Mr. Nedby of the other part, Mrs. Nedby, in consideration of love and affection for her husband, Mr. Nedby, granted and assigned to him one half part of the personal estate of the testator bequeathed to her.

Mr. and Mrs. Nedby lived together from the time of their marriage until August 1836, when they separated. In September 1836, Mrs. Nedby filed a bill, for the administration of the testator's estate, against Mr. Nedby and the other parties interested in it. The bill stated that Mr. Nedby claimed to be entitled to her share by virtue of an indenture, executed by the plaintiff, but charged “that she never executed any such indenture, or that, if she executed the same, she did so in ignorance of its contents and purport, and without professional advice or assistance, and upon the faith of a representation made to her by the said William Nedby, under whose influence she was, that the execution of such indenture was merely intended to facilitate the proving of the will, and the duly administering the estate of the said testator, and that she was deceived and imposed on in respect thereof, and that such indenture ought to be held fraudulent and void as against her.” In respect of this, the bill prayed that the deed, if any, might be declared to be fraudulent and void.

Mr. Nedby, in his answer, set up the indenture of assignment to him, and stated that the deed had been prepared by Mr. Vincent, a solicitor, who had acted as solicitor on Mrs. Nedby's behalf, and that the deed had been executed by her at Mr. Vincent's office.

By the decree made at the hearing in November 1844, it was referred to the Master to inquire whether the instrument,

in question was ever, and when, executed by Mrs. Nedby, and under what circumstances.

The Master, by his report, found that the deed had been prepared by Mr. Vincent, who was then, and previously had been, the solicitor of Mr. Nedby, and was executed by Mrs. Nedby at the house of Mr. Nedby, in the presence of Williams and Beale, two of Mr. Vincent's clerks, and that the deed was not read over to her at the time of the execution, and that, except as aforesaid, he was unable to state the circumstances under which the deed was executed, no sufficient evidence having been laid before him.

Williams, one of the attesting witnesses, made an affidavit, in the inquiry before the Master, that Mrs. Nedby at the time of the execution of the deed "was agitated and distressed, and that she signed it in a reluctant manner, with a dash of the pen."

Mr. and Mrs. Nedby both died, and the suit was duly revived.

The report of the Master was not accepted to. The cause now came on for further directions.

Mr. Glasse and *Mr. Greene*, for the plaintiff, proposed to read the affidavit of Williams, made in the Master's office.

Mr. Wigram and *Mr. Hoare*, for the representatives of Mr. Nedby, objected to the reading of the affidavit. The report of the Master had not been excepted to, and must be taken as accepted, and it was not competent to the plaintiff to travel out of it. It would be imposing a great hardship on the parties if all the documents before the Master were to be considered as part of the materials for the hearing. At any rate, notice should be given beforehand by the parties intending to use such materials of such intention.

[PARKER, V.C. said that the plaintiff was at liberty to give any information to the Court as to the materials used before the Master, and that the plaintiff's counsel might, therefore, read the affidavit, or such parts as they pleased.]

Mr. Glasse and *Mr. Greene*, for the plaintiff.—It is clearly established that where A. stands in a certain relation to B, as his medical attendant or spiritual adviser,

and B. makes a deed of gift to A, the burden lies upon A. of shewing that the transaction was perfectly fair—*Huguenin v. Baseley* (1), *Dent v. Bennett* (2), *Gibson v. Russell* (3). This principle ought to be held to extend to all deeds of gift from a wife to her husband—*Pybus v. Smith* (4), *Milnes v. Busk* (5). The circumstances of this case which shew that the transaction was not fair are, that Mrs. Nedby had no solicitor to act for her; that the deed was not read over to her; that Mr. Nedby, in his answer, states that the place of the execution of the deed was at the office of the solicitor, whereas it was at his own house; and the evidence of Williams that Mrs. Nedby was in a state of agitation and distress when she signed it.

Mr. Wigram and *Mr. Hoare*, for the representatives of Mr. Nedby, contended that the deed was *prima facie* valid, and that nothing had been adduced in evidence to affect its validity. They read the following passages in Lord Hardwicke's judgment in *Grigby v. Cox* (6):—"For the rule of the Court is, that where anything is settled to the wife's separate use, she is considered as a feme sole, and may appoint in what manner she pleases." * * *

"And this will hold, though the act done by the wife is in some degree a transaction alone with the husband: although, in that case, a Court of equity will have more jealousy over it, and, therefore, if there is any proof that the husband had any improper influence over the wife in it, by ill, or even extraordinary good usage, to induce her to it, the Court might set it aside, but not without that. The wife might have made an immediate appointment for the benefit of her husband, which would have stood, unless some such proof as before mentioned." They also referred to *Collinson v. Patrick* (7).

Mr. Glasse replied.

Mr. Bacon, *Mr. Nichols*, and *Mr. Bevir*, for the other parties.

(1) 14 Ves. 273.

(2) 4 Myl. & Cr. 269; s. c. 8 Law J. Rep. (N.S.) Chanc. 125.

(3) 2 You. & C. C.C. 104.

(4) 1 Ves. jun. 189.

(5) 2 Ibid. 488.

(6) 1 Ves. sen. 517.

(7) 2 Keen, 123; s. c. 7 Law J. Rep. (N.S.) Chanc. 83.

PARKER, V.C.—In this case Mrs. Nedby, by a deed, dated the 9th of January 1821, made an appointment, under a power, in favour of her husband, and the Court thought it right, under the circumstances, to direct an inquiry whether the deed in question was executed by her, and under what circumstances. The Master has made his report, containing nothing very material or decisive with respect to the circumstances. This gives rise to the question, on which side is the burthen of proof? Is the appointment to be invalid unless the husband can shew that the circumstances were such that the appointment ought to be supported, or is it valid unless the wife can shew that the circumstances were such as ought to invalidate it? By the instrument which created the power the wife was placed in the position of a feme sole. With respect to the particular subject thereof, she had a good power of appointment, the protection to her being that the act of appointment was to be by a deed duly executed, so that she had the protection that might be afforded by the formalities required for the execution of the power. I think that, on all the principles governing the Court, I am bound to consider the appointment good, unless those claiming against it could produce sufficient matter to invalidate it. No doubt the Court will regard such deeds with jealousy, and think it right to inquire into them, as in the case of *Grigby v. Cox*.

Now, what were the circumstances in this case? The Master has found, in substance, that the deed was prepared by the husband's solicitor, and was executed by the wife in the presence of two of the clerks of that solicitor, and was not read over to her. All these circumstances constantly occurred in perfectly proper transactions, and it would be a dangerous thing to say that the deed could not be supported merely on those grounds. It gives rise to suspicion, but it is not enough to invalidate it. The only other circumstance upon which the Court was asked to set aside this deed was, that one of the attesting witnesses said "that she signed it with agitation and reluctance." It is impossible to act upon that as a ground for setting aside the deed.

The costs of the general administration

must come out of the entirety, except so far as they were increased by the inquiry as to the validity of this deed, which must come out of Mrs. Nedby's moiety.

PARKER, V.C. }
May 26. } MARTIN v. PYCROFT.

Specific Performance—Statute of Frauds.

Claim for specific performance by A. against B. The claim stated that B. had agreed, by writing, to demise a house to A. for a certain term, at a certain rent; and that, at the same time, A. had agreed by parol to pay B. a premium of 200l. The claim prayed that B. might grant A. a lease, A. offering to pay the premium agreed on by parol. Claim dismissed, as being in contravention of the Statute of Frauds.

In consideration of 200l. premium paid by A. a lease was granted to A. of a house at a certain rent for a certain term. This term expired. B. agreed to grant A. a lease for a certain term at a certain rent, under and subject to the same covenants, clauses, and agreements as were contained in the old lease:—Held, that this agreement did not include the term that A. should pay B. a premium of 200l.

Mrs. Pycroft demised the public house mentioned in the agreement hereafter stated to Mr. Calvert, for a term of years expiring on the 29th of September 1852.

By an indenture of lease, dated the 6th of April 1832, and made between Mr. Calvert of the one part, and Mr. Martin, the plaintiff, of the other part, in consideration of 200l. paid by Mr. Martin to Mr. Calvert, by way of premium, Mr. Calvert demised the public house to Mr. Martin for the term of twenty-one years, less two days, to commence from the 29th of September 1831 (which would, therefore, expire on the 27th of September 1851) at the rent of 70l. In this deed Mr. Martin covenanted to lay out 200l. in repairs and improvements.

Mrs. Pycroft's interest in the property became vested in James Pycroft, John W. Pycroft, and Joseph Pycroft.

An agreement dated the 1st of August 1849, and signed by Messrs. James Pycroft, J. W. Pycroft, and Joseph Pycroft,

was in the following terms:—"The said James Pycroft, J. W. Pycroft, and Joseph Pycroft severally agree with the said William Martin, at any time hereafter, at his request, costs, and charges, by a good and sufficient deed, to demise and lease the messuage or tenement known by the name of 'The Ship Alehouse,' together with the messuage or tenement adjoining thereto, formerly used as a coffee-house, both situate in Chichester Rents aforesaid, with the appurtenances thereto belonging, (as the same are now in the occupation of the said William Martin, for the term of twenty-one years, wanting two days) from the expiration of the said lease under which the said William Martin holds the same, viz., from the 27th of September 1852, at the yearly rent of 70*l.* payable quarterly, and under and subject to such and the same covenants, clauses, and agreements, as are contained in the lease under which the said William Martin now holds the said premises."

This was a claim by Mr. Martin for a specific performance of the agreement.

The claim stated the lease from Mrs. Pycroft to Calvert, the lease from Calvert to Martin, and the agreement. The claim then contained the following statement:—"That it was agreed between the parties that 200*l.* should be paid by W. Martin as a premium, in consideration for the lease." The claim asked that, on the payment of 200*l.* by Martin, by way of premium, which payment he was ready and willing and offered to make, a lease might be granted to him according to the terms of the agreement.

Mr. Daniel and *Mr. Dauncy*, for the plaintiff, admitted that the payment of a premium of 200*l.* was a part of the agreement between the plaintiff and the defendants, and that a decree for giving a lease to the plaintiff could only be made on the terms of the plaintiff paying such premium. They then contended that this term, "the payment of the premium," was included in the agreement. It was "a clause" or "an agreement" within the meaning of the words of the agreement—"the same covenants, clauses, and agreements as are contained in the lease." All the terms, then, were provided for by the written agreement. The proper construc-

tion of the agreement was, that in consideration of 200*l.* premium, paid by Martin, the plaintiffs were to grant a lease having the same operative part as that contained in the lease of the 6th of April 1832.

Mr. Malins and *Mr. W. R. Ellis* contended that the term as to the payment of the premium was not contained in the written agreement. The case of the plaintiff, then, was this—a claim to have performance of a written agreement, with a parol addition. This he was precluded from obtaining by the Statute of Frauds.

PARKER, V.C.—I do not see how I can get over the Statute of Frauds. The agreement is for a lease "under and subject to such and the same covenants, clauses, and agreements as are contained in the lease under which the plaintiff now holds." These expressions seem to prescribe the terms upon which the property is to be held after the lease is granted, and are not applicable to the consideration to be paid before the lease is granted. The premium of 200*l.* is not a "covenant," a "clause," or "an agreement," to be contained in the lease. There is, then, a written agreement for a lease without a premium. But then the plaintiff says that it was always the intention of the parties that a premium should be paid, and he offers to pay the same premium as that which he had paid to Mr. Calvert. If Mr. Martin had refused to perform the agreement, the defendants would in vain have urged the Court that Mr. Martin should take a lease and pay a premium of 300*l.* A material part of the agreement has been omitted from the written agreement, and I do not see how the Court can decide in favour of the plaintiff consistently with the Statute of Frauds.

Claim dismissed, without costs.

PARKER, V.C. }
May 8. }

HARTLAND v. DANCOK.

Practice — Foreclosure Claims — Abandoned Issue.

At the hearing of a foreclosure claim, an issue was directed as to a question of notice, which issue was afterwards abandoned by the defendant:—Held, that before the claim

could come on again for hearing, an order must be made on motion, that the issue should be taken pro confesso.

This was a foreclosure claim. At the hearing an issue was directed as to a question of notice. The defendants abandoned the issue.

This was an application on the part of the plaintiff that the claim might be restored to the paper.

Mr. Torriano, for the application.

PARKER, V.C. said that he thought the proper course was that the plaintiff should give a notice of motion that the issue should be taken *pro confesso*. On the motion coming on, an order would be made on it, the effect of which would be that the trial of the issue would be dispensed with, and the claim be put in the same situation as if the issue had been tried and found in the plaintiff's favour.

LORDS JUSTICES. } LORD JAMES STUART v.
 1852. } THE LONDON AND
 April 19, 20, 28; } NORTH-WESTERN RAIL-
 May 4. } WAY COMPANY.

Railway—Landowner—Abandonment of Line—Specific Performance.

A railway company, about to make a branch line, agreed with a landowner to take so much of certain specified lands as should be required for the branch line, at a stated price per acre, which price, as to one part, was to include consequential damages, in consideration of his withdrawing his opposition to the bill in parliament. The opposition was withdrawn, and the bill passed in July 1847. On the 1st of September following, a formal agreement was tendered to the company for their execution, but their solicitors altered it into a contract conditional on the formation of the line, and did not return it to the landowner's solicitors until the 7th of December 1848. Before this, the landowner, on the 18th of March 1848, had died, and on the 14th of October in the same year the company gave notice of their abandonment of the line. A claim for specific performance was filed by the devisees in trust of the will of the landowner, on the

18th of June 1850, but it was not brought to a hearing until the 21st of February 1852. The compulsory powers of taking land given by the act expired on the 9th of July 1850, but the time for the completion of the line would not terminate until the 9th of July 1852. The Master of the Rolls (on the authority of Webb v. the Direct London and Portsmouth Railway Company, since overruled) decreed specific performance; but on appeal,—Held, that the plaintiffs could have complete relief at law, if they were entitled to have any; that the principle of mutuality wholly failed; and that their laches either from the passing of the act, or, at any rate, from the time of notice of abandonment of the line to the time of the filing of the claim, was fatal to the suit, and that specific performance could not be decreed.

This was an appeal from a decree for specific performance, made by the present Master of the Rolls, on the 21st of February last. The facts were these:—In 1847 the London and North-Western Railway Company projected the formation of a branch line from their main line at or near Watford to St. Albans, Luton, and Dunstable, which line, if made, would pass through the property of the Marquis of Bute, in the parish of Luton. Other schemes for the same or a very similar line were projected, and the Marquis petitioned against the bill. In order to induce him to withdraw his opposition, the London and North-Western Railway Company entered into negotiations with him for the purchase of his land at stated prices, and the stipulations were, on the 1st of April, reduced to writing by a memorandum of that date, entitled "Watford and Dunstable Railway.—Heads of agreement for the purchase of the Marquis of Bute's land required by the above railway." The body of the agreement referred to a map at the end. There were four portions of land comprised in it, distinguished therein by the letters A, B, C, and D, which respectively referred to the map. As to A, the company were to give 400*l.* an acre for the land required for the railway, and an additional 100*l.* for making a particular road. As to B, which was land laid out for building purposes, and was called "The Seven Acres," the company were to give 1,250*l.* an acre,

for seven acres, extending from Love Lane to the street called "North Street;" and as to C. they were to give 400*l.* an acre for what was required; and as to D. they were to give 250*l.* an acre: besides which, they were to pay 1,000*l.* for depreciation of homesteads, &c. The agreement then contained the following clause:—"The above prices refer to the quantities of land required for the railway, and to the contents of the roads and severed portions, which are respectively to be accurately measured." The agreement was signed by Mr. Edward Driver, as agent on behalf of the company, and by Mr. S. Collindon, as agent on behalf of the Marquis of Bute. Upon the execution of this agreement, the Marquis withdrew his opposition, and the bill passed on the 9th of July 1847, empowering the London and North-Western Railway Company to construct the Watford, St. Albans, Luton and Dunstable branch line, the powers for compulsory purchase of lands to continue three years from the passing of the act, and the time for completion of the line being limited to five years from the passing of the act. After the act received the Royal assent, a formal draft agreement was drawn up by Messrs. Roy & Co., the solicitors of the Marquis, and by them transmitted, on the 1st of September 1847, to Messrs. Parker & Co. the company's solicitors, accompanied by a letter requiring Messrs. Parker & Co. to carry "the heads of agreement" into effect. This draft agreement was detained by Messrs. Parker till the 7th of December 1848, when it was returned to the devisees of the Marquis, who had died, with such alterations as to convert what Messrs. Roy & Co. intended to be a draft of an absolute and unconditional agreement into an agreement contingent and conditional upon and only to be effective in case the London and North-Western Railway Company should construct the railway through Luton, though the Marquis would be bound to sell and convey the lands upon the stipulated terms. This matter led to a long and useless correspondence. The Marquis of Bute made his will, dated the 22nd of July 1847, whereby he devised his Luton estate to Lord James Stuart, Mr. O. T. Bruce, and J. M. Macnabb, upon trusts for sale, and appointed them his executors. He died

on the 18th of March 1848. On the 14th of October 1848, the company gave notice to the devisees and executors of the will of their intention to abandon the branch line. On the 9th of July 1850 the compulsory powers of the company ceased; but the time for the construction of the line, being five years from the passing of the act, would only expire on the 9th of July 1852. The correspondence which had taken place between the solicitors of the company and the solicitors of the Marquis was continued after his death between the solicitors of the company and those of the devisees and executors under his will, down to the month of June 1850. On the 18th of that month, and three weeks before the compulsory powers under the act would cease, the devisees and executors filed their claim against the company, praying specific performance of the agreement of the 1st of April 1847, but (the case of *Webb v. the Direct London and Portsmouth Railway Company* having been decided by Vice Chancellor Turner on the 9th of July 1851, of which notice of appeal was immediately given), it was not proceeded with until the 21st of January last, and was brought to hearing on the 21st of February following, when the Master of the Rolls made a decree for specific performance. From this decree the company appealed. The Master of the Rolls, as appears by his judgment(1), considered

(1) The judgment of the Master of the Rolls was in part as follows:—"I cannot distinguish this case from that of *Webb v. the Direct London and Portsmouth Railway Company*, and I must decide accordingly. * * First, the contract is an absolute contract to be entered into immediately, and there is nothing in it shewing that it is conditional on the act passing. On the face of it it is an immediate and direct contract. There is a clause in it marked D, and in that the sum of 1,000*l.* is given for depreciation, and in *Webb v. the Direct London and Portsmouth Railway Company* the same thing appears. In that case Sir George Turner, in an elaborate judgment, after taking time to consider, decreed specific performance, though there it was urged, first, that the agreement was conditional; secondly, that one undivided sum was given as a price for the land and compensation for consequential damages, and therefore that the price of the land could not be ascertained; thirdly, that the powers of the company had ceased, and they could not compel a sale; and, fourthly, the hardship of the case. Now those grounds of objection to the specific performance are all to be found in this case. * * In the first place, I do not find such ambi-

himself as bound by the authority of *Webb v. the Direct London and Portsmouth Railway Company*. On that occasion the following cases were cited—

For the plaintiffs—

Webb v. the Direct London and Portsmouth Railway Company, 9 Hare, 129; s. c. 20 Law J. Rep. (N.S.) Chanc. 566.

Preston v. the Liverpool, Manchester, &c. Railway Company, 1 Sim. N.S. 586; s. c. ante, 61.

For the defendants—

— *v. White*, 3 Swanst. 108, n.

Heaphy v. Hill, 2 Sim. & S. 29.

Moore v. Blake, 1 Ball & B. 69.

Watson v. Reid, 1 Russ. & M. 236.

Walker v. Jefferys, 1 Hare, 348; s. c. 11 Law J. Rep. (N.S.) Chanc. 209.

Hawkes v. the Eastern Counties Railway Company, 20 Law J. Rep. (N.S.) Chanc. 243.

Clarke v. Moore, 1 Jones & Lat. 728.

guity as to make it impossible to perform the contract, assuming it to be a valid contract. I think a surveyor could ascertain the land required, and, of course, the price to be paid. The contract is for the land wanted for the present project, as contemplated at the time, and what was wanted for deviation was also talked of, and therefore I should have required something more on this point if the Vice Chancellor had not expressed an opinion in *Webb v. the Direct London and Portsmouth Railway Company*. It was there said that 4,500*l.* was for the land and for consequential damage; and, therefore, there was no distinct price stated as the price of the land. And so here the same thing appears. The other objections are that Mr. Driver had no authority. I am not satisfied, from the evidence, that he had authority to enter into this particular contract; but it is clear he had authority to enter into some contract, and the company saw the contract after it was entered into, and adopted it, and allowed the Marquis of Bute to withdraw his opposition in pursuance of it; and it is not denied that it was in consideration of the agreement that the Marquis withdrew his opposition. Now, if a party employs an agent, and he exceeds his powers, yet if the principal acts on what has been done by the agent, and allows others to act upon it, the Court will not allow the principal to draw back, but will compel him to abide by the contract. The next point is, that the company had no power to contract; but the same objection was taken in *Webb v. the Direct London and Portsmouth Railway Company*, and *Preston v. the Liverpool, Manchester and Newcastle Railway Company*. I am of opinion, therefore, that there is nothing on that ground to prevent a decree for specific performance, and I am bound by the authorities. As to

A short preliminary discussion arose on the opening of the appeal, whether the suit being by claim, and the appeal being from the whole decree, the defendants should begin, but, by consent of the defendants, the plaintiffs began (2).

Mr. Roundell Palmer and *Mr. Macnaghten*, for the plaintiffs.—The present is stronger than *Webb's case*, for here the period for the formation of the line has not expired; there the company was insolvent and unable to complete the line, here the defendants are a wealthy corporation. The Master of the Rolls has righteously decided that it is not because the company no longer want the land that the plaintiffs are not to have the benefit of that contract, on the faith of which the late Marquis of Bute withdrew his powerful opposition to their bill. His Honour has also well answered the objection as to any uncertainty as to the land required. We say the meaning of the words "land required for the railway," is land which, at the time of the contract, as shewn in the map annexed to and referred to in it, was assumed would

laches there is no difficulty. It is true that the rule is, and the cases shew, that parties must not delay, but must bring forward their claims with reasonable diligence, if they expect to succeed in obtaining redress; and I shall not be the first Judge to weaken that principle; but in all those cases the contract was given up at the time. Here, on the contrary, it was kept for a year and a half, and that is the laches, not of the plaintiffs, but of the defendants themselves. It is true no claim was filed till eighteen months after the draft-agreement was returned, but it was only then that the compulsory powers of the company ceased; and the plaintiffs did not know whether the company would or not take the land, and all this time the contract was insisted on as valid. I am of opinion, therefore, that the cases as to laches do not apply. As to the contract, or the enforcement of it being useless, it is the fault of the defendants themselves, for they might have done all they contemplated doing; and it would be a dangerous principle to say, that because one party to a contract has changed his mind, and now that he finds it of no use, refuses to carry it out, that, therefore, specific performance cannot be enforced. As to the hardship of the case, that question was discussed in *Webb v. the Direct London and Portsmouth Railway Company*; and I adopt the views there propounded. The case is one in which I am bound by authority, and specific performance must be decreed, and there must be a reference as to whether, and when first, a good title was shewn."

(2) See this point of practice decided, *Sims v. Helling*, ante, p. 387.

be required for the formation of the line. The following cases, in addition to those cited in the court below, were referred to—

Webb v. the Direct London and Portsmouth Railway Company (on appeal), ante, 337.

Peacock v. Penon, 11 Beav. 355; s. c. 18 Law J. Rep. (N.S.) Chanc. 57.

Edwards v. the Grand Junction Railway Company, 1 Myl. & Cr. 650; s. c. 6 Law J. Rep. (N.S.) Chanc. 47.

LORD JUSTICE KNIGHT BRUCE, soon after the opening of the case, inquired of the counsel for the defendants, whether, if the Court should think an action ought to be brought, the company were willing to admit at the trial that the heads of agreement, dated the 1st of April 1847, were a contract under the common seal of the company, or to that effect. The question was answered in the affirmative, and it was said that the company would make any admissions which the Court should think necessary to meet the justice of the case.

Mr. Bethell, Mr. Willcock and Mr. Speed, for the defendants.—The first and most material question for the Court to consider is, whether it will lend its aid to enforce specific performance at all in such a case; whether it will not adhere to its own determination in *Mr. Webb's* case, which practically adopted the principle lucidly laid down by Lord Redesdale in the case of *Harnett v. Yeilding* (3), both with respect to uncertainty in agreements, and also upon the question of the defendants being, or not being, legally competent to perform the act sought to be enforced. At page 553 he says, "I have bestowed a good deal of consideration upon this case, and particularly with reference to the jurisdiction exercised by courts of equity in decreeing specific performance of agreements. Whether courts of equity in their determinations on this subject have always considered what was the original foundation of decrees of this nature, I very much doubt: I believe that from something of habit decrees of this kind have been carried to an

extent which has tended to injustice. Unquestionably the original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground the Court, in a variety of cases, has refused to interfere, where from the nature of the case the damages must necessarily be commensurate to the injury sustained." Then, after an instance in point, and a statement as to the propriety of conduct of a plaintiff being necessary to induce the Court to interfere, his Lordship adds, "He must also shew that in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do; for if he does, a consequence is produced that quite passes by the object of the Court, in exercising the jurisdiction, which is to do more complete justice." There is the sound principle of the Court. Here it is quite obvious that it is against public policy, against the policy of the law, to assist, nay more, to force a corporation, as is here asked, to obtain land which they never can hold for the purposes for which alone they were by the legislature created a corporation. To say that the period for the formation of the railway has not expired, and that, therefore, the company may have the land, involves a practical absurdity, for this line of railway must be formed between the day when this Court will pronounce its judgment and the 9th of July, a thing physically impossible to be done. Then, the land to be taken was not what was marked on the map, but what was actually wanted for the formation of the line, and as none is now wanted none should be paid for. At any rate, the words, if they do not bear this interpretation, are too vague, too uncertain to be enforced. Then the 1,000*l.* is to be paid for depreciation of homesteads. How can it be said what homesteads are depreciated, so long as it is uncertain what homesteads will be interfered with? And as no line is to be made no homesteads can be interfered with.

[*Mr. Roundell Palmer*.—We do not insist on our claim to the 1,000*l.* We abandon that. We waive it in this court.]

The case, if one to be entertained, is one

for damages at law, and not for specific performance—*Bland v. Crowley* (4) and *Gervais v. Edwards* (5). The laches of the plaintiffs are not to be lost sight of, who, although they received notice of the abandonment of the line so early as the 14th of October 1848, did not file their claim until the middle of June 1850, nor bring it to a hearing until the latter part of February 1852.

Mr. Macnaghten, in reply.—There is no absurdity whatever in saying that the line can be formed, although the time limited by the act will expire on the 9th of July next, for there is ample time to obtain an act further extending the period for that purpose. On the question of laches the Master of the Rolls very justly said, that the contract was all along insisted on by the plaintiffs, as it had been by the Marquis of Bute, and that the draft of the formal instrument having been kept for a year and a half before it was returned altered by the solicitor of the company, shewed that the laches were on their side, not on ours.

LORD JUSTICE LORD CRANWORTH.—This case was decided by his Honour the Master of the Rolls, on the authority of the case of *Webb v. the Direct London and Portsmouth Railway Company*; not as that case now stands, it having been brought by appeal to this Court, but as it was after the decision of it by his Honour the Vice Chancellor Turner. As I understand from counsel, the Master of the Rolls seemed to intimate an opinion that but for that authority, probably, his decision might not have been such as, in fact, it was. If that be so, inasmuch as that case of *Webb v. the Direct London and Portsmouth Railway Company* has since been decided otherwise than it was decided by Vice Chancellor Turner, we have not, in fact, the duty of substantially overruling anything that was meant to be decided by his Honour the Master of the Rolls, and we shall be acting in conformity with what would probably have been his opinion, but for a decision which he then thought binding upon him, though, in fact, that decision has since been over-

ruled. Now, I confess I think that this is a weaker case than *Webb's case*, so far as the plaintiffs are concerned, inasmuch as it was offered that this should be put into a train of inquiry at law. It is, perhaps, not necessary, and perhaps not proper, to give any opinion about what the construction of the agreement is, but it seems to me much more doubtful whether there was any binding contract at all, which was also the case in *Webb v. the Direct London and Portsmouth Railway Company*. Upon that, however, I give no opinion. It may be that there was such a contract, or it may be there was not such a contract. The ground on which we proceeded in *Webb v. the Direct London and Portsmouth Railway Company* was this: that whether it was a contract or not, the circumstances of the case made it such that it was not fit for this Court to interfere by way of specific performance, because these two circumstances conspired: first, that complete relief might be obtained at law, if the parties were entitled to any relief; and secondly, the principle of mutuality wholly failed, for it was impossible for the company to hold the land for their benefit in consideration of the money which they were to pay. Now, it appears to me that that principle applies precisely in the same way in this case as it did in that. Supposing that this was a contract by Mr. Driver, amounting to a positive contract that, if the railway act passed, these specific pieces of land (assuming them to be defined) should be taken, and a given sum paid for them; supposing that was so, then the only difficulty which the present plaintiffs are in is this: that it was a contract, not (as it was in *Webb v. the Direct London and Portsmouth Railway Company*), binding on the defendants, because it was entered into by Mr. Driver, as agent, who had no authority to bind them. The interference, therefore, of this Court on the principle of the case of *Edwards v. the Grand Junction Railway Company*, and one or two others, which were decided on the same principle, is not to be entertained. Now, that may give a title to relief in this Court, but the only relief it could give would be to put the parties in the same situation as they were in the case of *Webb v. the Direct London and Portsmouth Railway Company*, where, in point of fact, the company, after

(4) 6 Exch. Rep. 522; s. c. 20 Law J. Rep. (N.S.) Exch. 218.

(5) 2 Dr. & War. 82.

the act of parliament had been obtained, entered into a contract binding themselves to adopt the contract entered into by the parties before the company came into existence. That is the course which appears to me, and, I think, to my learned Brother, proper to be taken, and will be the course that will do substantial justice in this case. It was agreed in the outset that the defendants would enter into any admissions or stipulations that might be necessary to enable the plaintiffs to raise the question at law, such as that the company will admit that an agreement dated the 10th of July 1847, was duly entered into by them under the common seal. The terms, however, of such admissions can be arranged, and the case be mentioned again.

LORD JUSTICE KNIGHT BRUCE.—Perhaps the time that the plaintiffs suffered to elapse after the passing of the act of 1847, or (if no time before October 1848, when notice of abandonment was given, ought to count, then) after October 1848 before they filed, in June 1850, the present claim, is fatal to it; but assuming that not to be so, I am unable to view the case as one for specific performance. In the first place, if the parties were reversed, could the defendants, as plaintiffs, have obtained a decree for specific performance? Against this, probably, the mere circumstance of the abandonment of the undertaking, for the purpose of executing which the land in question, or so much of it as in truth was proposed or agreed to be purchased, was purchased or agreed to be purchased, would have formed an insurmountable objection. If so, it may be thought to dispose of the actual contention; but, independently of any such consideration, I doubt whether to enforce specifically the terms, or any part of the terms, of the document before us, that of the 1st of April 1847, would not, in the actual condition of circumstances, be against public policy, or, in other words, contrary to law. But setting aside this point also, I am of opinion that the language of the document in parts of it necessary to be construed and acted upon, if there is to be a decree of any kind for specific performance against the defendants, is too vague, too uncertain, too obscure, to enable this Court to act with

safety or propriety for any such purpose. For this vagueness, uncertainty, and obscurity, very possibly the intention of the agents concerned that a more formal document, not merely by way of conveyance, but by way of contract, should be prepared and executed, may account. But, however this may be, the plaintiffs must, I conceive, be left to proceed at law as they may be advised; they will have the benefit of the concessions for facilitating their proceedings there which the defendants have made by their counsel.

May 4.—The admissions finally arranged were as follows:—"The defendants, by their counsel, consenting and undertaking that, in the event of an action being, before the end of Trinity term next, brought against them by or for the benefit, or under the direction of the plaintiffs, for the purpose of obtaining damages for the breach of the alleged agreement of the 1st of April 1847, and such action being prosecuted with due diligence, the defendants will in such action, and for the purposes thereof, admit that, on the 10th of July 1847, a deed was duly executed by the defendants, under their common seal, whereby they covenanted for themselves and their successors, with the late Marquis of Bute, his executors and administrators, that they would perform all agreements, if any, entered into previously to the 9th of July 1847 by Edward Driver, acting, or purporting to act, as their agent for the purchase of any lands from the said Marquis, to be taken by them for the intended railway, and for compensation to be made for any damage to be occasioned by the said railway, in the same way as if such agreements or agreement, if any, had been duly entered into by them under their common seal on the day of the date thereof, and as if they had then been duly authorized by law to enter into such agreement or agreements, the defendants also consenting to dispense with profert in such action; and any of the parties are to be at liberty to apply to this Court as there shall be occasion."

M.R. }
Feb. 16. } PEARD v. KEKEWICH.

Will—Power—Execution—Remoteness—Accumulations.

G. P., a tenant for life of real estate, with remainder for all and every, or any one or more, to the exclusion of the other or others of his children as he should by deed or will appoint, made an appointment to trustees upon trust for his son G. S. P., his heirs, executors, administrators and assigns, and to be conveyed to him when and as he should attain the age of twenty-three years; and in case his son G. S. P. should die before he should have attained the age of twenty-one years, to the use of the second, third, and fourth, and every other son of the testator successively in tail, with remainder to his daughters in tail, with remainder to his brother in fee. And after directing the payment of two annual sums of money during the minority of his son, he directed his trustees to invest the clear residue of the rents and profits to accumulate until G. S. P., or such other sons as aforesaid, should attain the age of twenty-three, and on his or their first attaining that age, then upon trust to pay over all such securities and accumulations unto G. S. P., or to such other sons, his executors, administrators and assigns, for his and their absolute use and benefit:—Held, that the power of appointment was duly exercised; that G. S. P. took an estate in fee upon the death of the testator liable to be divested in case of his death under twenty-one, and that the trust for accumulation was valid until G. S. P. attained the age of twenty-three.

This was a special case under the 13 & 14 Vict. c. 35.

Shuldham Peard, by his will, dated the 15th of June 1820, gave and devised all his lands, tenements, and hereditaments wheresoever, unto and to the use of the defendants William Henry Whitehead and Deeble Boger, their heirs and assigns, upon trust as to one-half of whatever might be his estate and interest in the tithes of the parish of Budock and Falmouth, in the county of Cornwall, and as to certain other hereditaments therein particularly specified and described, upon certain trusts therein, in favour of his son John Whitehead Peard

and his children : and as to all the rest and remainder of the lands, tenements, and hereditaments devised to his said trustees, upon trust for his the said testator's son George Peard and his assigns during his natural life, with remainder for all and every, or any one or more, to the exclusion of the others or other of them, of the children of George Peard, for such estate or estates, and in such manner and form as George Peard should at any time or times by any writing or writings, to be by him signed and sealed in the presence of, and attested by two or more credible witnesses, or by his last will and testament in writing to be signed and published as the law required for the devise of real estates, direct, limit and appoint; and in default of such direction, limitation, or appointment, or subject thereto, upon trust for all and every the children of the said George Peard in tail, such children to be entitled equally as tenants in common in tail, with cross remainders in tail between such children respectively as tenants in tail for the time being, to be always entitled if more than one as equal tenants in common, with remainder if there should be but one child for that one child in tail, with remainder for the said J. W. Peard, his heirs and assigns for ever; and the testator declared that such of the estates for life thereinbefore limited should be considered as without impeachment for waste; and the said testator declared that the estate and interest of all married women entitled under the limitations in his will should, whether the same were real or personal estate, be for their separate use and benefit independent of their husbands.

By a codicil, dated the 4th of June 1831, the testator, after stating that he had, since the date of his will, contracted to purchase of the representatives of Mr. Richards his moiety or interest in the tithes of Budock, gave and devised such moiety or interest to the above-named defendants, W. H. Whitehead and D. Boger, their heirs and assigns, to hold the same upon the trusts declared concerning the other moiety of the same tithes which he was then seised of or entitled to.

On the 27th of December 1832, Shuldham Peard died, leaving his two sons G.

Peard and J. W. Peard surviving; he was seised of real estates which were not in any way affected or disposed of by his will and codicil, otherwise than as his residuary real estate, of which trusts were declared by his will and codicil in favour of George Peard and his children.

By an indenture, dated the 5th of July 1833, between J. W. Peard of the one part, and G. Peard of the other part, J. W. Peard granted and released to G. Peard and his heirs the quarter of all that undivided moiety, which by the will and codicil of Shuldham Peard was devised to or in trust for J. W. Peard during his life, with limitations over in favour of his children, of and in the tithes in the parish of Budock, to hold the same unto the said G. Peard, his heirs and assigns, for and during the natural life of John Whitehead Peard, to the use of the said G. Peard, his heirs and assigns, during the natural life of the said J. W. Peard.

Before the date of the will of S. Peard, G. Peard had intermarried with Frances Cook Peard, and by her had two sons and three daughters, that is to say, G. Peard, born the 25th of July 1825, who died on the 2nd of August in the same year; the plaintiff G. S. Peard, born the 29th of June 1829, in the lifetime of S. Peard; the defendant Charlotte Kekewich, who attained twenty-one, and was the wife of the defendant Trehawke Kekewich; Francis Peard, who was born on the 30th of June 1832, and died the 3rd of June 1834; and the defendant Frances Peard, who was still an infant of the age of sixteen years.

G. Peard, by his will, dated the 30th of November 1836, appointed his wife F. C. Peard his sole executrix, and also appointed her during her life, and after her decease his trustees thereafter named, and the survivors and survivor of them, guardians of the persons and property of his children during their respective minorities; and after making various provisions respecting his personal estate, the testator thereby gave, devised, and bequeathed and appointed all that one-eighth part of the great tithes of Budock, in the county of Cornwall, or the sum of money equivalent to such eighth part, as the same might have been conveyed or secured to him under and by virtue of a deed under the hand and seal

of his brother J. W. Peard, and also all and singular other the lands, tenements, tithes, and hereditaments, and parts and shares thereof to which he was in any way seised or entitled, or over which he had a power of appointment or disposal under or by virtue of the last will and testament of his father S. Peard, deceased, or otherwise howsoever, unto Hugh Middleton Ellicombe, William Henry Whitehead, and George Bradford Ellicombe, their heirs, executors and administrators, according to the nature and quality thereof respectively, in trust for his son G. S. Peard, his heirs, executors, administrators and assigns, and to be respectively conveyed, assigned and assured to him when and as he should attain the age of twenty-three years; and in case his said son G. S. Peard should die before he should have attained the age of twenty-one years, to the use of the second, third, fourth, and all and every other son and sons of the said testator's body lawfully begotten, whether born in his, the said testator's, lifetime or after his decease, severally and successively and in remainder one after another as they and every of them should be in seniority of age and priority of birth; and of the several and respective heirs of the body and bodies of all and every such son and sons issuing, the elder of such sons and the heirs of his body issuing being always preferred, and to take before the younger of the same son and sons, and the heirs of his and their body and bodies issuing, and to be respectively conveyed, assigned, and assured to such respective sons when and as they should first attain the age of twenty-three years; and for default of such issue to the use of his, the testator's, daughters Charlotte Kekewich and Frances Peard, and of all and every other the daughter and daughters of his body lawfully issuing and to be begotten, equally to be divided between and amongst them, share and share alike, and they to take as tenants in common, and to the use of the several heirs of the body and bodies of all his several daughters respectively issuing; and in case of the death and failure of issue of the body and bodies of any one or more of his said daughters, then as to the part and share of her or them so dying without issue, to the use of the survivors or others of his said daughters, equally to be divided

between and amongst them, share and share alike as tenants in common, and to the use of the several and respective heirs of the body and bodies of such surviving or other daughters lawfully issuing; and if there should be a failure of issue of all such daughters but one, then to the use of such only remaining daughter and the heirs of her body lawfully issuing; and for default of such issue to the use of his brother J. W. Peard, his heirs and assigns for ever. And the testator did thereby direct the trustees or trustee for the time being of that his will, by and out of the rents and profits of the lands, tithes, and hereditaments therein-before appointed, to pay unto his wife and her assigns until his eldest son should attain the age of seventeen years a clear yearly sum of 50*l.* for or towards the maintenance and education of his son G. S. Peard, by two even half-yearly payments, the first payment thereof to be made at the end of six calendar months next after his decease; and the testator did thereby declare that on his son G. S. Peard attaining the age of seventeen years, or in case of his dying before that age, then his second, third, fourth, or any other son of his body lawfully issuing and attaining the age of seventeen years, it should be lawful for the trustees or trustee for the time being of that his will to allow and apply the sum of 250*l.* per annum out of the rents and profits of the lands, tithes and hereditaments, for the maintenance and education of his son G. S. Peard, or such other son as aforesaid, at one of the Universities of Oxford or Cambridge, or otherwise for his or their benefit, support, or advancement in the world, in such manner in all respects as his wife if living, whether sole or covert, should direct, or if dead, as his trustees or trustee for the time being should think proper, it being his will and intention that no future husband of his wife should have any power or controul over George S. Peard or any other of her children or their property; and subject as aforesaid, the testator directed his trustees or trustee from time to time to invest all the clear residue of the rents and profits which should remain after satisfying and discharging the yearly sums of 50*l.* and 250*l.*, and all necessary outgoings in respect of the real estates theretofore appointed, in govern-

ment or public securities to accumulate, and also to accumulate the accumulations in like manner, until his son G. S. Peard, or such other sons as aforesaid should first attain the age of twenty-three years, and on his or their first attaining that age, then upon trust to pay, assign and make over all such securities and accumulations unto G. S. Peard, or to such other sons as aforesaid who should live first to attain that age, his executors, administrators and assigns, for his and their own absolute use and benefit.

George Peard died on the 16th of February 1837; his will was proved by his widow and executrix, but he never exercised his power of appointment over the residuary real estate of the said Shuldham Peard, otherwise than by his will.

The construction of the will not being clear, questions were raised, first, whether the power of appointment given by the will of S. Peard to George Peard was duly exercised by the will of George Peard.

Secondly, what estate or interest G. S. Peard took under such appointment, if any, and in particular whether the same estate or interest was or not vested on the said G. S. Peard attaining the age of twenty-one years.

Thirdly, whether under such appointment, if any, the trust in the will of G. Peard contained for accumulating the surplus rents of the residuary real estate of S. Peard until G. S. Peard or such other sons of the said G. Peard should attain the age of twenty-three years, was valid or invalid, and if invalid, to what extent, and who were entitled to such surplus rent and the accumulations, and in what proportions.

Fourthly, whether the trusts of the will of G. Peard contained for accumulating the profits of the tithes granted to G. Peard, by the indenture of the 5th of July 1833, until G. S. Peard or such other sons of George Peard should attain the age of twenty-three was valid or invalid; if invalid, to what extent was the same invalid, and who were, or was, entitled to the profits of the tithes, and the accumulations thereof, and in what proportions.

Mr. Walpole and Mr. Amphlett, for the plaintiff G. S. Peard.—The limitations in

the will executing the power must be read as if inserted in the will creating the power — *Duke of Marlborough v. Lord Godolphin* (1), 1 *Sugd. on Powers*, 498, 6th ed., 1 *Jar. on Wills*, 248. In this case the power was given that the appointee might appoint among children, but he gave it to his first son attaining twenty-one, and with a direction that it should be conveyed to such son at twenty-three; the interest, however, was vested at twenty-one, not only in the real estate, but also in the accumulation of the rents.

Mr. Lloyd and Mr. J. H. Palmer.—The true construction of this will is, that such one of the sons of the appointor as should attain twenty-three should be entitled to the accumulations. In all cases of powers of appointment by will, it relates to the circumstances as they existed at the death of the testator, and not as they existed at the date of the will. The plaintiff G. S. Peard was one of a class. The testator directed that the first son attaining twenty-three should take. The plaintiff has not made out his title to the accumulations, as there was no gift to him except that contained in the direction to convey at twenty-three. The gift to his daughter, in default of such issue, referred to all the antecedent limitations, meaning that they should all attain twenty-three, until which time it was intended there should be no enjoyment of the gift. The words of conveyance were connected with the words of gift. In this case the construction must be made with reference to the will creating the power. It is, therefore, asked that so much of the gifts as exceeded the period allowed by law, might be declared void, and go under the provisions contained in the will of Shuldham Peard.

Browne v. Sloughion, 14 Sim. 369; s. c. 15 Law J. Rep. (n.s.) Chanc. 391.

Ferrand v. Wilson, 4 Hare, 344; s. c. 15 Law J. Rep. (n.s.) Chanc. 41.

Ring v. Hardwick, 2 Beav. 352.

Lord Southampton v. the Marquis of Hertford, 2 Ves. & Bea. 54.

Marshall v. Holloway, 2 Swanst. 432.

Doe d. Wight v. Cundall, 9 East, 400.

Porter v. Fox, 6 Sim. 485.

(1) 1 Eden, 404; s. c. 2 Ves. sen. 61.

Leake v. Robinson, 2 Mer. 363.

Williams v. Teale, 6 Hare, 239.

Lord Dungannon v. Smith, 12 Cl. & F. 546.

Doe d. Harris v. Taylor, 10 Q.B. Rep. 718.

1 *Sugd. on Powers*, 498, 6th ed.

Saunders v. Vautier, Cr. & P. 240; s. c. 4 Beav. 115; 10 Law J. Rep.

(n.s.) Chanc. 354.

Lewis on Perpetuity, 528, c. 18, n. p. 27.

1 *Jar. on Devises*, 259.

Mr. Nalder, for the trustees of the will of George Peard and also for Frances Peard, an infant.—The testator was entitled to a portion of the tithes *pur autre vie*, limited to himself, his heirs and assigns. If, therefore, the bequest was bad, it would seem that the legal representative of George Peard was entitled.

Doe d. Jeff v. Robinson, 8 B. & C. 296; s. c. 2 M. & R. 249; 6 Law J. Rep.

K.B. 273.

1 *Williams on Executors*, 571.

THE MASTER OF THE ROLLS.—Upon the first question, I think the will was a good execution of the power of appointment. With respect to the second question, the gift was made to trustees upon trust for George S. Peard, his executors, administrators and assigns. It has been contended that I must stop there, and that is my opinion. On the other hand, it is contended that I must construe it with reference to the succeeding sentence; but stopping at the first part, the sentence is complete, and no doubt exists that, if you give an estate to trustees upon trust for another person, his heirs and assigns, he will take an estate in fee simple upon the death of the original testator, and no further words are required to make the gift complete, as the words are complete in themselves. It is, however, said that the gift cannot be separated from the words which follow, and that they are mixed up with it: but that seems contrary to the grammatical sense of the sentence, as well as the authorities in which words analogous to these have been contained. There might possibly have been some question if it had gone on to say—"in trust for his son, his heirs and assigns, to be conveyed and

assigned at the age of twenty-three years," but the word "and" makes a distinction and a separation between the two sentences. But giving it to the trustees in trust for the son, his heirs and assigns, and to be respectively conveyed, assigned and assured to him when and as he attains the age of twenty-three years, does make a distinction between the gift to him and the period when he is to have the enjoyment of the gift itself; and that is made consistent and clear with the subsequent gift by which the rents are directed to accumulate till the age of twenty-three years, and is made still more distinct by what follows, because it directs that in case the son should die before he attained twenty-one years of age, then it was to go over to the second, third, fourth and every other son. If, then, the construction contended for by the defendant in this case is admitted by the Court, what is to take place if G. S. Peard should die after having attained twenty-one and before attaining twenty-three? According to the argument, he would not have obtained a vested interest in himself, nor would the gift over take effect, and consequently it would be a case in which the testator, though he had evidently endeavoured to provide for every event, had manifestly failed to provide for this. But the whole is distinct and intelligible, if the gift is made to the son in fee simple, that it is to be conveyed to him, and that he is to have the benefit of it at the age of twenty-three with the accumulations in the mean time, but that there is to be a gift over if he should not attain the age of twenty-one.

In gifts of legacies similar cases constantly occur. The case of *Porter v. Fox* is no authority for a contrary decision. There an interest was given to trustees in trust to accumulate the rents for the benefit of certain persons. As soon, therefore, as a direction is made to accumulate the rents for certain persons, it shews that they are not to have a vested interest on the death of the testator, because if it were so there could be no accumulation, and then the testator himself must fix the period of accumulation; and in that case he fixed it at the age of twenty-five, the consequence of which was, that there was no gift to them until they attained the age of twenty-

five, the period to which the rents were to be accumulated. In *Leake v. Robinson* the estates were given to trustees in trust to receive the rents and profits of the estates, and to apply such portion of the rents and profits as might be thought proper for the maintenance and support of certain persons. That is no gift to those persons; it is a mere trust to apply the rents for their benefit. When, therefore, is that trust to cease? When they attain the age of twenty-one the trustees are then to pay over to them certain shares, and Sir William Grant held, no doubt in accordance with all former and subsequent decisions, that there was no gift to them until they attained the age of twenty-one, and that the gift was only contained in the words of payment. Here, there appears to be a distinct gift independent of any words of payment; here there is no direction that the estates shall not be vested in G. S. Peard; but there is a direction that they shall be conveyed to him when he attains the age of twenty-three. I am, therefore, of opinion that G. S. Peard took an estate in fee simple upon the death of the testator, liable to be divested in case of his death under the age of twenty-one years (which event has not occurred), and with a direction that the estates should be conveyed and assured to him upon his attaining the age of twenty-three.

Upon the trust for accumulation, I am of opinion that it is governed by the principle and authority distinctly laid down in *Williams v. Teale*. There a gentleman gave a power of appointment over a fund, and directed the donee to divide it amongst a certain class. In such a case, the donee cannot give the fund to any person to whom the original creator of the power could not himself have given it. Here the testator gave a power to the donee of the power to divide the estate between one or more child or children, exclusive of the others, in such shares and proportions as he should think fit, by will. At the time when that power came into effect there was one son of his son alive. Why could not the original testator have given a limited estate to that son if he had thought fit, or directed that there should be an accumulation during the period, until that son attained the age of twenty-three, he

being at that time of the age of twenty-three years and upwards? Thinking that he had the power of so doing, I am of opinion that the testator had the power of making that accumulation in favour of the elder son.

As no point arises with respect to the other sons, I express no opinion, though it is evident that I think it would not come within the same rule as the other; but that, to the extent of the accumulations, until the son then *in esse* attained the age of twenty-three, the trust for accumulation was a good, valid and subsisting trust. Such being my opinion, it will not be necessary to notice the fourth point, as it could only arise in case the trust for accumulation was considered invalid. My opinion, therefore, is, first, that the appointment was duly exercised; secondly, that G. S. Peard took an estate in fee simple upon the death of the testator, liable to be divested in case of his death under twenty-one; and thirdly, that the trust for accumulation was valid until G. S. Peard attained the age of twenty-three years.

PARKER, V.C. { *In the matter of THE BRIGHTON, LEWES AND TUNBRIDGE WELLS RAILWAY COMPANY, ex parte CONWAY.*
1851.
Dec. 19, 22.

Company — Provisional Committee-man — Allotment of Shares — Upfill's Case.

The provisional committee of a projected railway company passed a resolution that fifty shares should be offered to each provisional committee-man. A, a provisional committee-man, applied for fifty shares. A. stated in an affidavit that no reply was given to his application, and that he never received any communication respecting it, and that he never attended any meetings, and did not pay anything by way of deposit or call. No evidence of any allotment of shares was given in opposition to A.'s statement:—Held, that A.'s case differed from Upfill's case, and that he was properly excluded from the list of contributories.

The Master having struck out the name

of Mr. Conway from the list of contributories of this company, this was a motion on the part of the official manager that this decision should be reversed, and that Mr. Conway's name should be placed on the list.

The facts of the case sufficiently appear from the judgment.

Mr. Terrell, for the motion, relied on *Hutton v. Upfill*(1).

Mr. W. W. Cooper, for Mr. Conway, referred to—

Carmichael's case, 17 Sim. 163; s. c.

20 Law J. Rep. (N.S.) Chanc. 12.

Onions' case, 1 Sim. N.S. 394.

Carrick's case, 1 Sim. N.S. 505; s. c.

20 Law J. Rep. (N.S.) Chanc. 670;

and

Barber's case, 20 Law J. Rep. (N.S.)

Chanc. 146.

PARKER, V.C.—On the 22nd of July last, Sir William Horne, the Master to whom the winding up of the affairs of this company had been referred, made an order directing the name of Mr. Seymour Conway to be struck out of the list of contributories, and the official manager now moves that that order may be discharged. Previously to the month of October 1845, Mr. Conway had applied for shares in the company, and to be placed on the list of the provisional committee. On the 10th of that month the provisional committee or the managing committee passed a resolution in these words—"That the number of shares offered to the provisional committee be fifty, and that a letter be sent to each gentleman, requesting an answer on or before the 15th of October 1845, stating what number, if any, he is inclined to take." It appeared that this notice, with a letter from the secretary, was sent in pursuance of this resolution. There was no evidence of what the letter was, but it must have been a letter communicating the notice, for Mr. Conway, in his affidavit, states that "the qualification for a provisional director was the holding of fifty shares in the said company." On the 14th of October 1845 Mr. Conway wrote to the

(1) 2 H.L. Cas. 674.

secretary of the company thus—"In answer to yours of yesterday, I beg to say that I have made application for fifty shares, and, as a member of the provisional committee, I shall be obliged if you will allot them to me."

It was said that this case is governed by *Upfill's case* in the House of Lords, which, no doubt, is binding on this Court, but, looking at the circumstances of the present case, as far as I have stated them, I find a plain distinction between the two cases. In *Upfill's case* there was an allotment of shares. Upfill was a provisional committee-man, and had accepted the shares allotted to him. In the present case there was no allotment. A resolution was passed that a certain number of shares (fifty) should be offered to each member of the provisional committee, and that a letter should be sent to each member requesting an answer, stating the number which he was inclined to take. The allotment was not to take place, if at all, until after the answer had been received. Mr. Conway's letter contained the request that the fifty shares might be allotted to him, that is, when the allotment of shares should take place. In *Upfill's case*, however, there was an actual allotment of shares. Here there was merely an offer of an allotment of shares to be, but not yet, allotted; and to bring the present case within *Upfill's*, I consider it incumbent on the official manager to shew that the offer to Mr. Conway was followed by a due allotment of shares to him. My view of *Upfill's case* is in accordance with the judgment in *Barber's case*, which was referred to in the course of the argument.

But how does the alleged allotment stand upon the evidence? The list of contributories appears to have been made out by the Master on the affidavit of Mr. Nalder, the secretary to the company. The affidavit is an extremely loose statement: it contains no reference to the books or to any records kept by anybody on behalf of the company as to what had actually been done. It contains no particular statement as to the letter sent to Mr. Conway, and it does not state in what way the letters represented to have been posted, were addressed.

The Master had put the names of all the provisional committee-men to whom such letters were addressed on the list. Mr. Conway, thereupon, moved that his name might be taken off the list upon this affidavit—"I say that the said secretary did not, nor did any other person, reply to the said letter; and I positively say that I did not receive any letter or communication on the subject, either assenting to my application or declining the same, or allotting any shares to me in the said company; and I, therefore, concluded that my said application was not granted, and that no shares were allotted to me, and that my name was not placed on the provisional committee, and I did not further interfere therein. And I further say that I did not pay any deposit or call or make any other payment in respect of any shares in the said company."

This affidavit of Mr. Conway in distinct terms denied that any allotment, with his knowledge, was ever made to him or communicated to him, and this put the official manager on proof of the allotment having been actually made. The proof tendered by him was the *vidæ voce* examination of the secretary of the company, who says, "I received a letter of application from Mr. Conway, and, in reply, sent him the usual letter of allotment, and a letter was received from him stating his readiness to accept those shares." There must be some mistake here. There must have been a letter written to Mr. Conway in answer to his letter of the 14th of October, and it could not have been the usual letter of allotment. This appeared from Mr. Conway's answer. In a subsequent part of his *vidæ voce* examination the secretary said that Mr. Conway's name was not struck out. I believe the only record of the proceedings is a prospectus a great deal used, and out of which a great many names have been struck. Mr. Conway's name has been struck out of this prospectus, but before the ink was dry, somebody's finger has been drawn across it to prevent his name being struck out. This is the only record of this important transaction which so much affects the interests of the provisional committee-men. The secretary said, "I believe the

names struck out were struck out by the order of the directors, but Mr. Conway's name was not struck out." Perhaps it was not struck out, for, before the ink was dry, there appears to have been some alteration or change of intention in this respect. In answer to the question whether he sent any letters of the kind sent to Mr. Conway the secretary said "I have no doubt that I did, for I sent letters to every one whose names are on this list." And, again, he was asked, "Is that a copy of the letter written by you to Mr. Conway?" he said "It is a true copy so far as the printed portion, but the blanks are filled up according to the number of shares applied for, and in Mr. Conway's case the blank was filled up for fifty shares." Now, that which was produced as a copy was a blank form of a printed letter of allotment, having the date of December 1845, but the word "December" was struck out, and the 17th of November substituted in handwriting, and the blanks were filled up, not with reference to Mr. Conway, but to some person who was to take not fifty, but sixty shares. It was, therefore, a copy of nothing that was sent to Mr. Conway. There was no duplicate kept of any letter sent to Mr. Conway; there was nothing in any book or record, or in the *voir dire* examination of the secretary, to shew what was the address of the letter posted to Mr. Conway.

Nothing could be more loose than this state of things, and the Master, on this evidence, and on these grounds, appears to have come to the conclusion, and I think rightly, that the official manager had failed to prove that any allotment had been made to Mr. Conway, or that any communication had been made to him subsequently to October 1845. What is Mr. Conway's position? He was a member of the provisional committee who applied for shares, and said he would accept them if they were allotted to him, but no shares were ever allotted to him. It is not alleged that Mr. Conway took part in any proceedings of the provisional committee, or that he attended any of the meetings; and, as the case stands clear of *Upfill's case*, I am of opinion that, as the law now exists, Mr. Conway is not liable as a contributory, and

that his name has been properly struck off the list. The motion must be refused, with costs, to be paid by the official manager; he obtaining them from the estate.

PARKER, V.C. }
April 28. } REECE v. TAYLOR.

Judgment—1 & 2 Vict. c. 110. s. 14.—
Judge's Order—*Charge of Stock*.

A. was entitled to a sum of stock carried over to his account in a suit. B, a judgment creditor of A, obtained a Judge's order under the 1 & 2 Vict. c. 110, charging the stock, and then filed a claim against A. and served him with it. The claim was brought on, and A. did not appear:—Held, that B. could not obtain the stock without a petition to be presented in the suit, but that it was not necessary to serve A. with the petition.

An annuity was bequeathed to the defendant, Mr. Taylor, by the will of a testator, whose estate was administered under the direction of the Court, and a sum of stock was carried over in the administration suit to the annuity account of Mr. Taylor.

The plaintiff, Mr. Reece, a judgment creditor of Mr. Taylor, obtained a Judge's order under the 14th section of the 1 & 2 Vict. c. 110, charging the stock.

This was a claim filed by Mr. Reece against Mr. Taylor, for the purpose of making the stock available to his debt.

The defendant Taylor had been out of the jurisdiction from the time of filing the claim, but he had been duly served with process.

The claim now came on to be heard.

Mr. Pole, for the plaintiff.

PARKER, V.C. made the order.

Mr. Pole then stated that it would be necessary that a petition should be presented in the administration suit, in order to make the annuity fund available, and raised the question whether it would be necessary to serve Mr. Taylor with it.

PARKER, V.C. said that he thought that such a petition must be presented, but that

it would be a mere form, and that it would not be necessary to serve Mr. Taylor with it. The best course would be that the claim should stand over, that a petition should be presented in the administration suit, and that the cause and petition should come on together, and that one order be made on both.

PARKER, V.C. }
March 8, 12. } CARWARDINE v. WISHLADE.

Practice—Appointment of a Guardian ad Litem to infant Defendants.

Comparative expenses of the appointment of a guardian ad litem for infant defendants on motion in court, by commission, and on their appearance in court.

This was an application for the appointment of a guardian *ad litem* to infant defendants without a commission, and without their appearance in court. Two of the infants were resident in Herefordshire and the other in Shropshire.

Mr. T. C. Wright, for the motion.

PARKER, V.C. said—That before he made any order on this application, he desired to make some inquiries of the officers of the court.

PARKER, V.C.—This application was made on the ground that the appointment of a guardian without the appearance of the infants in court, and without a commission, would save expense. I have made strict inquiries of the officers of the court, and especially of the taxing Masters, on the point, and I find that the costs of appointing a guardian, on the motion of counsel, are actually greater than the costs of appointing a guardian on the appearance of the infants in court, or by means of a commission. It is very desirable that this should be generally known, as similar applications to the present have become frequent. The costs of appointing a guardian when the infants appear in court are 2*l.* 5*s.* 8*d.*, and by commission, if executed in one place, 3*l.* 3*s.* 2*d.* It should be

observed, too, that there might be but one commission for appointing a guardian and taking the answer of the infant. In the present case, if the appointment of a guardian were made by commission, it would be necessary to execute that commission at two places, and the expense would be 4*l.* 9*s.* 10*d.* But the costs of an appointment of a guardian on motion are 5*l.* 12*s.* 4*d.* It is, therefore, evidently desirable to adhere to the ancient practice of the court, and to appoint a guardian for these infants in the usual way.

PARKER, V.C. }
Feb. 10. } *In re* KIRBY'S TRUST.

Practice—Vivâ voce Examination before the Master.

A party to a matter may be examined vivâ voce by the Master on an inquiry directed to him.

By an order, made on the petition of Mrs. Kirby and her children, it was referred to the Master to make inquiries as to certain funds mentioned in the petition.

It was proposed to examine Mrs. Kirby in the Master's office *vivâ voce*. The Master doubted his power to take the examination.

Mr. Rasch stated the difficulty to the Court, and cited *Phelps v. Prothero* (1), *Wood v. Homfray* (2), and referred to the 14 & 15 *Vict. c. 99*.

PARKER, V.C. said—The Master, under the General Orders of the Court, may examine any witness *vivâ voce*, and by the recent act amending the law of evidence, a party may be examined as a witness. There is, then, no difficulty in the way of the examination being taken.

(1) 2 De Gex & Sm. 274; s. c. 17 Law J. Rep. (N.S.) Chanc. 404.

(2) 14 Beav. 7.

L.C.
1851. }
Aug. 1, 2. } MACKENZIE v. MACKENZIE.
Nov. 7. }

Settlement—Construction—Limitation to Executor or Administrator of Settlor.

By a post-nuptial settlement, R. M. settled certain policies of insurance on his own life, in trust for his wife for life, and after her death, upon trust for the appointees of R. M., and in default of appointment for the children of the marriage. In 1821 R. M., by deed, appointed the monies to become payable on the policies to his executors and administrators. Under an order in a suit instituted for the purpose of carrying the settlement into effect, the policies were sold, and the proceeds invested, to accumulate during the joint lives of the husband and wife. In 1847 the wife died. In 1828 R. M. took the benefit of the Insolvent Debtors Act, and in 1845 became bankrupt:—Held, that by the appointment, the money representing the policies became part of the general personal estate of R. M.

In 1809, Roderick Mackenzie, being possessed of certain policies of insurance upon his life, became bankrupt, and obtained his certificate, and his assignees renounced the policies. In 1816 R. Mackenzie, by deed, settled the money payable under the policies, upon trust, for his wife, Barbara Mackenzie, for life; and after her decease, upon trust for his appointees, and in default of appointment, in trust for the children of the marriage; and he thereby covenanted to keep the policies on foot.

In 1821 R. Mackenzie, by deed, appointed that the monies payable under the policies should, after the decease of his wife Barbara, go to his executors and administrators.

In 1821, by an order made in a suit, instituted for carrying the trusts of the settlement into execution, it was directed that the trustees should sell the policies, and that the proceeds should be paid into court, and invested, and the dividends be accumulated during the joint lives of Mr. and Mrs. Mackenzie.

In 1828 R. Mackenzie took the benefit of the Insolvent Debtors Act; and in 1845

he again became bankrupt, and obtained his certificate.

In 1847 Mrs. Mackenzie died, leaving several children by the said R. Mackenzie. In 1850 the children presented a petition, praying a declaration that they, as next-of-kin, were entitled to the fund in equal shares, or, in the alternative, that the fund might be accumulated until the death of their father. An order was made upon this petition by the Vice Chancellor of England, that the fund should be accumulated until the death of the father. The assignees in bankruptcy appealed against this order; and the assignee under the insolvency, who had not been served with the petition of the children, also presented a petition, praying for the discharge of the Vice Chancellor's order, and for the payment of the fund to himself. Both petitions now came on for hearing before the Lord Chancellor.

Mr. Rolit and Mr. Osborne, for the assignee under the insolvency, contended that an appointment by a man to his executors was an appointment to himself: and they cited—

Holloway v. Clarkson, 2 Hare, 521.

Daniel v. Dudley, 1 Ph. 1.

The Attorney General v. Malkin, 2 Ph. 64; s. c. 16 Law J. Rep. (N.S.) Chanc. 99.

Mr. Follett appeared for the assignees under the bankruptcy.

The Solicitor General, for the children, cited the cases of *Bridge v. Abbot* (1), *Palin v. Hills* (2), and *Bulmer v. Jay* (3), to shew that the words "executors and administrators" might be construed "next-of-kin."

Mr. Hislop Clarke and Mr. Campbell appeared for R. Mackenzie and the trustees of the settlement.

Nov. 7.—THE LORD CHANCELLOR (TRURO) [after stating the facts of the case].—Upon the circumstances which I have stated four questions arise: first, whether the next-

(1) 3 Bro. C.C. 224.

(2) 1 Myl. & K. 470; s. c. 2 Law J. Rep. (N.S.) Chanc. 142.

(3) 3 Myl. & K. 197.

of-kin are designated by the appointment; or, secondly, whether this is an appointment to the executors or administrators beneficially; or, thirdly, whether the effect of the appointment is to make this property a part of the personal estate of the husband; and, fourthly, (if the last is the true view,) whether the property passes presently to the husband's assignees.

I am of opinion that the next-of-kin of the husband are not designated by the appointment, nor are the executors or administrators to take beneficially, but that the effect of the appointment is to make this property a part of the personal estate of the husband. The authorities fully establish that the effect of a settlement by deed, limiting property to the executor or administrator of the settlor, is to make such property subject to the disposition of the settlor by will, or to be dealt with under the Statute of Distributions. The authorities to that effect are *The Attorney General v. Malkin*, *Daniel v. Dudley*, *Hames v. Hames* (4), *Palin v. Hills*, *Collier v. Squire* (5), and *Holloway v. Clarkson*; and the case of *Holloway v. Clarkson* further shews that the settlor in such cases has a present controul over the property settled for his own benefit, or, in other words, the settlor has as unlimited a power of disposition as he had before the settlement. It is true that in *Palin v. Hills* and *Bulmer v. Jay* the words "executors and administrators" have been held to designate the next-of-kin. But the decision in these cases depended on special circumstances, which clearly do not resemble the circumstances of the present case. It is true also, that in other cases, such as *Sanders v. Franks* (6), executors or administrators have been held to take beneficially; but it was so held by the force of the words "for their own use and benefit," which do not occur here. The natural meaning of the words "a gift to the executors or administrators" does not import a gift to the next-of-kin, even indirectly through the medium of the executors or administrators. And there is commonly a far greater probability that when a person limits property to his own

executors or administrators, he means it to form a part of and to follow the destination of his personal estate, than to be given absolutely to his next-of-kin. For the usual purposes accomplished by giving it to his next-of-kin are accomplished by causing it to form part of his general personal estate, in case he does not afterwards choose expressly to give it away from the next-of-kin. And at the same time, if he adopts a mode of limitation by which he causes it to form part of his general personal estate, he thereby reserves to himself that power of giving it to whomsoever he chooses which it is natural for him to wish to possess. There is, indeed, one purpose not answered by the limitation which makes the property part of his personal estate, which is affected by a limitation in a deed to the next-of-kin, and that is to secure the property to his next-of-kin against subsequent creditors; but that is not an honest purpose, and, therefore, not an object to be implied, or to be conjecturally imputed.

Again, as it has been observed in another case, it is extremely improbable that a person should give his property to his administrator beneficially, when it is unknown and uncertain who may claim to be his administrator, and who might be a small creditor.

The words naturally import, and the presumable intention in such cases is, that the property should go to the executors or administrators, to be applied by them as part of the general personal estate under the will or the Statutes of Distribution, as the case may be, subject, of course, to payment of debts. And as this property forms part of the husband's personal estate, so it appears clear that it passes to his assignees.

In deference, however, to the decision of the Court below, I have thought it advisable to consider on what grounds the claim of the assignees could have been allowed to be obstructed. The assignees would have been entitled to the fund in question if it had been the identical fund settled, and the settlor had afterwards appointed it, instead of the fund being a substitution for the monies which would have been payable at the settlor's death under the policies of insurance; for it ap-

(4) 2 Keen, 646; a. c. 7 Law J. Rep. (N.S.) Chanc. 123.

(5) 3 Russ. 467; a. c. 5 Law J. Rep. Chanc. 186.

(6) 2 Madd. 154.

pears from *Holloway v. Clarkson* that in that case the settlor, after the death of the wife, might have required immediate payment to be made to himself. As the case stands, however, it has been contended that the Court cannot determine to whom the fund belongs till the death of the settlor, the time when the money would have been receivable, if the covenant in the settlement had been fulfilled by keeping up the policies.

As regards the children, I think they must be placed in a position in relation to this fund as nearly approaching their position with regard to the original fund as may be. This might be very important to them, as it is possible that before the death of the settlor he might pay all his creditors in full, and in that case the children might become entitled to the fund, as they might to the original fund. It is proper, therefore, to consider what would have been the position of the children even as regards the original fund. The policies might, after the appointment, have been sold by the settlor, as part of his personal estate, and what he might sell, the assignees would be able to claim. The children have no interest, entitling them to resist the claim of the assignees. In the first place, the children have no such interest under the limitation to them in default of appointment. They never had a vested interest under that limitation, inasmuch as the very subject of the settlement was necessarily a thing only existing inchoately; and even the executory interest which they took under the limitation in default of appointment was annihilated by the appointment.

Nor have the children such an interest as I have before mentioned as next-of-kin of the settlor, irrespective of any limitation in the settlement. Regarded in this light, their claim as next-of-kin is a mere hope or chance of succession. In this respect they have only a possibility, or less than what is technically termed a legal possibility, of an interest derivable through their father, and not an interest capable of being set up as an independent interest.

Nor have they an interest as next-of-kin under the settlement by means of the appointment itself. It may be urged, indeed, that the effect of the appointment as re-

gards the destination of the property is to give the original fund to such person as shall be entitled to the settlor's personal estate at his death, either under his will or under the Statutes of Distribution, as the case may be; that the children are of the class so contingently entitled; that they have an interest under a limitation, as opposed to that mere hope or chance of succession which they have as next-of-kin, in respect of the general personalty of their father, independent of any limitation; that the subject of that hope or chance has only an ideal potential existence; for whether the father will have any general personalty at the time of his death is a matter of perfect uncertainty, and no act is done to secure the existence of such personalty, even if it should exist. But it may be said, that the original fund in question has an actual, though only an inchoate existence, and not a mere ideal potential existence; that an act has been done to secure its existence; that it inchoately exists as a fund tied up till the father's death, and then at least, if the policies are not before vacated, the fund will certainly form part of his personal estate by virtue of an express limitation, and the children will take if they survive, unless the property shall by will be given away from them; that though they have no vested interest, yet their interest is as certain to take effect in possession as that of the appointees under a revocable deed, except so far as the liability to the debts of the intestate is concerned; a liability which does not prevent a legatee from having even a vested interest; and, therefore, cannot prevent the next-of-kin in a case of this kind from taking an interest; and that in such case the children, long before the existence of the claim of creditors, may have ventured to marry, and have founded families in dependence upon an interest like this.

These arguments, however, do not, nor does any other which has been suggested, or which occurs to me, shew that the children take any interest, technically and properly speaking, under the appointment. The fact is, that the effect of the appointment is to add the money to the husband's personal estate, in the first instance, in the hands of his executors or administrators; and, when in the hands of his executors

or administrators, it then becomes subject to the operation of any testamentary disposition of it, or in default of that to the operation of the Statutes of Distribution. The persons who take it beneficially do not take as purchasers under the instrument by which the property becomes added to his personal estate. They are not like the objects of a limitation particularly designated by that instrument. They have only the hope or chance, whatever it may amount to, of becoming entitled to the property, or some part of it, not under that instrument, but under the will or intestacy, as the case be.

The children, then, having no interest properly speaking, under the settlement or the appointment, the husband, after the death of the wife, could have sold the policy to the insurance office, or the assignees might have sold it, and would have been entitled to the proceeds. But in fact it has been sold, and, consequently, those are entitled to the fund which has arisen from the sale, who are now entitled to the settlor's interest.

The order of the Vice Chancellor must be discharged, with costs, and the fund must be carried over to the account of the estate of Roderick Mackenzie, with liberty to apply.

PARKER, V.C. { *In the matter of THE NORTH
Feb. 16. OF ENGLAND JOINT-STOCK
BANKING COMPANY, ex
parte BERNARD.*

Company—Contributories — Transfer of Shares—Waiving Formalities required by the Deed of Settlement.

A. purchased fifty shares in a banking company from the directors of the company. No deed of transfer of these shares to him was executed, as required by the deed of settlement of the company, but the directors gave him certificates of the shares, and he received the dividends declared on them from time to time. The company was ordered to be wound up:—Held, that A. was properly put on the list of contributories in respect of these shares.

A. purchased of B, a shareholder of the company, thirty shares in the company. No deed of transfer was executed, as required

by the deed of settlement, but the directors gave A. certificates, and he received the dividends declared on them:—Held, that the formality had been waived, and that the transfer had been complete; and that A. had properly been put on the list of contributories in respect of the shares.

In January 1844, Mr. Bernard purchased of Mr. Johnson twenty shares in the North of England Joint-Stock Banking Company, and a regular transfer of them was made by deed, in pursuance of the deed of settlement.

In the same month, Mr. Bernard contracted to purchase thirty other shares from Gale's executors. No transfer of the shares was ever made to him, but the directors of the company gave Mr. Bernard certificates of the shares, and he received the dividends which were from time to time declared on them.

Mr. Bernard subsequently applied to the directors of the company to purchase of them some more shares, and, in May 1844, they sold him fifty shares for 200*l.* No transfer was ever made to him of these shares, but, as in the other case, certificates were given him, and he received the dividends on them.

The company was ordered to be wound up, and Mr. Bernard's name was placed by the Master on the list of contributories for 100 shares, without qualification.

It was admitted that all the capital of the company had been lost previously to 1837, and that in January 1844 the liabilities of the company exceeded their assets. It was alleged by Mr. Bernard that he had been induced to take shares from the false representations of the directors.

This was a motion by Mr. Bernard, that the Master's decision might be reversed, or that he might be placed on the list of contributories in respect only of the losses incurred subsequently to 1844.

The clauses of the deed of settlement, which have any bearing on the question argued in this case, are fully stated in the judgment.

Mr. Hetherington, for the motion, cited—

Sanderson's case, 3 De Gex & Sm. 66; s. c. 19 Law J. Rep. (N.S.) Chanc. 122.

Dodgson's case, 3 De Gex & Sm. 85.
Ex parte Staffon's Executors, 15 Jur. 321.

Mr. Bacon and Mr. J. V. Prior, for the official manager.

Mr. Hetherington replied.

PARKER, V.C.—I do not think that Mr. Bernard is entitled to the relief which he asks in respect of these shares. It appeared that there were 100 shares altogether. Of twenty of these he became a purchaser in the regular mode, the formalities prescribed by the deed of settlement having been duly observed. The question which has arisen here is as to fifty and thirty shares, which were purchased subsequently.

As to the fifty, the matter rests upon very clear grounds: he was a purchaser of them from the directors under the 25th clause of the deed of settlement, which gave the directors power to sell shares, and provides "that every purchaser of such shares shall, when and so soon as he shall have paid his purchase-money to the directors, and otherwise have complied with the provisions of the deed of settlement respecting purchasers of shares, or such of them as may be applicable to the case now in contemplation, receive from the directors a certificate or transfer of the same shares under the hands of two of their body, and be thereupon recognized as a shareholder in respect of the same shares, and invested with all the rights, privileges and qualifications incident to the complete ownership of such shares." Mr. Bernard bought these fifty shares from the directors, paid for them, received the certificates contemplated by this clause, and received the dividends on the shares. I find the following provision in the 24th clause, "Every purchaser or transferee of shares shall, in respect thereof, if required by the directors, either expressly, or by a general regulation in that behalf, execute a deed," &c. It appears that the directors did not require him to execute a deed of transfer as contemplated by this clause before the delivery of the certificate, or before the receipt of dividends, but the proceedings were treated as complete without that formality. He took these shares from the directors at that time, for better

for worse, and put himself in the position of any other shareholder. It is impossible to suppose that every shareholder entered into a distinct contract with the directors, which was to have regard to the liabilities and the state of the concern at the time of entering into each contract. He was, no doubt, in precisely the same position as any other shareholder of the company, and it did not appear that there had been any irregularity in the proceedings as to these fifty shares.

With respect to the thirty shares bought by Mr. Bernard from Gale's executors, no deed of transfer was ever executed, but the directors gave him a certificate, and he also received the dividends upon them. The 34th clause is as follows:—"Upon every transfer of shares the certificate or certificates held by the former holder or transferor shall be given up to be cancelled, and shall forthwith be cancelled accordingly, and a new certificate shall be issued to the new holder in respect of the shares transferred to him." Hence the directors, in giving him the certificates, gave him what he was not entitled to, except upon having the shares transferred. By the 30th clause the dividends were to remain in suspense until the transfer of the shares should be completed. No doubt the previous clauses assumed that there must be a complete transfer, and there had been more or less irregularity, but it appears to me that the transfer had been waived by the vendor and the directors. There may be considerable inconvenience arising from the waiver, but the circumstance that there was not a deed of transfer, where there was no doubt as to the nature of the contract, cannot vary Mr. Bernard's liability to the company, nor the relation in which he stood to the vendor. The deed was looked upon as a formality more or less important, which they had here dispensed with. The 26th clause which has been so much relied on is this:—"Whenever, by any means whatsoever, any shares shall become actually forfeited, or shall be duly and effectually transferred to a new holder, then and in such case, and not before, the responsibility of the previous holder as a member of the company in respect of such shares shall (so far as the law will in that behalf allow) cease and

determine, and such previous holder shall be exonerated and released from all subsequent claims, demands and obligations in respect of the same shares, and from all future observance and performance of the covenants, conditions, stipulations and agreements in the deed of settlement contained in respect of the same shares: Provided, nevertheless, that nothing in this article contained shall extend, or be construed to extend, to release the previous holder of shares so forfeited or transferred as aforesaid from his proportion of the losses (if any) sustained by the company up to the period of his ceasing to be such holder as aforesaid." I consider that these shares have been effectually transferred for every purpose, and that the consequences of the transfer existed in this case. The liability of a vendor did not cease, even though there had been a regular transfer, and he was to remain liable for losses during his time of ownership. It would obviously be putting these parties in a different position from what was intended by the contract, if I were to hold that the transaction between them fell short of a complete transfer.

As to the argument that Mr. Bernard was induced to take these shares by incorrect representations, that point was taken in *Dodgson's case*, and the Vice Chancellor Knight Bruce said that, whatever fraud there might be, if fraud there was, it was charged against the directors, who could not be the agents of the body of shareholders to commit a fraud. For these reasons, the motion must be refused.

Motion refused, with costs.

PARKER, V.C. }
Feb. 16, 23. } BOGUE v. HOULSTON.

Copyright—Prints and Engravings.

Prints in books containing letter-press and prints, the prints being illustrative of the letter-press, are protected by the 5 & 6 Vict. c. 45.

The provisions of the 8 Geo. 2. c. 13. as to the date of the publication and the name of the proprietor being printed on every print, apply only to prints published separately, and do not apply to prints forming parts of books made up of prints and letter-press.

In 1851, Mr. Bogue published a book called "The Comical Creatures from Wurttemberg, including the History of Reynard the Fox, with twenty illustrations, drawn from the stuffed animals contributed by Herman Ploucquet, of Stuttgart, to the Great Exhibition."

The book consisted of stories, illustrated by a variety of wood-cuts.

In 1852, the defendants, Messrs. Houlston & Stoneman, published a book called "The Comical History and Tragical End of Reynard the Fox," being the first number of an intended series of like books to be called "Story Books for Young People, by Aunt Mary."

This book also consisted of stories, illustrated by a variety of wood-cuts. The stories were different from those in Mr. Bogue's book, but the wood-cuts, it was alleged by Mr. Bogue, were pirated from those in his book.

A motion was now made, on the part of Mr. Bogue, for an injunction to restrain the defendants from selling the wood-cuts alleged to be pirated.

By the 8 Geo. 2. c. 13. s. 1. it is enacted, "That from and after the 24th of June 1735, every person who shall invent and design, engrave, etch, or work in mezzotinto or chiaro oscuro, or, from his own works and invention, shall cause to be designed and engraved, etched or worked in mezzotinto or chiaro oscuro, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for the term of fourteen years, to commence from the day of the first publishing thereof, which (*i. e.* the day of publication) shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints."

This act is extended by the 7 Geo. 3. c. 38. and 17 Geo. 3. c. 57.

By the 5 & 6 Vict. c. 45. s. 2, there is the following enactment:—"That in the construction of this act the word 'book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published."

None of the illustrations in the plaintiff's book had the day of publication or

the name of the proprietor engraved or marked on them.

Mr. Craig and Mr. Reilly, for the plaintiff.

Mr. Swanston and Mr. W. H. Bennet, for the defendants, contended that, as the act of the 8 Geo. 2. c. 13, which was now in force with reference to prints, had required that the day of publication and the name of the proprietor should be engraved on each print, and as this enactment had not been complied with, the plaintiff was not entitled to an injunction.

The following cases were cited :—

Blackwell v. Harper, 2 Atk. 93.

Harrison v. Hogg, 2 Ves. jun. 323.

Thompson v. Symonds, 5 Term Rep. 41.

Mackmurdo v. Smith, 7 Ibid. 518.

Sayer v. Dicey, 3 Wils. 60.

Newton v. Cowie, 4 Bing. 234; s. c. 5 Law J. Rep. C.P. 159.

Brooks v. Cock, 3 Ad. & E. 138; s. c. 4 Law J. Rep. (N.S.) K.B. 144.

Colnaghi v. Ward, 12 Law J. Rep. (N.S.) Q.B. 1.

PARKER, V.C. said he had no doubt that the illustrations in the defendants' book were copies from the plates of the plaintiff's, and were not taken from originals; and that the plaintiff was entitled to an injunction, subject to the question which had been raised with reference to the act of 8 Geo. 2. c. 13. On this, he reserved his judgment.

PARKER, V.C.—This was a motion for an injunction. The plaintiff published a book containing designs of a group of stuffed animals taken from the Exhibition of last year. To each of the designs was annexed a label descriptive of it, and these designs were illustrations of letter-press, consisting of stories in which the characters which appeared in the group were the persons of whom the stories were told. The defendants published a smaller book containing stories with the names of the same persons or *dramatis personæ*, but the stories were different from those of the plaintiff, although illustrated by the same designs, which the plaintiff alleged to be piratical copies of the designs contained in his book. This was denied by the defen-

dants, who alleged that they, or the person for whom they published, had paid artists to make original drawings of the group of animals. But, upon an inspection of the designs themselves, and upon a careful perusal of the evidence, I have come to the conclusion that the drawings published by the defendants have been copied from those of the plaintiff. They have not only copied his designs, but they have copied the descriptive labels which the plaintiff had annexed to the designs. Under these circumstances, I entertain no doubt that the plaintiff is entitled to the injunction.

But, it was argued, that the plaintiff had not established his title to any copyright in the designs in question, inasmuch as he had not complied with the requisitions of the 8 Geo. 2. c. 13, the existing statute regulating the copyright in prints and engravings, which provides that the date of the publication and the name of the proprietor must be truly engraved upon the plate, and printed on every print. This act of parliament has been explained and extended by two other acts of Geo. 3. It was admitted on the part of the plaintiff that the act of 8 Geo. 2. c. 13, was the one which now regulates the law with respect to the copyright in designs. But the plaintiff said that his publication was a book, and that it was entered at Stationers' Hall in his name as the proprietor, and he referred to the 5 & 6 Vict. c. 45. as giving him the copyright in the book.

The definition of a book given in the interpretation clause of that statute is as follows:—"Every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published." No doubt this does not extend to prints or designs separately published; but, where the prints or designs form part of the book, (and the book is no less a book because it contains, in addition to the letter-press, prints or designs or other illustrations of the letter-press), the statute vests in the proprietor of that book, of which he has been registered as proprietor, the right to restrain any invasion or infringement of his copyright. It appears to me that the term "book" must include every part of the book: it must include the engravings and

designs which are a part of the book, as well as the letter-press, which is another part of the book. It may be very true that prints published separately are not within that act of parliament by express definition; but the case before the Court is not that of a print published separately, but of designs forming part of a book. I am not aware that there is any decision of a court of law or of this Court either way upon the point. There are some cases which were referred to by the defendants' counsel, but it does not appear that the question before the Court arose in any of them. In the absence of any decision, I think that the correct construction of the 5 & 6 Vict. c. 45. is, that, where there are designs or illustrations forming part of a book, of which book a party has a copyright, that copyright extends to the designs as well as to the letter-press. I must, therefore, decide that the plaintiff is entitled to an injunction in the terms of the notice of motion. The defendants have, however, a right to put the plaintiff to bring his action at law, and the injunction must issue on the plaintiff's undertaking, if the defendants require it, to bring his action at law.

TURNER, V.C. }
Feb. 18, 23. } BILLING v. SOUTHER.

Jurisdiction—Surgeon and Patient—Confidential Relation.

A surgeon obtained from a poor patient, on a change of circumstances, his promissory note for an amount beyond what was due for medical attendance. The Court, in the absence of evidence to prove that the patient intended to pay more than what was justly due, ordered the note to be impounded, and directed an issue at law to try the amount actually due.

This was a suit against the defendant, a surgeon at Cambridge, to cancel a promissory note for 325*l.*, given by the plaintiff to him in 1848 in remuneration for his medical attendance. The defendant had brought an action on the note and obtained judgment by default. The defendant had pleaded fraud and covin, and obtained an injunction in this suit to stay execution on

the judgment. The bill also prayed for an account of what was due to the defendant at the date of the note, and for an injunction to restrain its negotiation.

It appeared from the pleadings that the plaintiff was a shoemaker at Cambridge, in a very humble way, from 1840 to 1848, during which time he was very frequently attended by the defendant, and certain surgical operations were performed by the latter. In 1848 the plaintiff's daughter married a man of large property, and the plaintiff, previously to his then leaving Cambridge, gave the promissory note in question to the defendant. The bill charged that the note had been fraudulently obtained from the plaintiff, and in ignorance of the real amount for which it was signed, the plaintiff alleging that he thought the amount was for 25*l.* instead of 325*l.* It was also alleged that the average amount of the defendant's yearly bills was about 25*l.*; they had never exceeded 30*l.* or 40*l.*; and that there had been a settlement of account in 1843. The defendant stated by his answer that the plaintiff, on the occasion of his daughter's marriage, called upon the defendant and voluntarily offered to recompense him for his services, and executed and signed the promissory note in the presence of the defendant's footman. The defendant scheduled his visits and attendances from 1840 (and which were nearly daily) and the amount received from the plaintiff. The defendant charged at the rate of a guinea for every visit and claimed payment of the balance. The plaintiff went into evidence to prove that the charges were extortionate, and assuming that there was a settlement up to 1843, and taking credit for the payments made, that there was less than the amount of the note due at the time it was given.

Mr. Rolt and Mr. Cole appeared for the plaintiff.

Mr. Stuart and Mr. Rogers, for the defendant.

Mr. Cole replied.

Feb. 23.—TURNER, V.C., after referring to the pleadings and evidence, said—The question is, whether, under these circumstances, the plaintiff has made out a case entitling him to equitable relief. It is clear that he has not made out that he

intended only to pay 25*l.*, and thought the promissory note was only given for that amount. It is clear that he knew the amount of the note at the time of giving it. It was argued on behalf of the defendant, that the case had been decided by the verdict at law; but if the plaintiff thought that he had a good equitable case, it was open to him to avail himself of it, and to make no defence at law.

The case on the merits is, that a medical attendant obtained from a poor patient a sum beyond the most extravagant charges as remuneration for his services, and obtained it at a time when the patient's position in life was about to change. There is no part of the jurisdiction of this Court more useful or better founded than that which assumes the controul over all transactions between persons occupying a confidential relation towards each other. This jurisdiction ought to be exercised, whatever be the circumstances and position of the parties between whom this confidential relation exists, whether attorney and client, guardian and ward, or surgeon and patient. There is no doubt, that in the present case, such a confidence existed, and no doubt that advantage was taken of that confidence. Why should a greater amount be sought to be obtained from the plaintiff for past services rendered to him, because his position in life was about to change? Why was not an account sent in in the usual way? It was said that the plaintiff did not intend to confine his liberality to merely paying the defendant his account, but that he intended to reward him, and was surely at liberty to do so. This is true; but intention imports knowledge; and liberty, absence of influence. There is not sufficient evidence to shew that the plaintiff intended to pay more than was justly due; and therefore the defendant will not be allowed to appropriate the whole of what he has thus obtained from the plaintiff. On the other hand, the defendant is entitled to receive so much as is justly due to him, and the Court in exercising jurisdiction in the case is bound to take care of the defendant's interests. Although the defendant, therefore, cannot be permitted to recover the full amount, the note cannot be immediately delivered up to be cancelled, but must be impounded as a

security for the amount justly due to the defendant. I shall, therefore, direct an issue to try whether the plaintiff was indebted to the defendant in the amount of the note at the time of its date, (that being the form, I understand, in which the issue must be tried,) and direct that the amount, if any, which shall be found by the jury to have been actually due, shall be indorsed on the *postea*.

Decree accordingly.

KINDERSLEY, V.C. }
 March 6, 22. } WESTWOOD v. SOUTHEY.

Will—Specific Bequest—Leaving Issue living at Death.

*A testator bequeathed to his son William the dividends, interest and annual produce to arise from the sum of 3,000*l.* 3½*l.* per cent. Bank annuities for his life: and after his decease he gave the said principal sum of 3,000*l.* to all and every the child or children of his said son, to be equally divided between them, or if only one child, then the whole to such only child, to be paid on their respectively attaining the age of twenty-one: the interest in the mean time to be applied for their maintenance and education. The testator gave two further sums of 3,000*l.* to another son and daughter in similar terms: and upon the death of either of his said sons and daughter without issue, then he directed the interest, dividends and produce so given to him, her or them so dying, to be paid to the survivors and survivor in equal shares and proportions. The testator's son William had one child only, who died an infant during his father's lifetime:—Held, that the infant took a vested interest in the 3,000*l.*, liable to be divested by the death of his father without leaving issue living at his death; and that event having happened, the gift over took effect.*

This case came on upon two petitions, and the question turned upon the construction of the will of John Westwood, dated the 12th of May 1830, by which the testator gave certain specific property to his eldest son, and then continued in the following terms:—"I give and bequeath unto my son Henry Frederick Westwood

the dividends, interest and annual produce to arise from the sum of 3,000*l.* new 3½*l.* per cent. Bank annuities now standing in my name in the books of the Governor and Company of the Bank of England for and during the term of his natural life, and from and immediately after his decease, I give and bequeath the said principal sum or stock of 3,000*l.* unto all and every the child and children of my said son Henry Frederick Westwood, to be equally divided between and amongst them, share and share alike if more than one, but if there shall be but one such child, then the whole of the said principal stock or sum of 3,000*l.* to such only child, the same to be paid or transferred to him, her or them on their severally and respectively attaining the age of twenty-one years, the interest and produce thereof to be in the meantime applied for and towards their maintenance and education." The testator then gave another sum of 3,000*l.* Bank annuities in similar terms to his daughter Eliza Westwood, and a third sum of the same amount to his son William Westwood also in precisely similar terms, and then followed this clause:—"And upon the death of either of my said sons and daughter without issue, then I direct that the interest, dividends and produce so as aforesaid given and bequeathed to him, her or them so dying, shall be paid and payable to the survivors and survivor of them my said sons and daughter in equal shares and proportions." The testator then gave two different legacies, and as to all the rest, residue and remainder of his property in the funds, and all other his estate and effects whatsoever, he gave and bequeathed the same to his daughter and his youngest son William Westwood, to be equally divided between them, share and share alike, for their absolute use and benefit, and he appointed James Gray and John Southey executors and trustees of his will and guardians of his children.

The testator died on the 3rd of May 1838, leaving his said three children, Henry Frederick, Eliza, and William, him surviving, and the will was proved by John Southey alone.

William Westwood attained the age of twenty-one years on the 13th of July 1838, and in March 1844 intermarried with the

petitioner Sophia Westwood, and there was issue of that marriage one child only, who was born in February 1846, and died in February 1847. W. Westwood died in November 1851, without having had any other issue, and by his will, dated the 16th of October 1851, gave and bequeathed all his estate and effects whatsoever and wheresoever to his wife, her executors, administrators and assigns, and appointed her sole executrix of his will. The petitioner, Sophia Westwood, proved the will of the said William Westwood, her husband, and also took out letters of administration to her infant son, who had died, and thereby became his legal personal representative. The petition of Sophia Westwood alleged that she was entitled to the sum of 3,000*l.*, the interest of which was given by the will of John Westwood to her husband, William Westwood, for life, and the capital to his children as before-mentioned, and the petition prayed that the said sum of 3,000*l.* might be transferred and paid to her accordingly.

The second petition was presented by Henry Frederick Westwood and Eliza Westwood, the two surviving children of John Westwood, claiming the said sum of 3,000*l.* by virtue of the gift over in the will of John Westwood upon the death of William Westwood without leaving children living at his decease.

Mr. Malins and *Mr. Welford* appeared in support of the petition presented by Sophia Westwood, and contended that the child of W. Westwood, who died in his lifetime, took a vested interest in the capital stock of 3,000*l.* There was an immediate gift in remainder upon the death of W. Westwood, to all and every the child and children of the said W. Westwood, with a subsequent direction for the same to be paid or transferred to him, her, or them at twenty-one. The language imported no contingency whatever, and this construction was fortified by the direction to apply the whole of the interest for maintenance and education during the minorities of the children.

The following cases were cited:—

Jones v. Jones, 13 Sim. 561; s. c. 13 Law J. Rep. (N.S.) Chanc. 16.

Doe d. Todd v. Duesbury, 8 Mee. & W. 514; s. c. 10 Law J. Rep. (N.S.) Exch. 410.

In re Bartholomew's Trust, 1 Hall & Tw. 565; 1 Mac. & Gor. 354; s. c. 19 Law J. Rep. (N.S.) Chanc. 237.

Hallifax v. Wilson, 16 Ves. 168.

Packham v. Gregory, 4 Hare, 396; s. c. 14 Law J. Rep. (N.S.) Chanc. 191.

Taylor v. Langford, 3 Ves. 119.

Salmon v. Green, 11 Beav. 453; s. c. 18 Law J. Rep. (N.S.) Chanc. 166.

Fonereau v. Fonereau, 3 Atk. 645.

Knight v. Knight, 2 S. & S. 490.

Mr. Wigram and Mr. Faber, contra, cited—

Hughes v. Sayer, 1 P. Wms. 534.

Lawson v. Lawson, 1 Ibid. 441.

Billingsley v. Wills, 3 Atk. 219.

Batsford v. Kebbell, 3 Ves. 363.

Mr. Welford, in reply.

Judgment postponed.

March 22.—KINDERSLEY, V.C.—The question upon these two petitions turns upon the construction of the will of John Westwood. At the date of his will J. Westwood had three children, as appears by his will, all of whom were under age at the time he made his will—Henry Frederick Westwood, Eliza Westwood and William Westwood. The question turns upon a gift of a legacy of 3,000*l.* stock for the benefit of W. Westwood's children, and similar legacies were given for the benefit of the other children, and as one of the clauses in the will, upon which the question turns relates to the three legacies, it is necessary to consider the gifts of all these three legacies given for the benefit of the three children of the testator.—[His Honour then read the clauses in the will as above set forth].—In each case the legacy is specific, and so far there would probably not be very much doubt about the construction; but, after giving the three legacies, the testator proceeds thus:—"And upon the death of either of my said sons or daughter, without issue, then I direct that the interest, dividends and produce so as aforesaid given and bequeathed to him, her or them so dying, shall be paid and payable to the survivor

or survivors of them my said sons and daughter, in equal shares and proportions." The testator afterwards gives the residue of his personal estate to his daughter and youngest son William, so that the two youngest children are the residuary legatees. Now, the facts upon which the question turns, which I have now to decide, are these. As I have already said, the question relates at present entirely to the legacy given for the benefit of William and his children.

The facts with respect to William are these: William attained the age of twenty-one and married, and had one child, and only one child, but that child died in early infancy, without leaving any issue in the lifetime of William. Then William died, having no issue living at his death. In that state of circumstances, the representative of the child of William, who is a petitioner upon one of these petitions, claims to have the legacy as having become vested in the child of William and not divested. Upon the other hand, the two other children of the testator, Henry Frederick and Eliza, who survived William, claim it by virtue of the gift over; they say it was not vested in the child, and they claim it by virtue of the gift over. There is a third alternative which might have been argued, but which has not been contended for on this petition, although the parties who might raise the question are before me, namely, whether the residuary legatees were not entitled; that is, whether the gift to the children gave no vested interest to the child of William, and that the gift over is void, and that, therefore, there was no gift at all before the death of William. That point has not been raised before me: still it is a possible construction of the will.

In order to determine the questions arising upon this will and this state of facts, the matter divides itself into the consideration of two points. The first is, whether under the prior gift the child of William took any vested interest at all, and if it did not, it is not necessary to consider what is the effect of the ulterior limitation over, upon the interest of that child; but if the child of William did take a vested interest under the prior gift, then it becomes material to consider the second point, which is, what

is the effect of the gift over in the event that has happened—of William dying without having left any issue living at his death.

Now, with respect to the first point, as to whether the child of William took a vested interest or not, it has been contended that in this case there is no gift of the corpus of the legacy of the stock till the death of William; that the gift to William is only of the dividends; and that the gift to the children being to take effect after the death of William, and it being first the gift of the principal, it is contended that the child did not take a vested interest, and the cases of *Batsford v. Kebbell* and *Billingsley v. Wills*, which are two common vouchers upon cases of this kind, were cited. *Batsford v. Kebbell* was this case—The testatrix gave Robert Endly the dividends of 500*l.* 3*l.* per cent. annuities till he should arrive at the age of thirty-two years, at which time the testatrix directed the executors to transfer to him the principal sum of 500*l.* of her 3*l.* per cent. annuities for his own use. The question was, as R. Endly died before he attained the age of thirty-two years, whether he had a vested interest in the stock, and the Court decided he had not: and most justly and reasonably; because the Court saw that upon the true construction of that will, the testatrix did not mean R. Endly to take anything but the dividends unless he attained the age of thirty-two years; and the Lord Chancellor pointed out the distinction between the gift of the dividends and the gift of the principal. He says the testatrix meant to give the dividends whether he attained the age of thirty-two or not, as long as he lived, but did not mean to give the principal, which is a distinct gift, unless he attained the age of thirty-two years, and therefore the Court determined that R. Endly did not take a vested interest.

The case of *Billingsley v. Wills* is a case a little more complicated, but still the principle of it is easily to be perceived. The gift was in this form:—"I do further give and bequeath to my brother Capel Billingsley the interest of 1,500*l.* during his natural life; then from and after the decease of my brother Capel Billingsley, I give the said sum of 1,500*l.* unto and amongst

all and every the younger son and sons, in case there be any younger sons, and all and every the daughter and daughters of my brother Capel Billingsley, now lawfully begotten or to be hereafter begotten, share and share alike; but in case he shall have only daughters lawfully begotten, then only unto and amongst the younger daughter or daughters; and to be paid to them all, every and each of them at and when they shall have obtained to their respective ages of one and twenty years. But my express will and meaning is, that no elder son, in case there shall be more than one son, nor any elder daughter, if there be only daughters of my brother Capel Billingsley living at his decease, shall have any part, share or interest in the 1,500*l.* But in case all the children of my said brother Capel Billingsley except one, either son or daughter, shall happen to die before their respective ages of twenty-one, then I give 1,000*l.*, part of the 1,500*l.*, to such surviving only child, whether son or daughter, and to be paid to him or her at their age of twenty-one." At the time the testator made his will Capel Billingsley had three children, a son and two daughters. Lord Hardwicke saw clearly that no child could possibly have a vested interest till the death of Capel Billingsley, because it was first of all the eldest son who was to be excluded; and if there should be no son, but only daughters, then the eldest daughter was to be excluded. Moreover there was this clause, "but no elder son, in case there shall be more than one son, nor any elder daughter, if there be only daughters of Capel Billingsley living at his decease, shall have any share or interest in the 1,500*l.*" Lord Hardwicke said these words "living at his decease" applied not only to the passage "if there be only daughters," but also to the passage "if there be any sons." Therefore, it comes to this, that it was a limitation over to persons as to whom it could only be ascertained who would answer the description at the death of Capel Billingsley; *ex necessitate*, it was not a vested interest until the death of Capel Billingsley.

These two cases of *Batsford v. Kebbell* and *Billingsley v. Wills* have been often supposed to establish the proposition which I am satisfied they are never meant to esta-

blish and have not been held to establish, namely, that merely because the dividends of a sum of stock are given in the first instance to A. for life, and then afterwards there is a gift of the capital of that stock over to his children, that is a vested interest, because there is a difference between the gift of the principal and a gift of the dividends. That is not the principle established by these cases; and to shew that it is not, I would refer to a case that was not cited in the argument, but which is an important case, or rather two cases of the same name, *Chaffers v. Abell*, both of which are reported in 3 *Jurist*, 577. The two cases relate to two different wills, and therefore were evidently two causes, though they seem to have been two parties of the same name. They follow each other in the volume of the *Jurist* to which I have referred. The first case is at p. 577. I read merely the marginal summary:—"A testator bequeathed certain sums of stock," that is, an aggregate sum of stock, "to trustees, to pay 40*l.* per annum to his daughter for life, and after her decease to pay, assign and transfer the sum of 1,000*l.* stock equally amongst all and every the child and children of his daughter, share and share alike, to be paid and transferred to them when and so soon as the youngest should attain his or her age of twenty-one years. At the death of the testator the daughter had four children, one of whom died before the youngest attained twenty-one. The youngest only survived the daughter, yet it was held that the four children took vested interests in the stock." Now, it might have been equally contended that there was no gift of the principal until the death of the daughter; and not only so, but there was actually no intermediate gift of the dividends of that sum of stock which was given to the children. It was only a direction out of the dividends of an aggregate sum of stock, to pay 40*l.* a-year to the daughter; and yet the Court held that it was a vested interest in the children. In that case, it is true, there was the gift of an aggregate sum of stock to the trustees in the first instance; but in the next case, of *Chaffers v. Abell*, p. 578, which, as I have said, is not only upon a different legacy but upon a different will, there was no gift to trustees at all, and

therefore it is extremely like the case before me. I will read the terms of the will from the case itself rather than from the marginal note, as being fuller. "Ann Page, by her will, gave to her sister Mary Abell, wife of Francis Abell, the interest of 500*l.* 5*l.* per cent. Navy Stock, standing in the name of the testatrix, in the books of the Governor and Company of the Bank of England," exactly so far like the case before me, "for her own separate use, not subject to the controul of her present or any future husband, and at her death the said 500*l.* stock to be divided between her children, share and share alike." Now, it is impossible to conceive a case more exactly at all fours with the case now before me. It was a gift, not to trustees at all, but a gift to the sister, during her life, of the dividends of a specific sum of stock, mentioned to be stock standing in the name of the testatrix only, without any gift of the principal; and after her death the said principal sum of stock was given over to her children. "The sister had three children at the death of the testatrix, but only one survived her; and it was held that the three children took vested interests." Now, it is seldom one finds a case so exactly at all fours with the case under consideration; but even if it were not here the case, I have no hesitation in saying that *Batsford v. Kebbell* and *Billingsley v. Wills* have been respectively misrepresented as determining this as an abstract proposition, that in all cases where there is only a gift of the dividends in the first instance to A. for life and then a gift over after the death of the tenant for life of the corpus of the stock, in all cases and under all circumstances, the effect of that is to make the gift over a contingent and not a vested interest.

I am of opinion, therefore, that the child of William, on its birth, took a vested interest in the stock; and I may here observe that the gift is to the children; and, then, there is another clause directing the time of payment to be at the age of twenty-one, which, in the ordinary way, makes it a vested gift; and there is the direction also with regard to the application of the interest and dividends, which is not material for the present question. Then, assuming I am right in saying that the child

of William took a vested interest at its birth, the next point of consideration is, what is the effect of the limitation over upon the death of William without issue? Does that clause divest the interest that was vested in the children, and what was the effect of it?

Now, of course, the words "on the death of either without issue" are in themselves capable of three different constructions. The first is an indefinite failure of issue—failure of issue generally; the second is "dying without such issue," that is, the class of issue before mentioned (by interpolating the word "such"); and the third is, without issue living at the death of the person mentioned, the person dying. Now, upon the first construction, if that were the right one, if it meant an indefinite failure of issue, the gift over, of course, would be void. The gift over can only be made valid by assuming that the "dying without issue" means either "dying without such issue," or "dying without issue living at the death of the party." That is the only way, by one or other of the two constructions, that the gift over can be made valid at all; and I need not say that the Court will always, if it can, lean to that construction which shall make the gift over—which shall make, in short, every part of the will,—effective, if it can do so without violence. Now, let us see, does it here mean "dying without such issue," that is, am I to interpolate the word "such," or does it mean "dying without issue living at the death"? In order to give the just interpretation to this clause, we must have regard to the fact that the limitation over applies not merely to the particular legacy given for the benefit of William and his children, but that the clause is applicable to legacies given to all the three children, including William; and the language is this, "on the death of either of my said sons or daughter" (there being three of them at the date of the will) "without issue, then I direct that the interest, dividends, and produce so as aforesaid given and bequeathed to him, her, or them so dying, shall be paid and payable to the survivors or survivor of them, my said sons and daughter, in equal shares and proportions." So upon the death of either, without issue, the gift over is of the interest and dividends

to be paid and payable to the survivors or survivor of the other two, that is to such one or two of the others as shall survive the party dying without issue. Now, it may be stated to be a general rule, I do not say without exception, arising, perhaps, out of a different context, but as a general and *primâ facie* rule, where there is a gift over to the survivors or survivor of several persons, after the death of one of them without issue, the words "without issue" are construed to mean without leaving issue living at the death. That may be stated as the general *primâ facie* rule. For the purpose of shewing that that is the rule, I refer to *Ranelagh v. Ranelagh* (1), first decided by Sir John Leach, and afterwards, upon appeal, it was decided by the Lord Chancellor, affirming his decision. Sir John Leach, in his judgment, says this, "I adopt the language of Sir William Grant in *Massey v. Hudson* (2), and take the rule to be, that *primâ facie* a bequest over to the survivor or survivors of two or more persons after the death of one without issue, affords the presumption that an indefinite failure of issue could not be in the testator's contemplation. In that case, Sir William Grant considered that the presumption was repelled, because the limitation over was to the survivor, his or her executors, administrators and assigns, and the testator, therefore, had not solely in view the personal enjoyment of the survivor. In this case," that is, *Ranelagh v. Ranelagh*, "there is no circumstance to repel the presumption; on the contrary, the presumption is here fortified by the fact that the legacies are in the first place given for life only," as here, "and the limitation over is upon the determination of the life estate, to which determination the survivorship must be referred. If this plain rule be adhered to there will be no confusion in subsequent cases."

In the present case there is no larger interest given to William than for his life. The limitation over is, in case he dies without issue, to the survivors, and it is a direction to pay the dividends, interest and produce to the survivors or survivor, sons and daughters of the testator, in equal shares

(1) 2 Myl. & K. 441; a. c. 1 Law J. Rep. (N.S.) Chanc. 183.

(2) 2 Mer. 130.

and proportions. Here is no mention, as there was in *Massey v. Hudson* upon which Sir William Grant decided that case, of executors, administrators and assigns; and, moreover, it is not a simple gift of the stock, but it is a positive direction to pay the interest and dividends of the stock to the survivors or survivor of them. Now the words "survivors or survivor" clearly there must be used in their natural sense, that is, such one of them (or both of them, if both survive) as shall be living at the death of William. That must be the meaning of it; because, if it meant "the others of them" why say the survivors or survivor? He knew how many of them there were. They were his own children. He speaks of them *nominatim*, "his eldest son, his daughter, and his youngest son." He says, if either of them die without issue, then pay the dividends of the stock to the survivors or survivor. If both the others survive that one, then pay the dividends of that stock to those two in equal shares. If only one of them survive the party dying, then pay the dividends of the stock to that one; shewing as clearly as possible an intention of conferring a personal benefit on the survivors or survivor. I am of opinion, therefore, that the limitation over upon the death of any one of them without issue is to be construed, in that case, on the death of any one of them without leaving issue living at the death.

Now, having got thus far, and considering I have to interpret this will in the same manner as if the testator had used these words, that is, on the death of any one of them without issue living at his death, then pay the dividends to the survivors or survivor, the question is then, how does that apply to the gift to the children in the first instance? Now, it is perfectly true that where a legacy is given to one for life, and after his death to his children, with a gift over if he dies without issue, and there is nothing to restrict the "dying without issue" to "issue living at his death," it has been held that the words "without issue" shall be limited to the class of issue before mentioned, that is, the children to whom first the gift is made, as if the words had been "such issue," and that has been argued at the bar, and very tersely and

correctly stated to be the rule. But what is the ground on which the Court has felt it could be justified in using that violence to the words and interpolating the word "such"? Why, the ground is this, that as there is nothing to restrict "dying without issue" to "dying without leaving issue living at the death," the limitation would be void if it were not that the interpretation which is applied to it means the particular issue before mentioned. This is commonly called the referential construction; that is, you refer the language of the "gift over" to the language of the "prior gift" in order to limit the general term "issue" to the particular class of issue mentioned in the prior gift. But as I have said, the reason is because the gift would be void if you did not do that. But where the "dying without issue" is in express terms, or, as in this case, by the proper construction of the will, limited to "dying without leaving issue living at the death," no reason then exists for interpolating the word "such."

The limitation over is valid without the necessity of resorting to that expedient of doing violence to the words; and I am not aware of any case in which a legacy being given to one for life, and after his death to his children with a limitation over, that if he dies without leaving issue living at the time of his death, the word "issue" has been restricted to the children, as if the words "such issue" had been used by the testator. I believe no case can be found in which a construction of that sort has been placed in the way I have mentioned; indeed such a construction might entirely defeat the testator's intention, for if the words were construed to mean "if he dies without leaving such issue," that is, without leaving children, only see what might happen; he might have a single child who might attain twenty-one, marry and leave a family, and die before the tenant for life, and then that child and the issue of that child would be entirely excluded, because the tenant for life would have died without such issue, that is, without children living at his death.

Upon the whole case, therefore, I am of opinion that the child of William Westwood takes a vested interest in the 3,000*l.* stock, but that that vested interest was liable to be divested by the death of Wil-

liam Westwood without leaving issue living at his death, and that event having happened the gift over takes effect.

I may observe with reference to the construction that I have put upon this will, that, in the first place, it does no violence to any one single clause in the will. It does not interpolate a single word into the will. It does not reject or refuse to any single word used by the testator, its primary, and natural, and legitimate signification, without any distortion whatever; and, moreover, the interpretation I have given to this will would not only in the event that has happened, but in any event that can happen, be far more in accordance with what one may fairly suppose to be the general intention of the testator than any other construction that can be put upon the words. These reasons alone, I apprehend, would be sufficient to recommend this construction to the consideration of the Court: but I think it is not only so recommended, but that it is entirely in accordance with the cases that have been decided. Therefore, the declaration will be to the effect, that the two children who survived, that is, the eldest son and daughter of the testator, are entitled to the stock which now represents the legacy in question; that is to say, on the two petitions I will make one order granting the prayer of the petition of the surviving son and daughter of the testator. The costs to be paid out of the fund.

Mr. Malins said the case of *Billingsley v. Wills* had been fully considered by the Vice Chancellor Knight Bruce, in a case recently decided by him, but not reported, and upon this point his Honour had come to the same conclusion as that now expressed by the Court.

KINDERSLEY, V.C.—That is very satisfactory. I am satisfied that *Billingsley v. Wills* and *Batford v. Kebbell* have been repeatedly misapprehended. I have cited them myself when at the bar a hundred times, and I think I may say, never with success.

Note.—This case was subsequently set down for hearing upon appeal before the Lords Justices, but an arrangement was come to between the parties which prevented the necessity of its being argued.

L.C. }
1851. } ROWLAND v. WITHERDEN.
Feb. 11, 12; }
Nov. 8. }

Practice—*Examination of a Co-defendant*
—6 & 7 Vict. c. 85—*Breach of Trust.*

Trustees sold out trust stock and handed over the proceeds to J, their solicitor, for re-investment, who misapplied the money. In a suit by the cestuis que trust against the trustees and J, the plaintiffs examined J. as a witness, and the bill was dismissed as against him:—Held, that a decree might still be had against the trustees, on the ground that J. was not a necessary party to the suit in order to obtain the relief prayed against the trustees.

Quære—whether the effect of the statute 6 & 7 Vict. c. 85. is to enable the Court to make a decree against a defendant in equity who has been examined as a witness in the cause.

This was a suit instituted by Mrs. Rowland and her children, who were interested in certain stock, against the defendants Witherden and Morpeth, who were the trustees of that stock, and against Jenner, who had acted as the solicitor of the trustees in the sale of a portion of the stock; and the bill prayed that the stock so sold out might be replaced, &c., and for an account of what was due for interest to Mrs. Rowland; and that new trustees might be appointed in the place of the defendants Witherden & Morpeth. In 1838, so much of the stock was sold out by the trustees as produced the sum of 1,115*l.*; and the trustees paid over that sum to Jenner, for the purpose of its being invested on a mortgage. Jenner misapplied the money, but the trustees had no notice of that fact until April 1847. Jenner was in the habit of making remittances to Mrs. Rowland, as for the interest of the money received by him, and which he professed to have invested. In April 1847, the default of Jenner in making the usual remittance induced inquiries, which led to the discovery that Jenner had misappropriated the money; and, thereupon the trustees endeavoured to obtain security from Jenner; but before they were able to effect this, in February 1848, the present bill

was filed against the trustees and Jenner. In the course of the proceedings in the suit, the defendant Jenner was examined as a witness; and the cause coming on to be heard before the Vice Chancellor of England, the bill was dismissed against all the defendants, on the ground that the plaintiffs having examined Jenner as a witness they could have no relief against him; and, consequently, none against the other defendants. The plaintiffs appealed against that decision.

Mr. Bethell and *Mr. Jervis*, in support of the appeal.—Jenner was not a necessary party to the suit in order to obtain relief against the trustees—*Ling v. Colman* (1); and this distinguishes the present case from *Champion v. Champion* (2), upon which the judgment of the Vice Chancellor proceeded.

Mr. Stuart and *Mr. G. W. Collins*, for the defendants.—The bill prays that the accounts may be taken against the three defendants, treating them as all primarily liable. The decision in *Champion v. Champion* will, therefore, govern this case.

They cited also—

Goold v. O'Keeffe, Beat. 356.

Bacon v. Bacon, 5 Ves. 331.

Munch v. Cockerell, 5 Myl. & Cr. 178; s. c. 9 Law J. Rep. (n.s.) Chanc. 153.

Graham v. Stewart, 3 Deas. & And. 607.

The Attorney General v. Dew, 3 De Gex & S. 488.

Fussell v. Elwin, 7 Hare, 29; s. c. 18 Law J. Rep. (n.s.) Chanc. 349.

Bernal v. the Marquis of Donegal, 3 Dow, 133.

Mr. Bethell replied.

Nov. 8. — The LORD CHANCELLOR (TRURO).—It has been decided in several cases that the plaintiff by examining a defendant as a witness as to matters in which that defendant is interested, has precluded himself from a decree against him—*Goold v. O'Keeffe*, *Nightingale v. Dodd* (3), *Champion v. Champion*, *Bernal*

v. the Marquis of Donegal, *Thompson v. Harrison* (4), and *The Attorney General v. Dew*; and the reason of this is, as stated by Lord Hardwicke, in *Nightingale v. Dodd*, that if an adverse decree were allowed to be taken against a defendant who had been examined, it would be a great temptation to defendants to forswear themselves. The effect of the statute 6 & 7 Vict. c. 85, which provides that a defendant in equity may be examined by the plaintiff, and that such defendant's interest shall not be a just exception to his testimony, has not been observed upon. It remains to be considered, as justly remarked by Mr. Headlam, in his edition of *Daniell's Chancery Practice*, p. 851, whether not only will the evidence be admissible, but whether a decree also may not be had against such defendant notwithstanding he has been so examined. It appears strange that the effect of this statute was not adverted to in the case of *The Attorney General v. Dew*. I should not feel justified in deciding so important a point upon the construction of that statute without argument. If the plaintiffs are desirous of having this point argued before me, I will give them an opportunity of having that done; otherwise I shall dismiss the bill as against Jenner.

The question remains, whether the dismissing the bill against Jenner on this ground will have the effect of inducing a dismissal of the bill against the other defendants, the trustees. A plaintiff, by examining a defendant, precludes himself from obtaining a decree against that defendant, and also against the other defendants, if, in order to the relief which the plaintiff is entitled to against those defendants, a decree against the defendant who has been examined is necessary. I am of opinion, however, in this case, that in order to obtain relief against the trustees, a decree against Jenner was not necessary. I do not feel called upon in this case to give any opinion upon the general effect of the 32nd Order of the 26th of August 1841 (5), nor upon the propriety of the cases prior to that Order—*ex. gr.*, a suit against some only of a larger number of trustees charged

(1) 10 Beav. 370.

(2) 15 Sim. 101.

(3) 2 Amb. 583.

(4) 1 Cox, 344.

(5) Ord. Can. 174; 10 Law J. Rep. (n.s.) Chanc. 413.

with a breach of trust ; but I consider that the trustees in this case might have been sued without their agent being joined with them as a defendant. The plaintiffs were entitled to sue Jenner also, but they were equally at liberty to sue the trustees alone. The power of joining constructive trustees is rather a privilege than a duty ; and it might be productive of great hardship if *cestuis que trust* were compelled to sue the agents of the trustees as well as the trustees themselves. If the plaintiffs, then, were entitled to a decree against the trustees if they had sued them alone, I do not think the fact of their having elected to make Jenner a party ought to prevent them from taking a decree against the trustees alone.

Upon the merits I entertain no doubt. The trustees, instead of seeing themselves to the investment of the trust fund, delegated that duty to their solicitor ; the money was misapplied ; these facts, being admitted, establish the liability of the trustees. The trustees were bound to satisfy themselves in some other way than by the assertion of Jenner that the money was duly invested on mortgage. They never required a sight of the mortgage-deed ; but allowed their solicitor to receive the money, relying upon his integrity ; so that, in place of a mortgage of real estate, the *cestuis que trust* had to depend upon nothing more than the personal security of Jenner. The plaintiffs are entitled to a decree against the trustees in accordance with the prayer of the bill ; and also against Jenner, if they can succeed in shewing that by the effect of the statute 6 & 7 Vict. c. 85. they are entitled to a decree against him, notwithstanding they have examined him as a witness.

M.R. }
 Feb. 27, 28 ; }
 March 1, 2, 3 ; } HOGHTON v. HOGHTON.
 April 16, 24. }

Parent and Child—Settlement—Undue Influence—Evidence—Legal Estate—Re-vesting.

This Court will not support the re-settlement of family estates between a father and son

when the father obtains extensive advantages to the prejudice of the son and his family, in the absence of unequivocal proof that the whole of the facts were known to the son, that the purposes of the deed were fully explained to him, and the operation of the respective provisions known to him.

Where, therefore, a re-settlement of family estates was made, in which the son, as tenant in tail, joined and re-settled the estates to such uses as the father and son should jointly appoint, with remainder to the father for life, with remainder to the son for life, with remainder to the first and other sons of the son successively in tail male, with remainder to such uses as the father surviving should appoint, with remainder to the second and other sons of the father for life, with remainder to their first and other sons in tail male, with remainder to any other son of the father in tail male, with remainder to the daughters of the father successively for life, with remainder to the first and other sons of each daughter successively in tail male, with remainder to the father in fee ; and power was reserved to the father to appoint by deed or will a jointure of 2,000l. per annum for any future wife, to be reduced to 1,500l. per annum in case he appointed 500l. per annum in favour of any stranger, it was set aside.

But various arrangements for the relief of the family estates from existing burthens, though the father obtained some advantages, were supported, on the ground that the effect of the transactions were known to the son and even acquiesced in by him.

Affidavits under the 13 & 14 Vict. c. 35. not admitted to prove that the son's marriage was entered into on the faith of that re-settlement.

The facts of this case and also the arguments and the evidence are sufficiently stated in the judgment, and also many of the cases which were cited.

Mr. Bethell, Mr. Follett and Mr. Bazalgette, for the plaintiff, Henry Hoghton.

Powys v. Mansfield, 6 Sim. 687 ; s. c. 5 Law J. Rep. (N.S.) Chanc. 297 ; 3 Myl. & Cr. 359 ; 7 Law J. Rep. (N.S.) Chanc. 9.

Cholmondeley v. Clinton, 2 Mer. 173, 362.

Tweddell v. Tweddell, Turn. & R. 1.
Toulmin v. Steere, 3 Mer. 210, 223.

Mr. James, for the plaintiff's brother, Richard Hoghton.

Mr. Gordon, for John Ireland Blackburn and Mary his wife, and the issue of the marriage; Dora Hoghton, and Robert Townley Parker, the surviving trustee of the deed of the 17th of May 1820.

Mr. J. W. Stephen, for the plaintiff's brother Charles Hoghton.

Mr. Roupell, *Mr. Rolt* and *Mr. Torriano*, for Sir Henry Bold Hoghton, and John Wilson Patten and Robert Mosley Master, trustees of the deed of the 7th of July 1843.

Winnington v. Foley, 1 P. Wms. 536.

Johnson v. Legard, 3 Madd. 283.

Clifton v. Cockburn, 3 Myl. & K. 76.

Mr. Palmer and *Mr. C. Hall*, for Cecil Hoghton.

Jodrell v. Jodrell, 14 Beav. 397.

Savage v. Carroll, 1 Ball & Beat. 548.

Mitford, Plead. 327, 4th ed.

Price v. Carver, 3 Myl. & Cr. 157.

Roddy v. Williams, 3 Jo. & Lat. 17.

Phelps v. Prothero, 2 De Gex & S. 274; s. c. 17 Law J. Rep. (N.S.) Chanc. 404.

Kelsall v. Kelsall, 2 Myl. & K. 409.

Bulkley v. Wilford, 2 Cl. & F. 102.

Glascott v. Lang, 8 Sim. 358; s. c. 3 Myl. & Cr. 451.

Bellamy v. Sabine, 2 Phill. 425, 439; s. c. 17 Law J. Rep. (N.S.) Chanc. 105.

Prodger v. Langham, 1 Sid. 133; s. c. 1 Keb. 486.

Mr. Bethell, in reply.

1 Story Eq. Jur. 248.

Walsh v. Trevanion, 16 Sim. 178.

April 16.—THE MASTER OF THE ROLLS.
 —This is a suit, instituted by a son against his father, to obtain a declaration from the Court that a deed executed by both, re-settling the paternal estate, is void, and ought to be set aside. The questions raised and to be determined are of great importance, not so much on account of the very large amount of property depending upon them, as on account of the principles involved in them, which affect deeply the

relations between parent and child, and go to the root of all their dealings with each other, whether they relate to a sale from one to the other, or to a re-settlement, or any other arrangement of the family property. Before I state what I conceive to be the principles of law applicable to cases of this description, and before I state the effect of the evidence relating to the transaction in question, a minute examination of which is essential for the purpose of arriving at a safe conclusion upon the questions at issue, it will be necessary to state shortly the principal facts of the case.

In the year 1820, Sir Henry Bold Hoghton, the defendant, and father of the plaintiff, married Dorothea Bold, the mother of the plaintiff. At the time of the marriage, the Bold estates, by a will which took effect several years before, were, in the event of the death of a sister of Dorothea without issue (which event took place), limited to Dorothea for life, with remainder to her first and other sons in tail male, with remainders over. It was not, therefore, possible upon this marriage to make any change in the limitation of this property, or to charge it in any manner for the benefit of the husband or younger children of the marriage. The Hoghton estates, on the other hand, were settled upon the marriage in the following manner: upon the death of Sir Francis to Sir Henry Bold Hoghton for life, with remainder to the first and other sons of the marriage in tail male; and the settlement contained a power to Sir Henry to grant to any wife he might have a rent-charge of 2,000*l.* per annum from and out of the rents of the estate, and also to charge it with 30,000*l.* in favour of the younger children. The Bold estate is said to have been of the value of 13,000*l.* and the Hoghton estate 8,000*l.* per annum, or thereabouts. The Bold estate was wholly unencumbered. The Hoghton estate was subject to mortgages amounting to 81,400*l.*, subject to which the limitations of the marriage settlement took effect.

There were five children of the marriage, who were all parties to the suit; the plaintiff being the eldest son, and born on the 2nd of August 1821. Lady Hoghton, the plaintiff's mother, died on the 7th of December 1840; and thereupon the plain-

tiff became tenant in tail in possession of the Bold estate. The change produced immediately by this event upon the income of Sir Henry was of the most serious character. For many years prior to the decease of Lady Hoghton, he had been in the receipt of a clear income of about 18,000*l.* per annum, and upon the decease of Lady Hoghton that income was reduced to about 5,000*l.* per annum. The plaintiff seems to have felt with pain the change thus produced upon his father's income, and to have been desirous to alleviate the consequences of it. He appointed his father his guardian, and as far as a person under the disability of infancy could sanction, he appears to have sanctioned an arrangement by which, as soon as he attained the age of twenty-one years, a portion of the Bold estate, called the North Meols estate, was to be sold to a gentleman of the name of Scarisbrick, and the proceeds were to be applied, as far as necessary, in the discharge of the incumbrances which affected the Hoghton estate. On the 2nd of August 1842 the son attained the age of twenty-one years; and on the following day he executed a deed disentailing the Bold estates and vesting them in himself in fee simple. Upon the same day he executed a bond, securing to his father an annual sum of 2,500*l.* for his life, with a proviso that this annuity was to cease as soon as the son should pay off the mortgages which then affected the Hoghton estate. Upon the 5th of the same month he executed a will, giving considerable benefits to his father; and in the month of October following he ratified, or rather entered into, the contract with Mr. Scarisbrick for the sale of the North Meols estate. In all this the plaintiff acted under the advice and with the assistance of Mr. Rowson, who had hitherto always acted as the solicitor to the family in all matters relating to the Bold estate, and no other solicitor was employed.

In February 1843 the contract for the sale of the North Meols estate was completed. The purchase-money consisted of 133,000*l.* 81,400*l.*, part of it, was applied in payment of the mortgages affecting the Hoghton estate, and the remainder of this sum of money was paid to the plaintiff. Up to this period, subject to a question

respecting a sum of 1,600*l.*, part of the 81,400*l.* (which I shall notice hereafter), no part of the transactions which occurred between the plaintiff and his father is complained of. The voluntary engagement which the son entered into he considered to be due to his father's altered condition. He understood and intended to do all that had been thereby effected; and, except as explanatory of what subsequently occurred, and for the purpose of affording assistance in the due appreciation of the evidence, these events do not affect the decision of the question at issue.

The first question raised is this: the deeds executed by the mortgagees upon the redemption of their mortgages, on the 2nd of February 1843, were so drawn as to produce a merger of these charges. This is complained of by the plaintiff, who insists that, according to the terms of the arrangement he entered into, those mortgages ought to have been assigned in such a manner as to keep them up as valid and subsisting charges against the inheritance of the Hoghton estate, although coupled with a proviso that during the lifetime of Sir Henry no interest should be paid or should accrue in respect thereof.

This, however, is a subordinate question, and but slightly connected with the other and main question in the cause, which is this: on the 7th of July 1843, a deed of re-settlement of the Hoghton estate was executed by the plaintiff and Sir Henry. The plaintiff contends that his execution of this deed was obtained by misrepresentation, and that he was in ignorance of the material provisions contained in it, and that he executed it upon the faith and in the belief that it was an instrument necessary to the final completion of the transactions relating to the payment off of the mortgages, and that it did not alter or affect his interest in the Hoghton estate.

At the time this deed was executed, the plaintiff was tenant in tail male in remainder of the Hoghton estate, subject to his father's life interest therein. The deed is to this effect:—It contains, in the first place, a joint power of appointment vested in Sir Henry and the plaintiff: subject to this, the estate is limited to Sir Henry for life, then to the plaintiff for life, then to the first and other sons of the plaintiff in

tail male, then to such uses as the father, if he survived the plaintiff, should by deed or will appoint; after which the estate is limited to the second and third sons of Sir Henry for life, with remainder to their first and other sons in tail male; after which the estate is limited to any other sons which Sir Henry might have in tail male; and subject to these limitations, the estates are limited to the defendant, Mrs. Mary Blackburn, the eldest daughter of Sir Henry, for life, with remainder to her first and other sons in tail male; after which the estate is limited to the defendant Miss Dora Hoghton, for her life, with remainder to her first and other sons in tail male, with remainder to all other daughters of Sir Henry in succession in tail male, with an ultimate remainder to Sir Henry in fee simple. The deed also contains a power to Sir Henry to appoint, by deed or will, a rent-charge by way of jointure to any future wife he might marry, to the extent of 2,000*l.* per annum, with a power to appoint 500*l.* per annum in favour of any stranger; in which case the jointuring sum was to be limited to 1,500*l.* per annum.

This is the instrument of which the plaintiff complains. He contends that, inasmuch as it is a voluntary instrument, not executed for a valuable consideration, it can be supported, if at all, only upon the ground of its being a proper and reasonable re-settlement of the family estates, knowingly and willingly entered into by him; and he submits that in this view it cannot be supported, both because the instrument itself is of an unreasonable character, and because he executed it without professional advice and assistance, and without receiving proper explanations of its nature and contents, of which he asserts that he was wholly ignorant. And he further asserts that he did so execute it under the influence and in obedience to the wishes of his father. The defendant, Sir Henry, on the other hand, contests all these positions. He submits that the instrument is not an improper or unreasonable re-settlement of the family property. He contends that the plaintiff was well aware of the contents of the deed; that it was fully and properly explained to him (the plaintiff), and that no influence or

controul was resorted to to procure its execution; and the defendant insists that according to the principles on which courts of equity act in cases of re-settlement of family property and of family arrangements generally, this deed must be supported, and if it be not, transactions in families of daily occurrence and to a great extent will be disturbed, the consequences of which will be disastrous and extensive.

Before proceeding further, I think it desirable to state what I apprehend to be the principles which affect transactions of this nature, entered into between members of the same family; in doing so, it is important in the first place to point out the distinction between two classes of cases which afford contradictory analogies, and both of which have been relied on as applicable to the questions before me.

The first class is that where one person, by undue influence, obtains advantage from another. The other class of cases is that where arrangements are entered into for the peace of families and the security of family property. I am of opinion, as I held in the case of *Cooke v. Lamotte* (1), that wherever one person obtains, by voluntary donation, a large pecuniary benefit from another, the burthen of proving that the transaction is righteous—to use the words of Lord Eldon in *Gibson v. Jeyes* (2)—falls on the person taking the benefit. But this proof is given if it be shewn that the donor knew and fully understood what it was that he was doing. If, however, besides obtaining the benefit of this voluntary gift from the donor, the donor and donee were so situated towards each other that undue influence might have been exercised by the donee over the donor, then a new consideration is added, and the question is not—to use the words of Lord Eldon in *Huguenin v. Baseley* (3)—whether the donor knew what he was doing, but how the intention was produced; and though the donor was well aware of what he did, yet if his disposition to do it was produced by undue influence, the transaction would be set aside.

In many cases the Court, from the relations existing between the parties to the

(1) *Ante*, p. 371.

(2) 6 Ves. 266.

(3) 14 Ibid. 273.

transaction, infers the probability of such undue influence having been exerted. These are the cases of guardian and ward, solicitor and client, spiritual adviser and pupil, medical adviser and patient, and the like; and in such cases the Court watches the whole transaction with great jealousy, not merely for the purpose of ascertaining that the person likely to be so influenced fully understood the act he was performing, but also for the purpose of ascertaining that his consent to perform that act was not obtained by reason of the influence possessed by the person receiving the benefit: not that the influence itself, flowing from such relations, is either blamed or discountenanced by the Court; on the contrary, the due exercise of it is considered advantageous and useful to society. But this Court holds as an inseparable condition that this influence must be exerted for the benefit of the person subject to it, and not for the advantage of the person possessing it. The case of parent and child is undoubtedly one of this class of cases. It is prominently put forward in all the cases illustrating this principle. "Every body"—says Lord Langdale, in *Archer v. Hudson* (4)—"will affirm in this court, that if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete emancipation, without any benefit moving to the child, the presumption is, that an undue influence has been exercised to procure that liability on the part of the child, and that it is the business and the duty of the party, who endeavours to maintain such a transaction, to shew, that that presumption is adequately rebutted; and" he adds, "that it may be adequately rebutted is perfectly clear."

In *Carpenter v. Heriot* (5) Lord Northington lays down the same principle; *Young v. Peachy* (6), *Heron v. Heron* (7) and *Hawes v. Wyatt* (8), are other instances of the same principle.

On the other hand, in transactions be-

tween members of the same family, even though that relation subsists between them from whence the Court will infer the moral certainty of the existence of considerable influence and the probability of its having been exercised, yet if the transaction be one that tends to the peace or security of the family, to the avoiding of family disputes and litigation, or to the preservation of the family property, the principles by which such transactions must be tried are not those applicable to dealings between strangers, but such as on the most comprehensive experience have been found to be most for the interest of families.

In *Frank v. Frank* (9), a man seised in tail of freehold lands, with remainder to his elder brother, and of copyhold lands in fee, devised the freeholds to a younger brother, and the copyholds to the elder brother. The brothers agreed in writing that the lands should be enjoyed according to the will, on the supposition that the testator had suffered a recovery, which was not the case, nor was there any surrender of the copyholds to the uses of the will. The Court enforced the specific performance of the agreement, and restrained the elder brother from bringing ejectment against the younger.

In *Beckley v. Newland* (10), two persons having married sisters, presumptive co-heiresses of the testator, agreed to divide whatever should be given to either of them. The testator died, leaving nearly the whole of his property to one of them, and a decree was made for the specific performance of the articles of agreement.

In *Stapilton v. Stapilton* (11) the father was tenant of lands for ninety-nine years, with remainder to his first and other sons in tail, remainder to himself in fee. He had two sons, Henry and Philip. The father and his two sons agreed by a deed to suffer a recovery of lands, to enure to such uses as that the estate, subject to the father's life, would be divided between Henry and Philip. Henry, the elder son, was illegitimate, so that the second son received no consideration for the destruction of the estate tail. Nevertheless, the Court decreed specific performance of the

(4) 7 Beav. 551; a. c. 13 Law J. Rep. (n.s.) Chanc. 380.

(5) 1 Eden, 338.

(6) 2 Atk. 254.

(7) Ibid. 161.

(8) 3 Bro. C.C. 156.

(9) 1 Chanc. Ca. 84.

(10) 2 P. Wms. 182.

(11) 1 Atk. 2, 10.

agreement, and Lord Hardwicke said,—“It was to save the honour of the father and his family, and was a reasonable agreement, and therefore if it is possible for a court of equity to decree a performance of it, it ought to be done.”

In *Pullen v. Ready* (12) a question arose, whether a forfeiture of a devise had not occurred, in consequence of the marriage of one of the three daughters of the devisee for life without the consent required by the will of the testator. Subsequently, an agreement was entered into by the three daughters and their husbands, whereby it was agreed that, on the death of the devisee for life, the property of the testator should be equally divided between them. The Court held that the articles ought to be specifically performed, and Lord Hardwicke said,—“There is nothing more mischievous than for this Court to decree a forfeiture after an agreement, in which, if there is any mistake, it was the mistake of all the parties to the articles, and no one of them is more under an imposition than the other.”

The cases are, if possible, still stronger when they relate to a re-settlement of the family property—*Cory v. Cory* (13) was unusually so. The question there was, whether an agreement should be set aside, one of the parties being drunk at the time it was entered into; but the Lord Chancellor refused to do so, and he principally laid weight on the circumstance “that this was an agreement to settle disputes in a family, and a reasonable agreement. So, if a son tenant in tail and a father tenant for life agree on something for the benefit of the younger children, and afterward the son complains of paternal authority being exerted, though there might be something of that sort, yet, if the agreement be reasonable, the Court will not set it aside.” And this case is cited by Lord Eldon with approbation for the general principles contained in it which I have stated.

Kinchant v. Kinchant (14) resembles the case before me in many of its circumstances. There, a mother, a tenant for life, with remainder to her eldest son in tail male, died, and the son, at the instance

of the father, re-settled the estate on himself for life, with remainder to his first and other sons in tail male, and in default of issue, to his father for life, with remainder to his brothers and sisters in succession for life, with successive remainders to their first and other sons in tail male. Mr. Justice Gould supported the transaction, notwithstanding the benefits which the father derived from that new deed. The defendant gave evidence to shew that the plaintiff fully understood the transaction. The plaintiff went into no evidence, but rested his case on the presumption of undue influence and the contents of the deed which gave a life interest to the father. Notwithstanding which, Mr. Justice Gould supported the transaction, and in the course of his judgment stated his opinion, that if the father had exercised some personal authority it would not have been sufficient to set aside the transaction. Notwithstanding this opinion, Mr. Justice Gould recommended a compromise, by payment of 200*l.* to the son, which being rejected by him, the bill was dismissed, but the suit was finally compromised to avoid an appeal. This case has not, however, met with complete approbation. Mr. Richards (afterwards Chief Baron Richards), in arguing the case of *Brown v. Carter* (15), stated that Lord Kenyon, then at the bar, was much dissatisfied with Mr. Justice Gould's decision; and Lord Alvanley, in giving judgment in that case, observes,—“It is said the decision in *Kinchant v. Kinchant* did not meet the approbation of a noble Lord, and I confess I think with some reason.”

The facts of the case of *Tendril v. Smith* (16) are not stated in the report, but Lord Hardwicke states these propositions broadly. “Where a father and a child of full age come to an agreement to alter the limitations under a settlement, there is no ground of equity for a child to set aside such agreement, under pretence of being drawn into it by the power and authority of a father, and to restore the ancient limitations again. In a case in Lord Cowper's time, where a father prevailed upon a son, who was tenant in tail under a settlement,

(12) 2 Atk. 587.

(13) 1 Ves. sen. 19.

(14) 1 Bro. C.C. 369.

(15) 5 Ves. 862.

(16) 2 Atk. 85.

to take an estate for life only, with remainder to his first and every other son, his Lordship would not set it aside upon the suggestion of the father's having an undue influence over him." It does not appear, however, in this case, that after the settlement thus made at the suggestion and under the influence of the father, the father acquired any advantage. In the later editions of *Atkyns*, the entry in the Registrar's book is set forth, but it does not appear from thence whether the father derived any advantage from the limitations of the estates as re-settled.

The case of *Wycherley v. Wycherley* (17) is of great importance, as it draws very clearly a distinction which, I think, renders all the cases reconcilable, except that, perhaps, of *Kinchant v. Kinchant*. The father was tenant for life, with remainder to the son in tail male. The father and son suffered a recovery, by which the property was re-settled to the father for life, remainder to the son in fee, who executed a memorandum of agreement to secure 500*l.* to each of his sisters within six months after the death of his father. Lord Northington enforced the specific performance of that contract, although there was evidence that the father had exerted influence to compel the son to enter into it; but in doing so Lord Northington expressly states that if the father had gained any advantage by the limitations, he would not have allowed the transaction to stand. "In cases," says Lord Northington, "where a father unduly compels a child by paternal influence, the Court ought to be strictly rigid in guarding against it. But here I see nothing which the father might not properly do (though more properly, to be sure, if he had done it with less warmth of temper); for what reason could there be for the father to come in and give the son a marketable interest, and the son do nothing for himself or the family? It was said, nothing was intended but to vest the remainder in fee in this family. I thought in the opening that such had been the case; if so, and the remainder in fee had been limited to the father, I should have thought it a case of parental influence. But here,

the father has only an estate for life, with a remainder in fee to the son."

The rule to be drawn from these cases, which is perfectly consistent with the rule which prevails in the first class of cases to which I have referred, may, I think, be thus stated: that if the settlement of the property be one in which the father acquires no benefit not already possessed by him, and if the settlement be a reasonable and proper one, the Court will support it, even though it may appear that some influence was exerted by him to induce the son to execute it. But it must also appear that there was no suppression of what is true or suggestion of what is false. The observations of Lord Eldon in *Gordon v. Gordon* (18), as applied to cases of family agreements, will also apply to this case of re-settlement. "Although," says he, "the parties may have greatly misunderstood their situation and mistaken their rights, a court of equity will not disturb the quiet which is the consequence of that agreement;" but where there is a mistake, though innocent, and the other party is accessory to it, this Court will interfere. The point of these observations is, that one party is as accessory to the mistake as the other. Where, however, the son confers on the parent, by the transaction, some advantage which he did not previously possess, then the principle which prevails in the first class of cases interposes, and then the Court (to use the words of Lord Langdale) "though it does not interfere to prevent an act even of bounty between parent and child, will take care that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of controul."

In order to apply these principles to the facts of the present case, it is necessary first to consider the nature of the settlement itself, and next the circumstances attending its preparation and execution. By the limitations of the settlement, Sir Henry Bold Hoghton obtains an advantage which he did not possess before its execution. If the plaintiff should die without issue male in the lifetime of Sir Henry, a general power of appointment, by deed or will, is

(17) 2 Eden, 175, 180.

(18) 3 Swanst. 400, 463.

vested in Sir Henry. In addition to this, he acquires an absolute power of appropriating 500*l.* from and out of the rents of the estate in favour of any stranger: and the ultimate limitation of the estate is in favour of Sir Henry, in fee, to the exclusion of any female heirs of the plaintiff. All these are direct benefits to the father, proceeding from the son, and which consequently raise that presumption of undue influence spoken of in *Archer v. Hudson*, which it is necessary should be adequately rebutted. In all cases of this description, the reasonableness of the settlement has been considered by various Judges to be shewn both by the preservation of the property in the family and by the conferring of benefits upon the younger children. If, in the absence of this settlement, the plaintiff had died without issue male in the lifetime of Sir Henry, the estate would have gone to the next son of Sir Henry, who might have survived him, in tail male. Under this settlement, if the plaintiff should so die, Sir Henry might sell or devise the estate to a stranger. The power of appointment of the 500*l.* per annum in favour of a stranger, is a power to take so much out of the estate belonging to the family. The ultimate limitation of the fee to Sir Henry would, in the event of the previous estates failing, enable him to dispose of the estates to strangers, although the plaintiff might have left a family of daughters and grandsons. In all these three specified cases the limitations of the settlement are prejudicial to the preservation of the estate in the family, and confer no benefits on the younger children. These defects in the settlement are not, in my opinion, counterbalanced by the circumstance that the estates tail in the sons of Sir Henry are cut down to life estates, and that they are consequently thereby prevented from disposing of the property away from the family, as they might now do if the property should vest in any one of them as tenants in tail in possession.

I am of opinion, therefore, that this deed was not a reasonable or proper mode of settling the property, if the interest of the family alone is to be regarded. It is not such a settlement as this Court would approve, if an estate had been devised to

trustees in trust to be settled in such a manner as might be most for the benefit of the Hoghton family, and a suit had been instituted for the purpose of carrying that trust into execution.

I now proceed to examine the circumstances connected with the preparation and execution of this deed. In the first place, the evidence establishes conclusively that, so far as the preparation of this instrument is concerned, the plaintiff had no professional advice or assistance. Previously to the plaintiff attaining twenty-one, Mr. Rowson had been employed as the solicitor of the family in all matters relating to the Bold estates, and Messrs. Pilkington & Walker in the like capacity in all matters relating to the Hoghton estates. Before the plaintiff had attained twenty-one Mr. Pilkington had retired, and Mr. Walker alone carried on business, and was employed as the family solicitor in all matters relating to the Hoghton estate. As this matter related to that estate, Mr. Walker was employed to prepare the settlement in question, but no other solicitor was consulted, or saw the draft of the deed before its execution. The instructions for its preparation, as appears from the bill of costs of Mr. Walker, were given in December 1842 by Sir Henry. The draft was settled by Mr. Coulson in February 1843. It is true that Mr. Walker, in his answer to the eighth interrogatory, says that he considered that he laid the draft before Mr. Coulson on behalf of all parties to the indenture, but Mr. Walker had not seen or communicated with the plaintiff on the subject of it. The draft, when settled, was sent to Sir Henry. The correspondence respecting it, and the alterations to be made in it, were suggested by Sir Henry alone. No copy was sent by Mr. Walker to the plaintiff. He never saw the plaintiff on the subject of the preparation of it. Indeed, he had seen the plaintiff but once in his whole life before the deed was executed. He never made any other communication to the plaintiff. He says it is true he considered and believed that it had been seen by the plaintiff, but "I cannot say" (he continues) "that I considered that it had been examined and approved by me, as that circumstance did not occur to my

consideration." It is alleged by Sir Henry in his answer that the draft was shewn to the plaintiff, but there is no evidence that it was, or that it was in any manner submitted to him, or to any person on his behalf, for his examination and consideration. It is obvious on the whole evidence that the first time the plaintiff ever saw anything in writing relative to this settlement of the Hoghton estates was on the day and at the time of the execution of the settlement, which was on the 7th of July 1843.

The circumstances relative to the execution of the deed are these. The deed was executed in the bed-room of Sir Henry, who had had an alarming attack of illness, and was still suffering from the consequences of it. The persons present were Sir Henry, who was then in bed, the plaintiff, Mr. Walker the solicitor who prepared the deed, and Mr. Pilkington the former partner of Mr. Walker, which last two gentlemen were the attesting witnesses. The first person admitted into the bed-room with Sir Henry was Mr. Walker. How long they were together does not appear. After this the plaintiff came into the room to them. How long they remained together does not appear, and finally Mr. Pilkington was admitted. The evidence relative to what then took place is most material. The only evidence on this subject is that of Mr. Pilkington in answer to the twelfth interrogatory, and that of Mr. Walker in answer to the ninth, tenth and twelfth interrogatories. When Mr. Pilkington was introduced into the room, Sir Henry, the plaintiff and Mr. Walker were there. Whatever the explanation of the deed which was given to the plaintiff was, it took place before Mr. Pilkington was introduced. "It was not" (he says) "read over to the plaintiff in my presence." That is distinctly the effect of the deposition. The evidence of Mr. Walker is to this effect. It is necessary I should read this. "I depose as follows:—The indenture, dated the 7th of July 1843, marked with the letter (A) in its present form was (as I considered and had every reason to believe) in conformity in all respects with the then wishes and intentions of the plaintiff, by reason that I read over the operative part of such deed to him before he executed

the same, and he made no sort of objection to the deed. The indenture was executed by the plaintiff on the 7th of July 1843, being the day of the date thereof. He had attained his age of twenty-one years about ten or eleven months, as I understood from the defendant, Sir Henry Bold Hoghton, when he executed the indenture." The two next depositions I shall read when I come to the place where I comment upon them.

The most attentive consideration which I have been able to give this evidence raises grave doubts in my mind, whether the objectionable points of the settlement in question were ever brought to the attention of the plaintiff. The first deposition I have read states that the operative parts were read over to the plaintiff. If this were all the evidence, it would, in my opinion, be insufficient to shew that the plaintiff understood what he was doing. In the first place, it is not stated what the witness considered to be the operative parts of the deed, and whether he includes in this description the power of appointment to the father. From his answer to the twelfth interrogatory it would appear that he makes a distinction between the operative parts of the deed and the powers of appointment contained in it. In the next place the mere reading over of a deed would not be sufficient to satisfy me that the person hearing it read understood it. To an unprofessional person, however intelligent, and exerting the closest attention, the long and involved sentences and technical language of a deed render it frequently unintelligible, and even the Court not unfrequently misapprehends the limitations and effect of the provisions of a deed read in open court, when the greatest pains are exerted to read it clearly and intelligibly; in my opinion, unless accompanied with an explanation of the contents of a deed, the reading over to an unprofessional person is more likely to confound than to enlighten him.

To the tenth interrogatory Mr. Walker says:—"I had not had much opportunity of judging of the plaintiff's acquaintance with matters of business, having only seen him on one occasion previously to the occasion of his executing the deed of the 7th of July 1843; but from what I saw of him

he appeared to me to be as much acquainted with matters of business as is usual at his time of life. When he executed the indenture dated the 7th of July 1843, I should say he was capable of judging of what he was doing; he appeared an intelligent young man, and I had no reason to think the contrary. I did so far explain to the plaintiff the effect of the indenture before he executed it, as that I explained shortly the joint power of appointment by him and his father over the estate, and that in default of such joint appointment the estate was held by his father for life, and then to him, the plaintiff, and his children. The plaintiff did appear to understand the effect of such indenture, as he made no objection to it. The plaintiff did before and in the month of February 1843, execute a deed of release." That latter part is not material. In his answer to the tenth interrogatory, Mr. Walker states that he explained to the plaintiff the power of appointment by himself and his father over the estate, and that in default of such joint appointment the estate was held by his father for life, and then to him, the plaintiff, and his children. This general explanation, as far as it goes, is inaccurate. The limitations after his father's life estate are not to the plaintiff and his children, but to the plaintiff and his sons, and the plaintiff's daughters are excluded. If this be a correct statement of the explanation given, it was, though no doubt unintentionally, a misrepresentation of the effect of the deed in a material point affecting both the interest of the plaintiff and that of the Hoghton family.

The answer to the twelfth interrogatory is that where Mr. Walker goes into great detail upon the subject. "The said indenture of the 7th of July 1843 was executed by the defendant Sir Henry Bold Hoghton and the plaintiff Henry Hoghton, and who are therein named and described as two of the parties thereto, in my presence. I am an attesting witness to the signing, sealing and delivery of the indenture by Sir H. B. Hoghton and the plaintiff H. Hoghton. The indenture was so executed as aforesaid on the 7th of July 1843, the day of the date thereof, and it was so executed by Sir H. B. Hoghton and the plaintiff in the bed-room of the defendant, Sir H. B. Hoghton, at his house situate in Park

Crescent, Regent's Park, in the county of Middlesex; and the reason of its being so executed in that room was, that the said defendant Sir H. B. Hoghton was in ill health and then in bed, he having, as I understood, then lately broken a blood-vessel; and it was requested that the deed should be executed in his bed-room. The plaintiff did come into the bed-room, and he then found in the bed-room the defendant Sir H. B. Hoghton and myself, and afterwards W. O. Pilkington came into the bed-room. I did before the execution of the indenture read aloud parts of the indenture, viz. the whole of the operative parts thereof, the power to jointure and power to grant annuities given to Sir H. B. Hoghton and the plaintiff, and I also shortly explained the effect of the various other clauses as they occurred, omitting the recitals and the schedules altogether, as they were long, and I thought it unnecessary and that the reading thereof was mere matter of form. The parts of such indenture which I so read were, as I considered, the material parts thereof. The plaintiff was present during the whole time of my reading over the aforesaid parts of the said indenture as I did so read over. Sir H. B. Hoghton asked some questions with reference to the meaning or effect of the indenture, whilst the same was being read as aforesaid in the presence and hearing of the plaintiff, but I do not recollect that any questions were asked by any other person with reference thereto whilst the same was being so read. I did explain to the plaintiff, as before stated, the indenture, and the general purport and effect and operation thereof before he executed the same. The plaintiff did, before he executed the indenture, appear to understand the indenture, or the general purport or effect thereof. I did explain to the plaintiff that it would be necessary for him to go before the proper officer to acknowledge the deed," &c. That is the whole that relates to the execution of the deed. He specifies the parts he read aloud. Those were the operative parts, the power to jointure, and the power to grant annuities given to Sir Henry and to the plaintiff. It is to be observed, that although Mr. Walker specifies the power of appointment, he does not mention the power of appointment given to Sir Henry

if he survived the decease of the plaintiff without issue male. The witness further states, that he shortly explained the effect of the various other clauses as they occurred, and that he explained to the plaintiff as before stated (these are the words of the deposition) "the general purport, effect and operation of the indenture before he executed it." The general effect explained as before stated in the deposition, was erroneous. And this passage, where he states that he shortly explained the effect of the various other clauses as they occurred, is the only part of the evidence that would necessarily include the first two of the three objectionable provisions contained in the deed I have already pointed out, and which provisions ought to have been carefully and accurately explained, and their effect explained to the plaintiff before he should have been permitted to execute the deed. If this had been done I cannot doubt that Mr. Walker would have remembered it, and would have stated it in his evidence and in his deposition, in answer to an interrogatory very carefully framed, to extract an exact statement of what was read and explained, and what was left unread and unexplained in the provisions of the deed. The result is, that this cursory and general explanation stated in this evidence is all that is done to enable a son to understand the full contents and effect of a deed which, so far as the evidence goes, he had never seen before. And even this explanation, imperfect as in my opinion it would be if given anywhere, is given in a bed-room of a sick father, when the ordinary affection of a son would necessarily prompt him strongly to desire that the business should be concluded as speedily as possible, and that no greater trouble or anxiety should be given than was absolutely necessary to a person so closely related to him.

Mr. Walker, in a letter dated five days previously, had expressed his hope that Sir Henry would be so far recovered as to attend to the settlement of the business, which, he very considerably adds, "must not be made tiresome to you;" and a son, who more than a stranger, would fear that his father's health might be impaired by the fatigue occasioned by any considerable prolongation of such a business, would still more apprehend

that his father's health might be seriously injured by the effect likely to be produced by any refusal on the part of the son to execute a deed, or even by the expression of any doubts of its propriety if he had fully understood its contents. The whole of Mr. Walker's evidence satisfies me that he treated this matter as if he considered and believed that the draft of the deed and all its provisions had been the subject of repeated consultations and discussions between Sir Henry and the plaintiff, and that, in fact, the reading of the deed itself was (as he says of the recitals and schedules) mere matter of form. In truth, unless he had so believed, he would, no doubt, have thought it fit not to have allowed the plaintiff to execute the deed without ascertaining that some professional gentleman had, on his behalf, maturely considered the various provisions of it, and ascertained that the plaintiff understood and wished to carry them into effect. The rest of the evidence in the cause, which is principally documentary, does not, in my opinion, alter the view which I have taken of this case. There is evidence to shew that the plaintiff told Mr. Rowson that the Hoghton estates were to be re-settled, but there is none to shew that the plaintiff ever contemplated a re-settlement of this description. It is true that no complaint was made until the month of September 1844, but if I am right in the view I have taken of the explanation given at the time of the execution of the indenture, it was not until then that the plaintiff knew and understood the contents of the deed of the 7th of July 1843. His conduct on that occasion is quite consistent with his case and the evidence in the cause; and in July 1845, his then solicitor, Mr. Rowson, expressly states that the plaintiff will do no act to acknowledge the settlement. In addition, therefore, to this being the case of a re-settlement, where the father gains material advantages, in addition, also, to its being the case of a re-settlement containing some material provisions which are of an unreasonable character, it is, in my opinion, proved that the contents of it were not properly made known to the son, and that he was left without the assistance and information which are indispensable to enable

this Court to sustain such a transaction. The subsequent acts of the parties do not, in my opinion, vary their rights. The delay in filing the bill is explained by the fact that proposals for a compromise were pending; and if the correspondence contained (which, in my opinion, it does not) any admission affecting the plaintiff's rights, I should disregard such admissions made solely with a view to a compromise. I regret that such proposals have failed of success, and that the painful duty of deciding such a case as the present should have been cast upon the Court; but I am, in obedience to that duty, compelled to decide that, according to what I conceive the true principles of equity applied to the facts in evidence before me, this deed of the 7th of July 1843, as between the plaintiff and Sir Henry Bold Hoghton, must be delivered up to be cancelled.

The next question which arises is, that which relates to the defendant, Cecil Hoghton, the offspring of the marriage of the plaintiff with his late wife. Upon this marriage, a settlement was made which provided only for the younger children of the marriage, and it is contended on behalf of the infant defendant, that this was so limited because it was known that the settlement of the 7th of July 1843 provided for the eldest son of the marriage, and that inasmuch as the marriage proceeded on the faith of that settlement being valid, it cannot now be impeached so far as affects the interest taken under it by the eldest son of that marriage. In order to establish this fact affidavits were tendered in evidence under the 13 & 14 Vict. c. 35, and were objected to by the plaintiff on the ground that they are produced in order to prove a matter directly in issue between the plaintiff and the infant defendant. They were, however, read *de bene esse*, but my opinion is that they cannot be received; and even if these affidavits were admissible, they do not shew that the marriage proceeded on the faith of the validity of the settlement of July 1843. The written instructions for the settlement are silent on the subject of any such settlement, nor is any reference made to the landed property of the plaintiff, except that in the commencement of the instructions it is

stated that it is his desire to keep his landed estates free from any settlement or charge, and in the margin are written these words—"N.B. The eldest son will take the family estates," which may apply as much to the Bold estates as to the Hoghton estates. The case of *Brown v. Carter* is cited as an authority on behalf of the infant defendant, and for the purpose of shewing that, in the absence of evidence to the contrary, it is to be presumed that a person entering into the marriage contract communicates the state of his property to the other parties to the contract. But in my opinion this case does not establish that position. It only decides that after a lapse of thirty years, and loss of evidence, everything shall be presumed against the person who has delayed to bring the question before the Court for that period of time. In that case the settlement complained of had been executed by William Gapper in 1768. The limitations of it gave interests to any children he might have, with divers remainders over, and in 1779 he married. In 1799, William Gapper conveyed the property comprised in the settlement in trust for his creditors, who then filed a bill to set aside the deed of 1768. The words at the close of the judgment are conclusive as to this point. "The ground I go upon, without entering into the question how far relief could be given if all the circumstances were brought before the Court recently and during the father's life, is, that after a marriage by which the first and other sons were entitled to legal estates, protected by trustees to preserve contingent remainders, I cannot upon this bill, in the absence of persons who may claim, indeed, before their birth, interfere to have the legal estate taken out of them." This is a principle which pervades all questions of equity, not merely family agreements and settlements, as in this case and the case of *Stockley v. Stockley* (19), but even in the case of direct and positive fraud acquiescence will bar the right to relief. If I were compelled in this case to presume that the plaintiff made a statement of the state of his property, I must presume that he made a true and not a false or fraudulent statement; and if so, he ought then

to have said, and if he be presumed to have said anything, in the absence of direct evidence he must be presumed to have said—"There is a settlement of the Hoghton estates of the 7th of July 1843, under which my eldest son will be tenant in tail; but it is a deed of such a nature that in February last I stated that I would never acknowledge it. Proposals for a compromise are now pending to alter the limitations of that deed, but if they are not brought to a successful termination, it is my intention to seek the assistance of a court of equity to impeach the validity of it." If this were the statement, or the statement which must be presumed to have been made, it would evidently not entitle the infant defendant to any declaration or decree in his favour; and I am of opinion, therefore, that I cannot in this suit make any decree or direct any inquiry, with a view of afterwards making a decree which should afford any relief to the infant defendant Cecil Hoghton. While I say this, I have the satisfaction of considering that the decree I propose to make, which is to direct this deed to be cancelled, will not in the slightest degree affect the right which that infant defendant, or any person on his behalf, may have of filing a bill in this Court to compel the plaintiff to make good any representation made by him on his marriage in favour of any of the issue of that marriage, on the faith of which the marriage took place.

The next part is that relating to the merger of the mortgages in the Hoghton estate which I have already mentioned; and upon this point I have arrived at a conclusion unfavourable to the plaintiff. The plaintiff contends that these mortgages ought to have been kept on foot by assignment to trustees for his benefit, but he admits he did not intend that any interest should be charged during the lifetime of Sir Henry. In this question, Sir Henry has no immediate pecuniary interest; that is, he has none if the deed of the 7th of July 1843 should be held to be void. His only interest is that which he must feel for the continuance and prosperity of his family. But treating this question as one between the plaintiff and the persons who may succeed him in the Hoghton estate, if he should die without

barring the entail, I must look simply at what the arrangement was that the plaintiff made on attaining twenty-one with respect to the discharge of these incumbrances. Whatever that was, the plaintiff admits that he was bound to perform it, and it is contained in and evidenced by the deed of charge of the annuity of 2,500*l.* on the Bold estate. There is nothing to be found in this deed which contains the idea that it was intended to keep these mortgages on foot. The words are, that the annuity is to cease upon the death of Sir Henry, or if the plaintiff, his heirs, executors, administrators and assigns do and shall at any time during the life of Sir Henry pay off, satisfy and discharge the several mortgages. The Bold estate is afterwards declared to remain liable to pay this annuity during the natural life of Sir Henry, or until the discharge of the several incumbrances thereinbefore particularly mentioned. These passages point to an exoneration of the estates, and if the keeping alive of the incumbrances had been contemplated, some provision would have been introduced to that effect, and in order to provide for the non-payment of interest during the life of Sir Henry. It would be absurd for the annuity to Sir Henry to cease when the mortgages were paid off, if Sir Henry was to pay the interest to his son instead of paying it to the original mortgagees. But it was a reasonable and proper provision, and for the benefit of the family generally, that the estate itself should be exonerated by such means, the consequence of which would be, that all the persons who in succession might take the family estate would take it unencumbered and discharged from the mortgages which then fettered it. An arrangement such as in some of the cases I have already referred to, was treated as a reasonable and proper arrangement. This view of the case is confirmed by the will which the plaintiff executed on the 5th of August 1842, two days after the execution of the deed granting the annuity. This distinctly points to the exoneration of the estate, and under the will it would have been impossible to have kept the charges alive. This also appears to have been the view of the case taken by Mr. Rowson. The operative part of one of the deeds of re-

conveyance of the mortgaged estates was, he says, hastily perused by him on behalf of the plaintiff. However hasty that perusal might have been, it would have shewn a professional gentleman as experienced in the matters as Mr. Rowson, that the charge was merged, and that it was not kept on foot; yet he made no complaint or representation to the plaintiff on the subject. He considered, evidently, and I think rightly considered, that this mode of conveyance only carried into effect the arrangement made in the month of August. Neither was this matter complained of by the plaintiff when he first discovered it. The real and substantial ground of complaint has been the frame of the deed of settlement of July 1843, on which I have already expressed my opinion.

The only remaining point in this case is the question relating to the sum of 1,600*l.* This sum formed a portion of the 64,000*l.* advanced by the Bank of England. It was secured upon an estate of which Sir Henry was seised in fee simple, and consequently forming no part of the Hoghton settled estate; and it is contended that this 1,600*l.* ought to be repaid, and that it was not intended that this should be paid off. The bill makes no complaint in this respect; and the fact appears by the answer, which sets out the particulars of the mortgages discharged, and the reconveyance of the estate charged therewith. There is no doubt that this 1,600*l.* is part of the 81,400*l.*, which was the amount of the mortgage money to be paid off; and although the sums are left in blank in the draft of the annuity deed, the original having been destroyed, yet this omission is supplied by the will executed almost contemporaneously with it, and leaves no doubt on this subject that the amount of the mortgages to be paid off was 81,400*l.*, and that if there was any mistake on the subject in not confining it to that amount of mortgages, provided the whole amount was charged on the Hoghton estate, still it was a common mistake on both sides, and that there was no intentional concealment or misrepresentation. I am of opinion, therefore, that upon this part of the case the evidence before me is not sufficient to enable me to say that, having regard to the arrangement entered into in the month of

August 1842, which is not to be disturbed, and to the evidence of what that arrangement was, and the amount to be paid off, this Court ought to decree the repayment of that sum of 1,600*l.*

The result of the conclusion to which I have come on the parts of the case I have already stated, is, that a decree must be made declaring the deed of the 7th of July 1843 to be void, and ordering it to be delivered up to be cancelled; and that the bill must be dismissed so far as it seeks a declaration that the mortgages on the Hoghton estates are subsisting mortgages, and asks that a direction may be given for securing them for the benefit of the plaintiff.

I should be glad, in a case of this description, to be relieved from the necessity of giving any direction against costs.

Mr. Bethell.—On the part of the plaintiff, I am authorized to state that he does not desire any direction on the subject of costs. It will, however, be necessary to make a re-conveyance of the estate. The deed of the 7th of July 1843 passed the legal estate and created legal interests in other parties; and, therefore, although the deed is declared to be void and is directed to be cancelled, it must be accompanied with directions for a reconveyance, so as to revert the legal estate upon the uses and for the purposes existing at the date and execution of the deed of the 7th of July 1843, in order to restore the estate to the uses and interests which were subsisting immediately previous to the date of that deed.

THE MASTER OF THE ROLLS.—I am disposed to think that when by a decree of a competent court a deed is cancelled, that deed cannot be given in evidence, and that none of the estates created by it are in existence.

Mr. Bethell.—The deed of the 7th of July 1843 operated as a disentailing deed and is enrolled; and I do not see how we can render void the operation of that enrolment.

THE MASTER OF THE ROLLS.—I should have thought the enrolment would be vacated on the deed being cancelled. I

have certainly known many cases of deeds being delivered up to be cancelled without considering it necessary to have any deed for re-conveying the estate.

Mr. Bethell.—No difficulty arises unless the deed operated as a conveyance of the legal estate. If it did, the difficulty which suggests itself is, in what manner it is to be got back.

THE MASTER OF THE ROLLS.—My impression is, that if the deed is cancelled and the enrolment vacated, the legal estate remains as it was before the deed was executed.

April 24.—This case was again mentioned, when the decree taken was, to dismiss so much of the bill against Sir H. B. Hoghton as sought relief in respect of the mortgages. Declare that the deed of the 7th of July 1843 was void, and that it ought to be delivered up to be cancelled: and direct that it should be cancelled and the enrolment vacated.

M.R. }
1851. } **ASHFORD v. HAINES.**
Nov. 22. }

Will—Interest—Vesting—Survivors or Survivor—Share and Share alike—Construction.

A testator gave a leasehold house, which was let for twenty-eight years, to trustees to pay the rents and profits for the benefit of his five children, whom he named, or the survivors or survivor of them, in equal shares and proportions, share and share alike:—Held, that the words "survivors or survivor" referred to the death of any of them in his lifetime; that the words "share and share alike" referred to those children who should survive him, and created a tenancy in common, and that the interests were vested in the children on the death of the testator.

William Parrington, by his will, dated the 21st of October 1830, gave and bequeathed to Henry Haines the elder, and Henry Haines the younger, and Benjamin Croot, his leasehold public house, called

the Rose, with the appurtenances, then in the occupation of Thomas Cribb, under a lease for a term of twenty-eight years, from Christmas 1825, at the rent of 65*l.*, upon trust, after paying the ground rent, to pay or apply the clear residue of the rents and profits unto or for the benefit of his five children; the defendant, Catherine Hobson, the wife of William Hobson, but then the wife of Richard Bignell, deceased, William Parrington, since deceased, Henrietta, afterwards the wife of George Bignell, since deceased, the defendant, George Parrington, and the defendants, Emily Abigail, the wife of William Anstead, or the survivors or survivor of them, in equal shares and proportions, share and share alike; and after the expiration of the term of twenty-eight years to sell the said leasehold premises, and divide the monies to arise from such sale as in the said will mentioned.

The testator died on the 10th of June 1831, leaving all his children surviving. On the 11th of October 1839, William Parrington, in consideration of 45*l.*, assigned his fifth part or share in the rent of 65*l.*, bequeathed by the will of the testator, and all benefit of survivorship or accruer that might thereafter happen to arise to him under the bequest, to Richard Henry Ashford, his executors, administrators and assigns, for all the residue then to come of the term of twenty-eight years.

On the 24th of October 1839, George Bignell and Henrietta his wife, in consideration of 40*l.*, assigned all that fifth part or share of Henrietta Bignell in the rent of 65*l.*, bequeathed by the will of the testator, and all benefit of survivorship and accruer that might thereafter happen or arise to her, or to George Bignell in her right, under the bequest contained in the testator's will, to R. H. Ashford, his executors, administrators and assigns, for the residue of the term of twenty-eight years.

Henrietta Bignell died in 1840, and William Parrington died in July 1846.

The trustees, from the date of the assignments, paid the shares of William Parrington and Henrietta Bignell in the clear rents and profits of the premises to R. H. Ashford, but since their respective deaths the trustees refused to pay such shares or either of them to R. H. Ashford,

on the ground that the interests of the children who had died ceased by their respective deaths, and had become payable among the surviving children.

On the part of the plaintiff, R. H. Ashford, it was submitted that the words "survivors or survivor" applied to the survivors or survivor at the time of the death of the testator, and that each of the testator's five children took an absolute vested interest in one-fifth part of the clear rents and profits of the premises during the whole of the term of twenty-eight years. It was, therefore, asked that the rights and interests of the children in the rents and profits might be declared, and that the plaintiff might be declared entitled to the respective shares of W. Parrington and Henrietta Bignell which had been assigned to him.

Mr. H. Stevens, for the plaintiff, insisted that the will created a tenancy in common in the children living at the death of the testator, and that it was not intended to create any subsequent right of survivorship.

Mr. Freeling, for the surviving children of the testator.—The words "survivors or survivor" created a joint tenancy in the rents and profits—*Wordsworth v. Wood* (1). It was, in effect, the gift of an annuity to a class, to be enjoyed by them jointly as they from time to time existed, and not an absolute gift of a specific part to those who might be living when the testator died.

Mr. Martineau, for the trustees.

THE MASTER OF THE ROLLS.—The gift was made to the children or the survivor or survivor of them. This evidently only had reference to the death of any of them in his lifetime. The words "share and share alike" referred to those children who should survive him, and they were sufficient to give an absolute interest, and to create a tenancy in common. In my opinion, therefore, the interests were vested in the children living at the death of the testator as tenants in common.

(1) 4 Myl. & Cr. 641; s. c. 9 Law J. Rep. (N.S.) Chanc. 29.

L.C.
1851.
April 28, 29; } EMMET v. DEWHIRST.
Nov. 10.

Composition Deed — Condition — Parol Agreement—Statute of Frauds.

W. D., by deed, agreed to guarantee a composition of 8s. in the pound to all the creditors of his brother who should execute a release of their debts by a day named. *A*, a creditor, failed to execute the release by the day named, in consequence, as he alleged, of a parol agreement between him and the agent of *W. D.* that he should be allowed to postpone his execution until certain legal proceedings had against third parties, the result of which might influence the amount of his debt. Upon bill by *A*, for specific performance, *W. D.*, by his answer, denied any such agreement:—*Held*, that the condition not being performed, the agreement never took effect as to *A*; and, further, that the agreement being to pay the debt of a third person was within the 4th section of the Statute of Frauds, and any alteration in its terms must be evidenced by writing; and no fraud being alleged, a parol agreement, if proved, would not be binding.

The bill in this case was filed by *W. Emmet*, the public officer of the Halifax Joint-Stock Banking Company, to compel specific performance of an agreement of the 12th of February 1848, by which the defendant, *W. Dewhirst*, agreed with *Thomas Turney*, on behalf of himself and all other the creditors of *Isaac Dewhirst*, (a brother of *W. Dewhirst*), in consideration of a fiat against *Isaac Dewhirst* being abandoned, and of all the creditors forthwith accepting the composition, to guarantee a composition of 8s. in the pound to all the creditors of *Isaac Dewhirst* whose debts exceeded 20l., who should, before the 1st of March then next, sign a good and effectual release to the said *Isaac Dewhirst* of their respective claims on him. The condition was not performed by the plaintiff in point of fact; and the question raised was, whether the circumstances under which the condition was not performed (which circumstances are fully set out in the judgment,) entitled the plaintiff to equitable relief.

The debt claimed by the banking company against Isaac Dewhirst was 1,970*l.* 1*s.* 6*d.*, and this debt included two bills of exchange for 300*l.* and 195*l.*, accepted by one Carter, and by the banking company discounted for Isaac Dewhirst. An accountant of the name of Hervey was employed by the solicitor of Dewhirst, to deliver the promissory notes for the instalments to the creditors, and to obtain from them the execution of the release. Hervey waited on Mr. Caw, the agent of the bank, with the promissory notes for the composition, calculated upon the whole amount of the debt, 1,970*l.* 1*s.* 6*d.*, but refused to hand them over unless the bank would deliver up Carter's bills. The bank had instituted legal proceedings upon the bills against Carter, and Mr. Caw declined to execute the release until the result of those proceedings should be known; but, otherwise, he expressed the concurrence of the bank in the arrangement. Subsequently Carter absconded to America before the bank could recover upon the bills. The bank then applied to W. Dewhirst to be let in for the benefit of the composition deed; and upon his refusal, the bank, in February 1849, filed the present bill to compel specific performance of the agreement.

The cause came on for hearing before Knight Bruce, V.C., who made an order referring it to the Master to inquire and state whether J. Hervey, in the pleadings mentioned, acted as agent for the defendant W. Dewhirst, in the matters in the pleadings mentioned, or any and what part thereof; and whether the defendant adopted or agreed to the said acts of the said J. Hervey, or any, and what part thereof; and whether the defendant did, under any and what circumstances, agree that the bank should, as a creditor of I. Dewhirst, in the pleadings mentioned, be admitted to participate in the benefits of the agreement of the 12th of February 1848, upon any and what other terms and conditions than therein mentioned.

The defendant appealed against the whole decree.

Mr. James Russell and *Mr. Follett*, for the plaintiff.—The bank acquiesced in the composition deed, and acted under it, and are bound by it, though they may not

have signed it; and, therefore, are entitled to the benefit of it in this court—*Spottiswoode v. Stockdale* (1), *Tomlinson v. Gill* (2), and *Gregory v. Williams* (3). The bank would have signed the release but for the refusal of the agent to hand over the promissory notes, except upon the condition of the bank delivering up the securities of third parties, a condition unauthorized by the agreement—*Thomas v. Courtney* (4), *Cullingworth v. Loyd* (5), and *Lee v. Lockhart* (6). The evidence proves an agreement between the parties to wait for the result of the proceedings against Carter; and the plaintiff, therefore, is now entitled to be let in to the benefit of the composition deed.

Mr. Swanston and *Mr. Willcock*, for the defendant.—The authority of *Spottiswoode v. Stockdale* is questioned in *Collins v. Reece* (7); but the bank did not assent to the composition, except upon the terms of retaining their securities, which they were not entitled to do—*Bush v. Shipman* (8). Nothing but a performance of the condition could give a creditor a right to the benefit of the composition, except it was clearly proved that the defendant consented to accept something else in lieu of the performance of the condition. This is not shewn, and whatever was said on the subject by the agent was clearly without the authority of the defendant.

The following cases were also cited.

Reay v. White, 1 Cr. & M. 748; s. c.

2 Law J. Rep. (N.S.) Exch. 229.

Bradley v. Gregory, 2 Camp. 383.

Cranley v. Hillary, 2 M. & S. 120.

Oughton v. Trotter, 2 Nev. & M. 71;

s. c. 2 Law J. Rep. (N.S.) K.B. 185.

Nov. 10. — The LORD CHANCELLOR (TRURO).—No fraud is imputed on either

(1) G. Cooper, 102.

(2) 1 Amb. 330.

(3) 3 Mer. 582.

(4) 1 B. & Ald. 1.

(5) 2 Beav. 385; s. c. 9 Law J. Rep. (N.S.) Chanc. 218.

(6) 3 Myl. & Cr. 302.

(7) 1 Coll. 675.

(8) 14 Sim. 239; s. c. 15 Law J. Rep. (N.S.) Chanc. 356.

side; certainly none is imputed to the defendant W. Dewhirst. The condition appears not to have been performed in consequence of a natural misapprehension by the parties of their respective rights. Hervey, acting for the defendant, required the bank to give up Carter's bills, considering that if the debt due to the bank was to be satisfied by the promissory notes and a release was to be signed, all securities were to be given up; but in this he was mistaken, for as the agreement made no provision for the giving up of securities, the bank would be entitled to retain them. The consequence of the misapprehension on both sides was, that the settlement was postponed; and the question arises, whether there be any relief in equity with reference to the old agreement, or whether any new agreement was made under the circumstances.

In considering whether any new agreement was made, it is material to ascertain Hervey's authority. The bill alleges that it was agreed, by and between Hervey and Caw, that Hervey should hold the promissory notes for the amount of the composition of the debt to the bank and also the deed of release, until it was seen what the result of the proceedings against Carter would be; that it was expressly stated by Caw, and that it was the fact, that the banking company fully agreed to and acquiesced in the agreement for the composition, and that they were willing and ready and intended most fully to act on the same; that they also fully agreed to and acquiesced in the deed of release, and held themselves bound by all the terms and provisions thereof, and that they were ready to execute the same whenever the result of their proceedings against Carter was ascertained. The bill further alleges that the banking company, under the circumstances and for the reasons therein mentioned, did not execute the deed of release, and that Hervey did not hand over to the banking company the promissory notes; that Hervey thereupon left the bank and forthwith proceeded to hand over to the other creditors of Isaac Dewhirst the promissory notes for securing to them the instalments of the composition payable upon their respective debts, and to procure the execution by them of the deed of

release; that Hervey expressly informed the other creditors that the banking company had not executed the deed of release, but that they acquiesced in and agreed to the terms thereof, and were parties to the composition, and that all the other creditors thereupon accepted the composition and executed the deed of release. The bill also alleges that W. Dewhirst was in communication with Hervey while Hervey was completing the arrangement, and was informed by Hervey of what had passed with Caw, and that W. Dewhirst fully acquiesced in the arrangement.

The answer states that, in consequence of the proceedings of the plaintiff, the defendant's solicitor applied to Hervey for information as to what took place between him and the banking company, and that he was informed by Hervey that he called at the bank and saw Caw, and told him that he had called with Isaac Dewhirst's composition deed and promissory notes, and wished him to execute the deed and give up Carter's acceptances upon his handing to Caw the promissory notes signed by the defendant, but that Caw said that he would not give up Carter's acceptances until the bank saw what could be got from Carter's estate, and that, although a consenting party with the other creditors, he thought he had better delay signing the deed until he saw what could be got; and that Hervey stated that he believed that Caw also said that he would not sign the release without the consent of Isaac Dewhirst's guarantees to the bank for his general balance of account; and except as thereby appeared, the answer states that the defendant could not set forth as to his knowledge, information, remembrance or belief whether it was or not, or whether or not in consequence of the circumstances in the bill alleged, agreed by and between Hervey and Caw (save that if any such agreement was made it was without any authority given by the defendant, and was not binding on the defendant), that Hervey should hold the promissory notes for the amount of the composition of the debt of the banking company, or whether or not also the deed of release, until it was seen what the result of the proceedings against Carter would be.

Caw and Hervey have both been examined as witnesses; and Caw states that he

believes that Hervey called at the bank on the 18th of February 1848, and stated that he had come with the deed of release to be executed by the creditors, and with the promissory notes for the instalments of the composition upon the debt of the banking company; the composition was upon the whole of the banking company's debt, including the amount of Carter's bills. Caw says, "he asked me to give up Carter's bills to him: I said, that I could not do so, as the banking company were endeavouring to recover on the bills (the real amount of the banking company's debt depended upon whether anything could be recovered on the bills); he said he could not hand over the promissory notes for the instalments, unless the banking company gave up Carter's bills to him; I said I could not execute the release without receiving the promissory notes for the instalments, but that the banking company consented to the arrangement, and would execute the release when they had ascertained whether anything could be recovered from Carter or not; he asked if he might give his personal assurance to the other creditors that the banking company would execute the deed, and that they agreed to the composition, and I said he most decidedly might do so; it was agreed between us that he should hold the promissory notes, and also the deed of release for the Bank until we had seen the result of the proceedings against Carter."

The witness Hervey states, that it was understood that the parties should give up any bills or acceptances before receiving their promissory notes for payment of the instalments. "My instructions were to receive Carter's bills held by the Bank before giving to them the promissory notes for the instalments. I was instructed by Mr. James Stansfield, who was Isaac Dewhirst's solicitor, to prepare the necessary promissory notes for the completion of the agreement, and to get such agreement completed; I had specified instructions from Mr. Stansfield not to give the promissory notes till the creditors had delivered up any bills they might hold. I called at the Bank a few days afterwards, and saw Mr. Caw; my object in calling upon Mr. Caw was to inform him that W. Dewhirst had renewed the security, and to get him

to sign the release or composition deed, and deliver up all bills, or give an indemnity in the form supplied to me by Mr. Stansfield, and, upon that being done, to give him the promissory notes; he consented to the composition, but declined to give up Carter's bills. The amount secured by the promissory notes to the banking company was the amount of the instalments on their whole debt, without deducting the amount of Carter's bills. According to my previous instructions, I was to get in all bills before paying the composition; and, therefore, if I had got Carter's bills delivered up to me by the banking company, the amount of the notes to them would not have been altered. I took away with me the deed of release and the promissory notes because I did not receive Carter's bills; I held the promissory notes until the latter end of September following, as I understood, for the purpose of paying them to the bank upon their delivering up Carter's bills." On cross-examination he says,— "I cannot recollect that I had received any authority from W. Dewhirst to make any arrangement with the banking company, or with Mr. Caw, in relation to Carter's bills, or as to deferring the delivery of such notes and the execution of the release until such result should be known; I certainly had not authority in writing."

On the part of the plaintiff no evidence is given to shew that Hervey had any authority to make a new agreement; and the result seems to be that Hervey's authority is not proved. It may, however, be worth while to consider what would have been the legal conclusion from what took place, supposing that evidence had been given to shew that Hervey had authority to make a new arrangement. This agreement is within the 4th section of the Statute of Frauds (29 Car. 2. c. 3.) It is, "a special promise to answer for the debt of another person;" it is not a promise upon a good consideration to take the debt exclusively upon himself. It professes, in terms, to be a case of guarantee; the composition notes were to be the joint notes of Isaac Dewhirst, the principal debtor, and of the defendant William Dewhirst, as his guarantee or surety. The agreement is clearly within the 4th section of the Statute of Frauds, and must be in writing; and any alteration of it must also

be in writing—*Goss v. Lord Nugent* (9), *Stowell v. Robinson* (10), and *Marshall v. Lynn* (11). The last of these cases refers to *Stead v. Dawber* (12), overruling *Cuff v. Penn* (13). Whether, therefore, what passed between Hervey and Caw could or could not be contended to be a variation of the old agreement, or as the formation of a new agreement, it ought to be evidenced by some writing; and it is clear that no such writing exists; and the important difference between the evidence of Hervey and Caw shews the wisdom and benefit of the rule.

If, then, the defendant be discharged from the performance of the original contract by reason of the non-performance of the condition, can he in the absence of fraud be charged upon a new parol agreement? It is an agreement to pay the debt of another; and it is an agreement with a condition annexed to it, which condition has not been performed; or, rather, as I before remarked, it is not a contract with the bank unless the release on their part was executed before the 1st of March. The release was not executed on the part of the bank before the 1st of March; the contract, therefore, never took effect, so far as the bank was concerned; and, in the absence of fraud, the authorities are distinct and decisive that no new parol agreement can be substituted. It is clear, that at law such an agreement as this, namely, to pay the debt of another person, cannot be made and cannot be varied by parol; and in this court, unless there be fraud, the same rule prevails; and there is not here even a suggestion of fraud. It is, therefore, immaterial whether any, and, if any, what parol agreement was entered into.

Has, then, anything occurred to preclude the defendant from taking the benefit of the statute? He insists in his answer that he is not bound by the contract, because the release was not signed, and he

denies that he gave any authority on his part to make a contract, or that in point of fact any contract was made. There is no admission in the answer of any agreement to dispense with the condition, or to extend the time for performing it. If there had been such an admission, the Court might have enforced its performance; but there is not any such admission. The agreement, if any, must be proved; it cannot be proved by parol evidence, and the case affords no other; it cannot, therefore, be proved at all.

Such being the case, I think it unnecessary to make any reference to the Master; and to that extent the decree must be varied. I entirely concur with the Vice Chancellor, that the plaintiff is not entitled to any relief under the original agreement. The bill, therefore, must be dismissed, with costs.

PARKER, V.C. }
1851. }
Dec. 4, 5. }

OSTELL v. LEPAGE.

Pleading—Pending Suit in a Foreign or Colonial Court.

Bill by A. against B. The bill stated that A. and B. carried on business in partnership at Calcutta and in England, and that A. had commenced a suit against B. in Calcutta, but that, from B. having left the East Indies and come to reside in England, the suit could not properly be prosecuted. The bill prayed the usual partnership accounts. To this bill B. put in a plea that a decree had been made by the Supreme Court at Calcutta, in the suit mentioned in the bill, whereby it was referred to the Master to take an account of the partnership transactions between A. and B, and that the inquiries were still pending. The plea was overruled.

A pending suit in a foreign or colonial court between A. and B. cannot be pleaded in bar to relief sought in a suit in Chancery in England between the same parties relative to the same matters.

The bill in this case was filed by Mrs. Ostell against Mr. Lepage. The bill stated that Thomas Ostell, the plaintiff's husband, had carried on business as a bookseller in England and at Calcutta, and had taken

(9) 5 B. & Ad. 58; s.c. 2 Law J. Rep. (N.S.) K.B. 127.

(10) 3 Bing. N.C. 928; s.c. 6 Law J. Rep. (N.S.) C.P. 326.

(11) 6 Mee. & W. 109; s.c. 9 Law J. Rep. (N.S.) Exch. 126.

(12) 2 P. & D. 447; s.c. 9 Law J. Rep. (N.S.) Q.B. 101.

(13) 1 M. & S. 21.

Lepage into partnership in the Calcutta business in 1840; that in November 1841 Mr. Ostell had died; that Mrs. Ostell was his administratrix; that in December 1842 Mrs. Ostell and Lepage had agreed to carry on the business in partnership, one of the terms being that a sum was to be carried from the old partnership to the account of the estate of Mr. Ostell; and that the business had been carried on for some time, but that no accounts had ever been rendered by Lepage.

The bill then stated that a bill had been filed against Lepage at Calcutta by Mr. Molloy, as the administrator *de bonis non* of Ostell, and as the attorney of Mrs. Ostell; that Lepage had put in an answer to the bill, and that, directly after the answer had been filed, he had left Calcutta for England, where he had ever since resided; that a decree had been taken *pro confesso* against him in Calcutta, but that, from his absence, it could not be successfully prosecuted. The bill then prayed an account of the different partnership transactions between Mr. Ostell and Lepage, and Mrs. Ostell and Lepage, and the payment by Lepage of the balance, if any, to be found due from him.

To this bill, except the allegation that, by reason of the defendant's absence from India, Molloy had been unable to prosecute the decree there, and except the interrogatory founded thereon, and so much of the charge and interrogatory to obtain discovery of documents as related to the above excepted matters, the defendant pleaded, that in February 1851 a decree had been made at Calcutta in the suit of *Molloy v. Lepage*, whereby it was referred to the Master to take an account of the different partnership transactions, and that the inquiries were still being prosecuted before the Master, and were depending and undetermined. For answer to the parts of the bill excepted from the plea, the defendant denied that Molloy had been unable to prosecute the decree in India, and insisted that the decree was a complete, binding, and final decree between the plaintiff and the defendant, and could be, and had been, prosecuted, and said that he was ready and willing to give any discovery and produce any documents required, and he denied the possession of documents referring to the

matters thereby answered to, or any of them.

Mr. W. M. James and *Mr. Cotton*, for the plea.

Mr. Russell and *Mr. Bagshawe*, for the bill.

Mr. W. M. James replied.

The following authorities were cited—

Morgan v. —, 1 Atk. 408.

Mitf. Plead. 248.

Devie v. Lord Brownlow, 2 Dick. 611.

Bell v. Read, 3 Atk. 590.

Foster v. Vassall, Ibid. 587.

Lord Dillon v. Alvares, 4 Ves. 357.

Bayley v. Edwards, 3 Swanst. 703.

Wedderburn v. Wedderburn, 4 Myl. & Cr. 596; s. c. 8 Law J. Rep. (n.s.) Chanc. 177.

Hodson v. Ball, 1 Phil. 177; s. c. 12 Law J. Rep. (n.s.) Chanc. 80.

Garcias v. Ricardo, 14 Sim. 265; s. c. 14 Law J. Rep. (n.s.) Chanc. 339.

PARKER, V.C.—I cannot allow this plea. Passing by the question of the form of the plea, I will dispose of the case upon the substance. This is not a plea of a final decree of a foreign court. A final adjudication of a foreign court may be pleaded here in bar to relief for the same matters. This is well established. In the present case there is a plea of a pending suit in India. If both suits were in this country, and related to the same matters, the plea would be valid, and that with good reason. But where there are an action at law and a suit in equity relating to the same matters, the pending action cannot be pleaded to the suit, but the plaintiff must be put to his election between the two. How it is as to a suit in a foreign or a colonial court there is no precedent. The question has arisen in several cases, and in all of them the Court had found reasons for overruling the plea. In *Bayley v. Edwards* Lord Camden entertained a decided objection to the plea. In the present case, the plaintiff sued the defendant in Calcutta, and, pending that suit, the defendant came to England. By this plea it was sought to impose upon the plaintiff, having the defendant here, the difficulties of going on with the suit in

India. These difficulties are very great. The plaintiff can have no direct process of contempt to carry into effect the suit in India. If an injunction were granted in India it would be good for nothing here, unless there were another suit here to enforce it, and it would be the same as to a receiver. In the face of these difficulties the defendant contended that the plaintiff was bound to prosecute the suit in India. Such would be an extremely inconvenient rule, and would amount in many cases to a complete denial of justice. The proper course will be to apply to stay proceedings in one or other of the suits, and the Court will have no difficulty in putting the plaintiff under terms. The plea must be overruled, with costs.

PARKER, V.C. }
March 4. } LOCK v. LOMAS.

Trustee—Power to give Receipts.

A testator devised real estate to A. and B, their executors, administrators and assigns, for the term of 500 years, upon trust to raise by sale or mortgage the sum of 2,400l., and directed them to put out the same on Government or real securities, and call in and replace out the same from time to time, and to pay the income to C. for life, and after her death to pay the principal to such persons as C. should appoint by will, and in default of appointment to C.'s children. The will did not contain a power for the trustees to give receipts. A. and B. mortgaged the estate to C. for 2,400l., and C. assigned the mortgage to D. :—Held, that a power for A. and B. to give receipts for this sum might be implied, and that D. was entitled to the mortgaged premises as against the persons claiming under the trusts of the testator's will.

In this case, if C. had paid the money to A. and B. he would not have been bound to see to the application of it; and if the mortgage deed to C. was regular on the face of it, D. would not have been affected by any breach of trust in which A, B. and C. might have been implicated.

Isaac Wheeldon, by his will, dated the 18th of April 1816, devised the residue of his real estates to T. Lomas and W. Wood,

their executors, administrators and assigns, for the term of 500 years from the day of his death, upon the trusts thereafter mentioned, with remainder to J. Wheeldon for life, with remainder to his first and other sons in tail, with remainders over.

The trusts of the term were, that the trustees should by sale, demise, or mortgage of all or any part of the hereditaments comprised in the said term, for all or any part of the said term, or by other lawful ways and means, levy and raise (over and above the costs, charges and expenses of levying the same) the sum of 2,400l., and, when so raised, upon further trust that they should put and place out the same at interest upon Government or real security or securities, and call in and replace out the same from time to time as they should think proper, and should pay the interest, dividends and proceeds thereof as the same should become due unto Sarah Benton (the daughter of the testator) for her life, and should, after her decease, call in the said principal sum of 2,400l., and pay and apply the same unto and among such person or persons as the said Sarah Benton should by will appoint, and, in default thereof, unto and amongst the child and children of the said Sarah Benton living at her decease.

There was no power in the will authorizing Lomas and Wood to give receipts for the money so to be raised.

The testator died in 1822.

By an indenture, dated the 22nd of May 1828, in consideration of the sum of 2,400l. (the sum directed to be raised), and also of the sum of 50l. (for expenses) expressed to be paid by J. Williamson to the trustees Lomas and Wood, they, in pursuance of the trusts of the will, conveyed the premises comprised in it to J. Williamson for the term of 500 years, subject to the usual power for redemption. The usual receipt for the sums expressed to be paid was indorsed on the deed, and signed by the trustees.

This mortgage was duly assigned by Williamson to the plaintiffs.

In 1850 Mrs. Benton died.

This was a foreclosure suit, filed by the plaintiffs, against the persons interested in the mortgaged estates. Some of the defendants, by their answer to the bill, disputed the

plaintiffs' right to foreclose, on the ground that the money expressed to have been paid by Williamson to the trustees had not been paid to them, but that it had been paid to persons not entitled to receive it, and had been lost.

Mr. Bacon and Mr. Baggallay, for the plaintiffs.

Mr. Russell, Mr. F. T. White, Mr. Kenyon Parker, Mr. Keene, Mr. Smythe, and Mr. Freeling, for other parties.

PARKER, V.C.—I think that the plaintiffs are entitled to a decree for foreclosure. This is a trust of real estate. The trustees were to raise, by sale or mortgage, 2,400*l.*, and, when raised, they were to hold it on these trusts:—"that they should put and place out the same at interest upon government or real security or securities, and call in and replace out the same from time to time as they should think proper." Then certain trusts are declared of the money. The trustees made a mortgage which, upon the face of the deed, was regular, and signed a receipt for the money. An important question then arises. The plaintiffs have not proved that the trustees received or properly applied the money, and the question is whether this is one of those cases in which a mortgagee is bound to see to the application of the money advanced. No doubt a mere trust to raise money by mortgage or sale does not give the trustees power to give a discharge. It is consistent with the intention of the parties that a trustee should not have authority to receive the money. He may be intended to be a mere machine to raise the money, and to have no power to give receipts. You must look at the nature of the trust to see whether such an authority may be reasonably implied or not. Now what authority was here given to the trustees? They were to invest the money, and, having invested it, they might sell it out again, and re-invest it in other securities, and so on, *toties quoties*. Is it reasonable to suppose that the testator, giving them authority to change the investments from time to time, should deny them authority to receive the money? It seems to me most reasonable to suppose that the trustees

had this authority. In this case, without wishing to introduce exceptions to the general rule, I think that, from the nature of the trust, there was an implied authority for the trustees to receive the money, and then, they having given a receipt, it was not necessary for the mortgagee to shew that the money was invested. No doubt, if there had been a misapplication of the money, it might be shewn that he was a party to the misapplication.

The present plaintiffs are transferees of the mortgage, having the legal estate, and are not affected by the irregularities, if any, committed with respect to the application of the money by the trustees. I think, therefore, that they are entitled to a decree for foreclosure.

PARKER, V.C. }
March 5. } CRABBE v. MOXHAY.

Infant—Appointment of Guardian ad Litem to infant Defendants.

Motion for the appointment of a guardian ad litem for infant defendants without their appearance in court, no reason being given for their not appearing, refused.

This was an application that a guardian *ad litem* might be appointed to six infant defendants without their appearance in court. There was an affidavit that one of the children was unable to attend the court from ill health, but nothing was stated as to the other five.

Mr. Allnutt, for the application, cited Drant v. Vause (1).

PARKER, V.C. said—That the appearance of the infants in court was not an unmeaning form, it being desirable that it should be shewn that they were under the care of the guardian who was to be appointed. He would make the order as to all the infants upon the appearance in court of the five who were in health.

(1) 2 You. & C. C.C. 524; s. c. 12 Law J. Rep. (N.S.) Chanc. 439.

M. R. }
 1851. } FEARON v. DESBRISAY.
 Dec. 5. }

Power—Appointment—Execution.

A lady upon the marriage of her son, H. S. B., settled several sums of stock for the benefit of him and his wife, and the issue of the marriage, and in case there should be one or more child or children, not being an only daughter, then the stocks were to become vested in such child or children respectively, or any one or more exclusively, to be transferred and assigned to him or them respectively, at such age or ages, and in such proportions as H. S. B. should appoint by deed or will, with remainder in default of appointment for the benefit of the children of the marriage. H. S. B., upon the birth of a son, appointed the stocks unto his son C. S. B. absolutely, and declared that the same should be a vested interest in him immediately after the execution of the deed, but he reserved to himself a power of revocation. His wife being again enceinte, H. S. B. executed another deed, revoking the former deed, and appointing the whole of the stocks to his son C. S. B., and all and every other child or children of the marriage who should be living at his death or born afterwards, equally to be divided. H. S. B. was at that time in very ill health, and he died shortly after, and after his death a daughter was born. C. S. B. survived his father about five years, and upon his death letters of administration were taken out by his mother, who had married again, and upon a bill filed by her and her husband to have the trusts of the settlement and the deed of appointment carried into execution:—Held, that the power in the settlement was duly executed, and that the children alone were the objects of the appointment for whom benefits were provided.

Caroline Susannah Browne, being possessed of considerable sums of stock, upon the marriage of her son Henry Sabine Browne with Isabel Harriet Anne Bremer, transferred into the names of Thomas Henry William Desbrisay, Alfred Henry Howard, Richard Morgan and John Perry Crooke, the last two of whom were since dead, the sums of 16,666*l.* 13*s.* 4*d.* con-

sols, 13,333*l.* 6*s.* 8*d.* 3*l.* per cent. reduced annuities, and 1,000*l.* East India stock, upon trust, that they or the survivors or survivor of them, should out of the dividends and annual proceeds of the trust funds, pay to H. S. Browne and his assigns for the joint lives of himself and C. S. Browne the annual sum of 300*l.*, and should also during the joint lives of C. S. Browne and H. S. Browne pay all the residue or surplus of the dividends unto, or permit the same to be received by, C. S. Browne and her assigns for her and their own benefit, and after the decease of C. S. Browne upon trust to pay the whole of the dividends and annual produce of all the trust stocks, funds or securities unto, or authorize or permit the same to be received by, H. S. Browne and his assigns for his and their own benefit, but subject to the payment of an annuity of 300*l.* a year to I. H. A. Bremer or her assigns during her natural life. And as to the trust stocks, funds and securities after the decease of the survivor of them, C. S. Browne and H. S. Browne, upon trust, if there should be any child or children of the said H. S. Browne by his then intended or any future wife, that the trustees or the survivors or survivor of them should transfer and assign the several trust stocks, funds and securities, and every of them, to, between and among such child or children in manner thereafter mentioned, that is to say:—in case there should be issue of Henry Sabine Browne by Isabel Harriet Anne Bremer one or more child or children, not being an only daughter, then that the trust stocks, funds or securities should become vested in such child or children respectively, or any one or more exclusively of the other or others of them respectively, to be transferred or assigned to him or them respectively, at such age or respective ages, in such manner, and in such shares and proportions if more than one, the share and proportion or shares and proportions of any child or children together not being less than the value of the share to which an only daughter of the marriage would become entitled under or by virtue of the said indenture in default of the exercise of this power of appointment, as the said H. S. Browne should by any deed or

deeds, writing or writings, with or without power of revocation, to be duly sealed and delivered by him, or by his last will and testament in writing, to be by him duly executed, direct or appoint, give or bequeath the same. And for want of any such direction, if there should be but one such child, and such only child should be a son, then that the trust stock, funds, or securities should vest in such only son at his age of twenty-one years, and be transferred and assigned to him at such age. But if there should be but one such child only, and such only child should be a daughter, then that such only daughter should be entitled to the sum of 16,666*l.* 13*s.* 4*d.* consols only, part of the said trust funds or securities, which should vest in such only daughter at the age of twenty-one years or her marriage, with consent, &c., which should first happen, and be transferred to her on, or at the same age, day, or time. And if there should be two or more such children, then the trust stock, funds or securities in default of any such appointment should vest in and be transferred or assigned between such children in equal shares and proportions, the share or shares of such of them as should be a son or sons to vest in him or them respectively at his or their age or respective ages of twenty-one years, and the share or shares of such of them as should be a daughter or daughters to vest in her or them respectively at her or their age or respective ages of twenty-one, or day or respective days of marriage, with such consent as aforesaid, which should first happen, and be transferred to him, her or them respectively at the same ages, days, or times respectively. And it was provided that if there should be more than one child for whom portions were intended, and any one or more of them should die before he, she or they should acquire a vested interest in the trust stock, funds or securities, under or by virtue of the power or trusts therein contained, then as well the original share intended to be thereby provided for as the share or shares by virtue of the now stating indenture, surviving or accruing to each and every such child so dying, and so much thereof as should not have been applied for the preferment in the world of any such child or children being a son or

sons, in pursuance of the power therein contained, should vest in, accrue, and belong to the survivor or survivors or other or others of such children, in equal shares if more than one, at such time or times and in manner as is declared of and concerning his, her or their original share or shares in the trust stock, funds and securities.

The deed then directed advances to be made for the maintenance and education of the children of the marriage, and directed the accumulation of the surplus, and if there should be no child of the said Henry Sabine Browne and Isabel Harriet Anne Bremer, who should become absolutely entitled under any of the trusts or powers to the whole of the trust stock, funds or securities, or to the sum of 16,666*l.* 13*s.* 4*d.* consols, part thereof, then the same or such part thereof to which such child should not become so entitled, should go, and be held as to four equal fifth parts or shares thereof in trust for the defendants, Amelia Browne, the wife of W. S. Carter, Anna Maria Browne, the wife of T. Ingle, Harriet Browne and Juliana Browne, in equal shares and proportions as tenants in common, and their respective executors, administrators and assigns; and as to the remaining fifth part or share thereof, upon trust that the defendants T. H. W. Desbrisay, A. H. Howard, R. Morgan, and J. P. Crooke, and the survivors or survivor of them should, during the life of Caroline, the wife of James Power, pay the dividends or annual produce of such last-mentioned fifth part or share unto such person or persons as she should appoint, or into her own hands, for her separate use, with remainder for such person or persons as the said Caroline Power should by will appoint, with remainder to such persons as would have been entitled thereto if she had died intestate and without leaving a husband. The marriage between H. S. Browne and I. H. A. Bremer was solemnized in February 1840.

Caroline Susannah Browne died in March 1842. There were several children of the marriage between H. S. Browne and Isabel Harriet Anne Bremer,—Alice Sabine Browne, who was born in December 1840 and died on the 2nd of December 1841, Compton Sabine Browne, who was born in

May 1842 and died on the 2nd of March 1849, and the defendant Isabel Henrietta Browne, who was born on the 20th of June 1843.

By a deed-poll, dated the 8th of September 1842, H. S. Browne did, in exercise of the power reserved to him by the indenture of settlement, direct and appoint the several sums of 16,666*l.* 13*s.* 4*d.* consols, 13,333*l.* 6*s.* 8*d.* 3*l.* per cent. reduced annuities, and 1,000*l.* East India stock, unto his son C. S. Browne, his executors, administrators and assigns, absolutely, and expressly declared that the several trust funds, subject to his life estate therein, should be a vested interest in the said C. S. Browne immediately after the execution of the deed-poll. Provided, nevertheless, and he did thereby reserve to himself by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be sealed and delivered by him in the presence of, and to be attested by two or more credible witnesses, the power to revoke, annul and make void, wholly or in part, the appointment thereby made.

On the 17th of January 1843, his wife being again *enceinte*, H. S. Browne executed another deed-poll, in pursuance of the power contained in the indenture of the 8th of September 1842, and revoked the appointment made by him in favour of Compton Sabine Browne, and by virtue of and in execution of the power and authority given and reserved to him by the indenture of settlement of the 25th of February 1840, and of every other power and authority, did direct and appoint that all the stocks and funds in the deed-poll bearing date the 8th of September 1842, and the dividends and interest thereof, should, subject and without prejudice, as in the deed-poll expressed, remain, continue and be unto his said son, Compton Sabine Browne, and all and every other the child or children of him the said Henry Sabine Browne by Isabel Harriet Anne, his wife, who should be living at his death or be born in due time after, equally to be divided between them, if more than one, as tenants in common; and if he should leave but one such child, then he did direct and appoint the said stocks and funds and the dividends

and income thereof, but so subject as aforesaid, to such one child, his or her executor or administrator, to be absolutely vested in him or them respectively on the day of the death of him the said Henry Sabine Browne, or as soon after as circumstances would admit; and the said Henry Sabine Browne reserved to himself a power, by any deed, &c. wholly or in part to revoke the appointment thereby made.

Henry Sabine Browne died on the 24th of February 1843, having by his will, dated the 8th of September 1842, given and devised unto his wife, her heirs, executors and administrators, all the estate and effects, both real and personal, of which he was then, or at the time of his death might be seised or possessed, and appointed her his sole executrix thereof, and sole guardian of the persons, estates, and fortunes of his child or children during their respective minorities; and the will was proved by the testator's widow on the 1st of May 1843.

Upon the death of Compton S. Browne, his mother and sister were his sole next-of-kin, and letters of administration were taken out to him by his mother.

In December 1849, the testator's widow intermarried with the plaintiff, Frederick George William Fearon; and by an indenture, dated the 28th of December 1849, she assigned to Frederick Henry Hastings Glasse and Robert Gatty all the shares, right, and interest to which she, as one of the two only next-of-kin of Compton S. Browne, or otherwise howsoever, was then or might be entitled in the several sums of 16,666*l.* 13*s.* 4*d.* consols, 13,333*l.* 6*s.* 8*d.*, 3*l.* per cent. reduced annuities, and 1,000*l.* East India stock, and in all accumulations of dividends and income for the benefit of her intended husband and herself, and the issue of the marriage.

John Perry Crooke died in 1844, and Richard Morgan had also since departed this life.

It was now insisted that, by virtue of the deeds-poll, or one of them, Compton Sabine Browne, deceased, upon the death of Henry Sabine Browne, his father, became entitled to a vested interest in the whole or some part of the Bank annuities and East India stock, and that such right

had become vested in I. H. A. Fearon, as the legal personal representative of C. S. Browne; and this bill was filed by Mr. and Mrs. Fearon against the trustees of the settlement, and also against all the parties who were or who would have become entitled to the funds in remainder, in default of execution of the power, to have the trusts of the indenture of the 25th of February 1840 performed, and to have the necessary accounts taken.

The defendants, William Scott Carter and Amelia, his wife, and the other parties who would have become entitled, by their answers not only questioned the competency of Henry S. Browne to execute the deeds, but also disputed the validity of the execution of the power contained in the settlement of the 25th of February 1840, as it was made to take effect on the birth of the child and immediately on the death of the father, and they claimed a contingent interest in the trust funds in case the defendant, Isabel Henrietta Browne, the daughter of Henry S. Browne, should not live to attain twenty-one, or marry under that age with the requisite consent.

Mr. Roupell and Mr. G. L. Russell, for the plaintiffs, Mr. and Mrs. Fearon.—There could be no doubt upon the construction of the power, and *prima facie* the appointment was good, unless incompetency to execute could be proved, as the son dying a few years after the father could not be made a ground to defeat it. It was supposed that this case fell within those in which the appointment was made for the benefit of the donee.—

Gee v. Gurney, 2 Coll. 486.

Butcher v. Jackson, 14 Sim. 444.

Weir v. Chamley, 1 Irish Ca. N.S. 295.

Lord Hinchinbroke v. Seymour, 1 Bro. C.C. 395.

M'Queen v. Farquhar, 11 Ves. 467, 479.

Aleyn v. Belchier, 1 Eden, 132.

Wheate v. Hall, 17 Ves. 80.

Cowgill v. Lord Oxmantown, 3 You. & C. 369.

Mr. R. Palmer and Mr. Compton, for F. H. H. Glasse and R. Gatty, and the issue of the plaintiffs' marriage.

2 *Sugden on Powers*, 202.

Salmon v. Gibbs, 3 De Gex & Sm. 343; s.c. 18 Law J. Rep. (N.S.) Chanc. 177.

Mr. K. S. Parker, for the trustees of the original settlement.

Mr. Walpole and Mr. E. F. Smith, for the sisters of H. S. Browne and their husbands.—The appointment could not be made to vest so as to defeat the purposes of the settlement creating it. It is, however, to be considered, whether the appointments were framed according to the power, it is for that purpose necessary to bear in mind from whom the powers came, the objects and intention of the settlement, and the circumstances under which it was executed, and it is necessary to bear in mind the fact whether the property came from a person other than the settlor, and then the Court will look to the end and intention of the settlement, and if its object was defeated by the appointment it was void—2 *Sugden on Powers*, p. 302, *Lord Teynham v. Webb* (1) and *Lord Hinchinbroke v. Seymour*. In these cases no distinction was made between portions and the settlement. In this case the settlement was intended to keep the property in the family of Browne, but if the appointments were to be upheld, they would destroy all right by survivorship in the sisters of the donee of the power.

Edgeworth v. Edgeworth, Beat. 328, 334.

Aleyn v. Belchier, 1 Eden, 132; 2 *Sugd. App.* 647.

Wheate v. Hall, 17 Ves. 86.

Read v. Shaw, 2 *Sugd. App.* 649.

Cunynghame v. Thurlow, 1 Russ. & M. 436, n.

Mr. Lloyd and Mr. R. Walpole, for Isabel Henrietta Browne.—The effect consequent upon the execution of the power was to divest the fund from the expressed purpose of the settlement; but from the rules of law, it was not intended to give the husband a power to defeat the settlement.

Mr. Elmsley and Mr. R. R. Dean, for the trustees of the settlements made upon the marriage of W. S. Carter and Amelia his wife, and of the other person, entitled in

(1) 2 Ves. sen. 196.

remainder in case no appointment had been made.

Mr. Rousell did not reply.

The MASTER OF THE ROLLS.—I consider this to be a good execution of the power. But considering the state of health of the donee, and his debility in 1842, while in London; it was proper for the defendants to put the plaintiffs to proof of execution; at the same time, I think the competency of this gentleman is clearly and distinctly proved. That he was a person of very weak health and of no great capacity is, probably, perfectly clear; but that he understood at that time what the instrument was he was executing; that he had formerly executed a deed by which he appointed the whole to the only child he had then, and that he was executing a deed by which he appointed the whole amongst the two children he had then, because he speaks of the child in *ventre sa mère* at the time, is I think clear. Both the medical gentlemen and the solicitor who allowed him to execute the deed at the time were persons of unquestioned respectability, who would not have allowed a person who was not aware of what he was doing to execute a deed at that period of time. If he had not understood it, those persons, who had no interest whatever in the matter, would undoubtedly have interfered to prevent it; and in cases of this description, where there is no direct evidence impugning the sanity or impugning the capacity of the person who executed the deed, it would unsettle all species of instruments if the Court were to direct further inquiry or set a deed aside because it was not proved that the donee was sufficiently competent at the time he executed it. The burthen of proof lies on the other side; here there is evident and distinct proof that he executed the deed. The question whether the power was well executed is of very great importance: and if I had thought it open to a reasonable amount of doubt, I should have taken time to look into the authorities. But the husband has a power of appointing amongst all the children of the marriage, provided there are more than one, I may say all the children of the marriage, in such shares and proportions, the one to the exclusion of the other,

as he shall think fit, and to vest at such times as he thinks fit: that is my general impression of the effect of the power. He does execute the power upon the birth of a son, by giving the whole to that son; and when his wife subsequently became *enccinte*, he, being himself in a weak state of health, then executes the power, by which he gives the whole of the property equally amongst all the children whom he has or may have at the time of his death, or the survivor, to be divided equally amongst them. Whether that execution is good depends upon whether, in the first place, it is within the terms of the power; and, in the next place, whether, being within the terms of the power, it was executed *bond fide* for the purpose and intent of the settlement. That it is within the terms of the power there can be no question.

The property was to become and be vested in one or more child or children, exclusive of the others, and to be transferred and assigned to him or them at such age or ages, and in such shares and proportions, if more than one, as he should appoint. The words are express, that it is to become vested in the children, in any one of them at any age, in any manner and in any share which he shall appoint. There could not possibly be larger words; and if the donee of such a power cannot give the fund to one child, to be vested at any time he thinks fit, it would be totally impossible to construe any words to have a legal and intelligible meaning. It is quite clear, therefore, the words of the power are sufficiently large for the purpose. Then it is said, assume that the words of the power are sufficiently large, yet, nevertheless, the rule of the Court is, that you must not take advantage of the words of the power and execute it so as to give the property in such a manner that it may devolve either for your own advantage, or that it shall not *bond fide* be for the purpose and object of the settlement.

In the first place, before referring to the particular cases decided upon the subject, you must always ascertain the object and scope of the settlement, not merely from how the fund is to go in default of appointment, but also from the powers which are entrusted to the donee of the power. The settlement says the husband shall have an absolute and uncontrouled

dominion in saying how this is to go, and if he does not think fit to exercise that, it shall go in the following manner. It is not a fair observation to make upon any instrument, that because it has specified the manner in which the fund is to go in case the donee does not exercise the power, it is properly and necessarily to cut down the manner in which the donee is to exercise that power, so as not to allow him to go beyond either the words or the spirit of that which the settlement has declared shall be the manner in which the fund is to be distributed, if no appointment whatever is made. In this case it is manifest that the husband could gain no personal advantage himself from it. All the particular cases of fraud which are referred to where the donee of a power has executed it for the purpose of obtaining a personal advantage to himself may be easily explained; because as the power is only to take effect amongst a class of persons to be ascertained at his death, it is totally impossible that he could obtain any advantage by reason of their dying intestate and the fund go over to him as one of the next-of-kin. Then, what other object are you to look at? If he has the absolute and uncontrouled disposition of the fund, and he executes the power in such a manner that he himself shall not obtain any possible advantage, in what reasonable way can it be said that he has not executed it in good faith, and that his execution of it is a fraud upon the terms of the power? What consequences would this lead to?

This execution cannot be considered to be good or bad from the mere circumstance of whether he died immediately afterwards or not. The mere circumstance of the event which has occurred cannot make the execution of the power good or bad. Suppose he had thought fit to say that the son ought to have double the proportion of the daughter—that he had given two-thirds to the son and one-third to the daughter,—exactly the same observation would have arisen, that a child might have died, and it would not go to the survivor, and there could be no advantage taken by the survivor. Could it be contended, on his death, that the daughter, who only took one-half of what the son took, could have said, “if they had both

lived to the age of twenty-one, this was really a fraud upon the power, because the father might have died when they were both infants, and the son might have died also an infant, and, therefore, by reason of that, the mother might have taken one-third of that share, which would otherwise come to me”? It is obvious the argument on the other side must go to that extent, if it is held in the particular case that the execution of the power is bad. If the execution of the power is bad, would it have been bad if there had been a direction for survivorship between the children, which is omitted, so that in fact they would have taken it exactly in the same manner as they would in default of appointment. That must be contended for if it is held that the cases relating to portions which say the portion is not to vest before the time, or is not properly to be raised before the time when it ought reasonably to be raised, apply to cases of this description; because it is manifest, in that case, the vesting would have taken place at an earlier period than if there had been no execution of the power, and it had been allowed to go in default of appointment. I concur in the observation that in substance and effect the rules respecting powers must be treated exactly in the same manner as where there is a fund to be divided, or where there is a portion to be raised. It alters the case where there is a portion to be raised. There is an ingredient which may be a mark of fraud, and which does not arise in the other case; and therefore the person creates a fund for the purpose of obtaining a benefit from it, which does not arise in the other case; and though the rules respecting the execution of the powers are the same, yet there are circumstances connected with it which give a different colour to the transaction. If he were not to execute it so as to take effect during the infancy—(the argument must go to that full extent)—he cannot execute it so as to give a vested interest in them until they are twenty-one: if he cannot do that, it is manifest he cannot execute a power during his lifetime if he dies during the time they are infants. That appears to be totally at variance with the whole scope, object and view of the execution of the power. If I were to hold that

this was not a due execution of the power, I should be unsettling titles to a very great extent, and introducing a very dangerous limitation with respect to powers which may be executed by donees of powers. In this case, it is exceedingly probable that the intention of the original framers of the settlement was, that the widow of the donee should not take any interest or benefit in it, and I am also of opinion that it was not the intention of the donee, when he executed this power, that she should take any interest in it. He gives the fund equally between the two children, and it was very probable that he would not have in his mind the possibility of one of the children dying.

Under these circumstances, I am of opinion that they are the objects of the bounty, and that they are the persons to whom he intended to give it; and I am also of opinion, if I were to hold that this was a fraud on the power—a false execution—I should be deciding that which would do very great injury, and unsettle titles to a considerable extent. I must make a decree according to the prayer of the bill.

M.R. }
March 8. } FEARON v. DESBRISAY.

Decree—Enrolment—Rectifying Errors.

Where errors in a decree are obvious, the Court will rectify them, even after it is enrolled.

This was a motion that the decree made on the hearing might be altered or varied by adding the words, "the defendants, William Scott Carter and Amelia his wife, Thomas Ingle and Anna Maria his wife, and Roger Kynaston and Juliana his wife," after the words "*cestuis que trust*" in the direction that in taxing the costs the Taxing Master is to allow the several *cestuis que trust* and their trustees but one set of costs; and also by adding the word "General" after the word "Accountant" in the direction for sale of consols for payment of the duty on the grant of administration to the plaintiff, Isabel Harriet Anne Fearon, of the estate and effects of Compton

Sabine Browne, and of the costs of and relating to obtaining the same.

Mr. G. L. Russell, in support of the motion.—By the decree made in the cause the Taxing Master was to allow to the several *cestuis que trust* and to their trustees respectively but one set of costs. This direction was intended to apply to the defendants, Amelia Carter and others, who, on their respective marriages, had made settlements of their expectant shares, and their trustees were parties defendants to the suit; but the direction was not intended to extend to the defendant Isabel Henrietta Browne, who was entitled to three-fourths of the funds and a *cestui que trust* of the original settlement under which the matter in dispute arose. The Registrar would have amended the decree as being a mistake, the subsequent direction being for payment of the costs of the plaintiffs to their solicitors, and the costs of the defendant, Isabel Henrietta Browne, to Mr. Johnstone, her solicitor; but as the decree was enrolled he considered he had not the power.—

Weston v. Haggerston, Coop. 134.

Yow v. Townsend, 1 Dick. 59.

Spearing v. Lynn, 2 Vern. 376.

2 *Daniell's Ch. Prac.* 1012, 2nd ed.

The MASTER OF THE ROLLS.—You may take the order as it is asked.

TURNER, V.C. }
Jan. 24; } ROCHFORD v. HACKMAN.
Feb. 12. }

Will—Construction—Alienation—Insolvency—Life Estate—Gift over.

If there is a valid gift over on alienation by one entitled to a life interest in personalty, it will take effect on insolvency, and the interest of the insolvent will not pass to his assignee.

This was a claim for the administration of the trusts of the will of William Rochford, deceased. The testator, by his will, dated in August 1822, gave all his residuary personal estate (and which was subsequently invested in the purchase of

3,800*l.* 3*l.* per cent. consols,) to trustees, upon trust for his wife for life, and after her decease upon trust to divide the same into four shares for his four sons for life, and their respective children as and when the latter should respectively attain the age of twenty-one years, and the shares of such of the testator's sons as should die without issue to survive and accrue to the others. The testator declared by his will that in case his wife or any of his sons should in any manner, sell, assign, transfer, or incur or otherwise dispose of, or anticipate all or any part of his, her, or their share and interest, then and in such case, and from and immediately after such alienation, &c. the several bequests to or in trust for her, him, or them should cease, determine, and become utterly void as if the same had not been mentioned or made part of his will, or his wife or either of his sons were dead. After the death of the testator and his wife, two of the four sons died without issue, and Richard Rochford, one of the surviving sons, afterwards, and in December 1849, being insolvent and in prison, petitioned the Insolvent Debtors Court for his discharge, and upon his petition the usual order was made, vesting his property in the defendant English as assignee. Richard Rochford had, at the time the claim was filed, two children only; viz. Martha Ann, the wife of the plaintiff, James Rochford, and who had attained twenty-one years of age, and Richard Rochford, the younger, who was still an infant. The claim was filed by James Rochford and his wife against the executors of the testator's surviving trustee, English, and Richard Rochford, the younger. The plaintiffs claimed to have one half of the insolvent's moiety in the trust property paid to them, and the other half of the moiety secured for the benefit of the infant, Richard Rochford, the younger, if he should attain twenty-one years of age.

The Solicitor General (Sir W. P. Wood) and *Mr. Shebbeare* appeared for the plaintiffs; and *Mr. De Gex*, for the defendant, Richard Rochford, the younger, in support of the claim: and submitted that the effect of the insolvency of Richard Rochford, the elder, was an alienation of

his life interest within the terms of the testator's will. They cited—

Shee v. Hale, 13 Ves. 404.

Cooper v. Wyatt, 5 Mad. 484.

Dommett v. Bedford, 6 Term Rep. 684.

Wilkinson v. Wilkinson, 3 Swanst. 515.

Yarnold v. Moorhouse, 1 Russ. & Myl. 364.

Lear v. Leggett, Ibid. 690; s. c. 7 Law J. Rep. Chanc. 127.

Rishton v. Cobb, 9 Sim. 615; 5 Myl. & Cr. 152; s. c. 9 Law J. Rep. (N.S.) Chanc. 110.

Pym v. Lockyer, 12 Sim. 394; s. c. 11 Law J. Rep. (N.S.) Chanc. 8.

Brandon v. Aston, 2 You. & C. C.C. 24, 30.

Martin v. Margham, 14 Sim. 230; s. c. 13 Law J. Rep. (N.S.) Chanc. 392.

Churchill v. Marks, 1 Coll. 441; s. c. 14 Law J. Rep. (N.S.) Chanc. 65.

Mr. Tripp, for the assignee in insolvency, contended that there was not any valid gift over of the insolvent son's share under the testator's will, and therefore that his interest had passed to the assignee. He cited—

Bradley v. Peixoto, 3 Ves. 324.

Ross v. Ross, 1 Jac. & W. 154.

In re Dickson's Trust, 1 Sim. N.S. 37; s. c. 20 Law J. Rep. (N.S.) Chanc. 33.

Mr. Shebbeare replied.

Feb. 12.—TURNER, V.C. stated the facts, and said—Under these circumstances it was contended by the plaintiffs, and by the defendant, Richard Rochford the younger, that the insolvent's interest had ceased, and that the plaintiffs are absolutely, and Richard Rochford the defendant is contingently, entitled to the sum of 1,900*l.* stock in which, but for his insolvency, Richard Rochford the elder would have had a life interest. But the assignee claims to be entitled during the life of the insolvent.

In determining this question, the first point to consider is, to see whether there are any fixed rules to guide the determination of the Court; and on examination of the cases there appear to be two rules laid down which are applicable to and sufficient to govern the present case:

first, that property cannot be given for life, any more than absolutely, with any restriction upon alienation, and that any such restriction is void if annexed to a life estate, just as if annexed to an estate in fee; and secondly, that although a life estate be expressly given by the first part of the will, it may well be determined by an apt limitation over in the subsequent part of the will.

The first proposition is fully supported by *Brandon v. Robinson* (1) and *Graves v. Dolphin* (2), in both of which cases there were estates for life given, with a restriction on alienation, but no gift over on alienation, and the doctrine laid down in these cases has not been contravened by any subsequent decisions.

The second proposition, that a life estate may be determined by an apt limitation over is equally well settled, and I need only refer to the cases cited in argument—*Wilkinson v. Wilkinson*, *Cooper v. Wyatt*, *Brandon v. Aston* and *Churchill v. Marks*. It was said at the bar, indeed, that a limitation over was unnecessary, and the case of *Dickson's Trust* was relied on. I do not think it necessary to decide this point at present; but I do not understand the case of *Dickson's Trust* as deciding that a life interest may be well determined merely by a proviso that it should cease in a certain event without any gift over. The true rule is, that the Court must collect the testator's intention whether the life interest should continue or not, from the whole will, and we must look to the primary disposition to see what estate the testator intended to give, and to the ulterior disposition to see in what events it is given over. If the Court finds that there is a limitation over, and that it meets the event in which the primary disposition was to cease, then it is clear that the testator did not intend the life estate to continue. If the Court, on examination, finds that the limitation over does not meet the event in which the previous gift was to cease, then there is not sufficient evidence of the testator's intention that the life interest should determine. This rule takes away all difficulty and falls in with the case of *Dommett v. Bedford* (*supra*), in

which there was no gift over, but a proviso for cesser; for it would be difficult to argue that more force was due to a gift over than to a proviso for cesser.

Some expressions of Lord Eldon in the case of *Brandon v. Robinson* have been the subject of remark, and a few observations upon them may therefore be proper. "A disposition to a man until he shall become bankrupt," his Lordship says, "and after his bankruptcy, over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited." Now, I do not understand Lord Eldon here to say that the law will not permit a proviso determining the previous gift; on the contrary, he expressly says, that if the proviso be so expressed as to reduce the interest previously given to one short of a life estate, neither the man nor his assignees shall have it beyond the period for which the gift is limited. Lord Eldon then passes to the case of *Foley v. Burnell* (3), and the old law on the subject; and entering on the question, whether the interest was assignable by the Commissioners in Bankruptcy, he says, "To prevent that, it must be given to some one else." But this does not mean that in all cases there must be a gift over, but that under that particular will the assignees took the life interest of the bankrupt in the absence of any gift over. This seems clear, both from what precedes and from what follows the particular gift.

But without determining that a gift over be in all cases necessary, I am of opinion that in this case the testator has not merely provided for the cesser of the life interest, but has made a valid gift over. Some effect must, if possible, be given to all the words of the will, and if I were to hold otherwise in this case, no effect would be given to the proviso following the previous gift for life. Some observations were made on the terms in which this proviso was framed, but on looking to the previous part of the will, as

(1) 18 Ves. 422.

(2) 1 Sim. 67; s.c. 5 Law J. Rep. Chanc. 45.

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(3) 1 Bro. C.C. 274.

well as to the ulterior provisions, I think there is no difficulty if we refer to the different expressions, "as if the same had not been mentioned in or made part of this my will," and "as if my said wife or either of my sons were then dead," to the different persons and different events to whom and upon which the interests are given over, in the previous part of the will.

I am also of opinion that the event which has occurred is an event which the testator intended should determine the interests given in the previous part of the will.

I think that the views I have thus taken are in accordance with *Brandon v. Aston* and *Shee v. Hale*, (*supra*.) and are not affected by *Lear v. Leggett* and *Pym v. Lockyer*, (*supra*.) A learned text-writer has expressed some doubt as to the soundness of the distinction taken in *Shee v. Hale*, and other cases, between alienation under a bankruptcy and under an insolvency, but I see no reason for the doubts.

My conclusion is that the life interest of the insolvent is determined, and the only remaining question is, whether the capital should be now divided. I think that the capital is not yet divisible, for the determination of the life interest does not alter the class who are to take on that event, and a division of the fund at the present time might carry it beyond its objects, for after-born children, if any, will be equally entitled to come in. At present Mrs. Rochford, the plaintiff, takes under the will a vested interest in one moiety of the 1,900*l.* stock, and the defendant, Richard Rochford, the younger, takes a contingent interest in the other moiety, depending on his attaining twenty-one years, but both these interests would open so as to let in after-born children (if any) becoming entitled under the will. Their interest would be on the same footing with that of vested interests in a fund which is subject to a power of appointment, and which are, therefore, liable to be divested by the exercise of that power, in which case the parties entitled to the vested interests are entitled to the dividends and interest in the mean time. The fund must, therefore, be brought into court and kept entire.

Decree accordingly.

M.R. }
March 9; } FORD v. STUART.
April 19. }

Voluntary Settlement—Contract—Recital—Family Arrangement—Subsequent Mortgage—Stat. 27 Eliz. c. 4.

A charge created by C. S. upon his estates to secure the payment of a sum of money borrowed for S. H. S. is a good consideration, not only for a collateral charge upon the estates of S. H. S. to indemnify C. S. and his estate from the payment of the money borrowed, but also for a settlement of the S. estates upon his family.

*A. H., being a trustee for the younger children of S. H. S., advanced a sum of 5,185*l.* 3*s.* 4*d.* upon the security of certain estates in Berkshire, which C. S. on the 20th of January 1832 demised to A. H. for 300 years, to secure the repayment. The money was borrowed for S. H. S., who was tenant in tail of the S. estates in remainder expectant on the death of his mother, the tenant for life; and on the 21st of January 1832, S. H. S. demised the S. estates to C. S. for 2,000 years, to indemnify him and the Berkshire estates from the 5,185*l.* 3*s.* 4*d.* and interest, secured to A. H.; and by deeds dated the 23rd and 24th of January 1832, in further compliance with an agreement recited in this deed, he settled the S. estates upon various uses, for the benefit of his family. On the death of the tenant for life, S. H. S., being greatly indebted to G. S. F., executed a disentailing deed, and conveyed the S. estates to G. S. F., giving him a power of sale over the estates as a security for the money due: this was subsequently confirmed by another deed; and in a suit instituted by G. S. F., insisting that the settlement of the 23rd and 24th of January 1832 was voluntary and void against the subsequent alienation for value made to G. S. F., who had notice of the settlement,—Held, that the agreement made by S. H. S. with C. S. to indemnify him against the 5,185*l.* 3*s.* 4*d.* and to settle the S. estates, was such as this Court would specifically perform, and that it was a consideration sufficient to support the settlement; that the recital in the deed of the 24th of January 1832 of the agreement between S. H. S. and C. S. was sufficient evidence of the contract, and that it was doubtful if*

evidence to disprove it could have been entertained; that S. H. S. and C. S. were, by executing the deed, estopped from alleging that the recital was false; that the plaintiff G. S. F. was in the same position as S. H. S.; that the deeds of the 23rd and 24th of January 1832 were valid, and not voluntary and void against a subsequent purchaser for value; and the bill was dismissed with costs against the children of S. H. S. and the defendants resisting the plaintiff's demand, but without costs as against S. H. S. and the defendants supporting the plaintiff.

The facts of this case, with the several questions raised in argument, are sufficiently stated in the judgment.

Mr. Willcock and Mr. F. T. White, for G. S. Ford, the plaintiff.—

Dolan v. Colman, 1 Vern. 294.

27 Eliz. c. 4.

Jones v. Marsh, Ca. temp. Talb. 64.

Pulvertoft v. Pulvertoft, 18 Ves. 92.

Ellis v. Nimmo, Ll. & G. temp. Sugd. 333, 347.

Roe d. Hamerton v. Mitton, 2 Wils. 356.

Osgood v. Strobe, 2 P. Wms. 245.

Myddleton v. Lord Kenyon, 2 Ves. jun. 391, 410.

Sugden on Real Property, 153, 155.

Doe d. Otley v. Manning, 9 East, 59.

Buckle v. Mitchell, 18 Ves. 100.

Doe d. Watson v. Routledge, 2 Cowp. 705.

Doe d. Sweetland v. Webber, 1 Ad. & E. 733; s. c. 3 Law J. Rep. (N.S.) K.B. 208.

Lister v. Turner, 5 Hare, 281; s. c. 15 Law J. Rep. (N.S.) Chanc. 336.

2 *Smith's Lead. Ca. tit. 'Estoppel'*, 435.

Doe d. Williams v. Lloyd, 5 Bing. N.C. 741; s. c. 9 Law J. Rep. (N.S.) C.P. 83.

Doe d. Baverstock v. Rolfe, 8 Ad. & E. 650; s. c. 7 Law J. Rep. (N.S.) K.B. 251.

Mr. Toller, for Peter McNaughton, a creditor who had signed a creditors' deed, William Augustus Ford, trustee for the plaintiff for sale, and Sir Simeon Henry Stuart,

Mr. Webb, for John Malleson and Jonathan Norman Dalston, creditors who had signed a creditors' deed.

Mr. R. Palmer and Mr. G. L. Russell, for Arthur John Stuart, John Long and Georgiana Frances, his wife, and for all the other children of Sir Simeon Henry Stuart, except the eldest.—

Gully v. the Bishop of Exeter, 5 Bing.

171; s. c. 2 Mo. & P. 276; 7 Law J. Rep. C.P. 50.

Johnson v. Legard, Turn. & R. 281; s. c. 6 M. & S. 60.

Heap v. Tonge, 9 Hare, 90; s. c. 20 Law J. Rep. (N.S.) Chanc. 661.

Wycherley v. Wycherley, 2 Eden, 175; *Sugden's Vendors and Purchasers*, 657. 8th ed.

Stephens v. Olive, 2 Bro. C.C. 90.

Davenport v. Bishop, 2 You. & C. C.C. 451; s. c. 12 Law J. Rep. (N.S.) Chanc. 492.

Colyear v. the Countess of Mulgrave, 2 Keen, 98; s. c. 5 Law J. Rep. (N.S.) Chanc. 335.

Mr. Taylor, for Simeon Henry Stuart, the eldest son of Sir S. H. Stuart.

Mr. Headlam, for William Brown Ramsay and Thomas Pargeter Dickinson, the trustees of a term of 3,000 years.

Mr. Willcock, in reply.

THE MASTER OF THE ROLLS. — The question in this case is, whether a deed of the 24th of January 1832 is valid against a subsequent purchaser for valuable consideration, who bought with notice of the deed. The deed was a settlement executed by Sir Simeon Henry Stuart, whereby the family estates, situate in the county of Essex, were conveyed upon certain trusts for the benefit of his family. By a settlement made in the last century, Dame Frances Maria Stuart was tenant for life of the family estate, and, subject to her life estate, Sir Simeon Henry Stuart was first tenant in tail male. On the 25th of October 1815, Sir Simeon married Dame Georgiana Stuart, on which occasion a settlement was executed, by which a sum of 5,000*l.* was secured by the bonds of George and Robert Gun, to be paid within six months after the death of Lady Rossmore, to Samuel Pryer and Arthur

Henry as trustees, to be invested by them in trust for the benefit of the younger children of the marriage in such manner as Sir Simeon and his wife should jointly appoint, and in default as the survivor should appoint, and in default of any such appointment, equally amongst the other children of the marriage, and at the same time Sir Simeon covenanted to settle a jointure or rent-charge of 800*l.* on his estate in favour of his wife. On the 23rd of July 1823, Sir Simeon, without the concurrence of the tenant for life, Lady Stuart, conveyed the estates to uses to secure the jointure of 800*l.* to his wife Dame Georgiana Stuart; and subject thereto to such uses as he should appoint, and in default, to himself in fee. By this indenture, he acquired a base fee in the hereditaments in question. In the year 1828, the bond for 5,000*l.* was paid off, and the money was invested in the names of Samuel Pryer and Arthur Henry in the purchase of 6,339*l.* consols, upon the trusts of the settlement of 1815; and in January 1832 it was standing in the name of Arthur Henry, the surviving trustee of the settlement.

In January 1832 the transaction in question in this suit occurred, and the deeds which effected it are four, and their dates respectively are the 20th, 21st, 23rd and 24th days of that month. The first deed, bearing date the 20th of January 1832, was an indenture of demise by way of mortgage made between Sir Charles Saxton of the first part, Richard Samuel White of the second part, John Hudson of the third part, and Arthur Henry, the surviving trustee of the settlement of 1815, of the fourth part, by which, in consideration of 5,185*l.* 3*s.* 4*d.* paid by Arthur Henry to Sir Charles Saxton, Sir Charles Saxton, and Richard Samuel White, and John Hudson, his trustees, demised divers estates and hereditaments in the county of Berks, the property of Sir Charles Saxton, to Arthur Henry, his executors, administrators and assigns, for a term of three hundred years, for securing the repayment of the money so advanced, with interest at 4*l.* 10*s.* per cent. By this indenture, standing alone, the effect was, that Sir Charles Saxton borrowed from Arthur Henry, the trustee

for the younger children under the settlement of the 25th of October 1815, the sum of 5,000*l.* invested for their benefit, and secured the repayment thereof with interest by a mortgage on his Berkshire estate. On the following day, that is, on the 21st of January 1832, the following deed was made between Sir Simeon H. Stuart of the first part, William Frederick Hewer Stuart of the second part, Sir Charles Saxton of the third part, and Richard Samuel White of the fourth part. It recited that the 5,185*l.* 3*s.* 4*d.* paid to Sir Charles was, in fact, borrowed for the use, and at the request of, and was wholly paid to Sir Simeon, and that Sir Charles Saxton executed the deed of the 20th of January at the request and only as security for Sir Simeon, and that in consideration of his so doing, Sir Simeon had executed the indemnity thereafter contained, and accordingly Sir Simeon and W. F. H. Stuart, his trustee, granted and demised the Stuart family estates, subject to the life estate of Dame Frances M. Stuart therein, and subject to the rent-charge of 800*l.* in favour of Dame Georgiana Stuart, to Sir Charles Saxton, for a term of two thousand years, for the purpose of indemnifying Sir Charles Saxton, his heirs, executors, administrators and assigns, and their estate and effects, against the repayment of the sum of 5,185*l.* 3*s.* 4*d.* and interest so secured to Arthur Henry as aforesaid, and against all losses, costs and expenses on account of the same.

In this state of things, the indentures of lease and release of the 23rd and 24th of January 1832 were executed. The parties to the indenture of release of the 24th of January are, Sir Simeon H. Stuart of the first part, Dame Georgiana Stuart of the second part, Vernon Dolphin and R. S. White of the third part, William Brown Ramsay and Thomas Pargeter Dickinson of the fourth part, and Sir Charles Saxton of the fifth part. It recites the deed of the 23rd of July 1823, it recites the deed of the 20th of January 1832, and it then contains a recital in these words, "and whereas the said Sir Charles Saxton consented and agreed to guarantee the payment to the said Arthur Henry of the said principal sum of 5,185*l.* 3*s.* 4*d.* and the interest thereof in manner

aforesaid, and to give and execute the said mortgage security of the 20th of January instant of his own real estate therein comprised, in consideration not only of receiving such indemnity as aforesaid, but also in consideration of an express understanding and agreement by the said Sir Simeon Henry Stuart to settle and assure the manor, messuages, lands and other hereditaments hereinbefore referred to and hereinafter described, and also appointed and released, or intended so to be, with the appurtenances, subject nevertheless, and without prejudice as hereinafter mentioned, to the uses, upon and for the trusts, intents and purposes, and with, under and subject to the powers and provisos hereinafter contained, in order to secure some certain provision for the children and issue of the said Sir Simeon Henry Stuart by the said Dame Georgiana Stuart his wife, or otherwise as hereinafter mentioned." The deed then recites that there was issue of Sir Simeon by Dame Georgiana three sons and three daughters only, mentioning their names, after which it is by this indenture witnessed, that in pursuance of the said agreement and in order to secure a certain provision for the issue of Sir Simeon by the said Dame Georgiana Stuart, and in consideration of the said Sir Charles Saxton having so as aforesaid made and executed the deed, indenture or mortgage of the 20th of January 1832, and having by his covenant rendered himself liable to pay the sum of 5,185*l.* 3*s.* 4*d.*, Sir Simeon appointed and conveyed the messuages, lands and hereditaments subject to the life estate of Dame Frances M. Stuart, and subject to the jointure of 800*l.* per annum in favour of Dame Georgiana Stuart, and subject also to the term of one thousand years for securing the jointure, and the indemnity to Sir Charles Saxton, to Messrs. Vernon Dolphin and R. S. White, their heirs and assigns for ever, in trust for Sir Simeon for life, with remainder to W. B. Ramsay and T. P. Dickinson, for the term of three thousand years, with remainder to the first son of Sir Simeon for life, with remainder to his first and other sons in tail male, with remainder to the second son of Sir Simeon for life, with remainder to the first and other sons in tail male, with remainder to the third in like manner,

with remainder to all other sons of Sir Simeon by Dame Georgiana Stuart in tail male, with an ultimate remainder to Sir Simeon in fee. By this settlement, the trusts of the term of three thousand years, vested in Messrs. Ramsay and Dickinson, are declared to be for the purpose of raising 5,000*l.* and interest at 4 per cent. for the younger children of the marriage, other than a child entitled in possession to the hereditaments under the limitations before mentioned. This sum is to be divided among such younger children in such manner as Sir Simeon and Lady Georgiana or the survivor should appoint, and in default of appointment, equally.

Subsequently to this indenture, and beginning in the year 1842, and extending down to the year 1849, Sir Simeon borrowed considerable sums of money and incurred debts to a large amount to the plaintiff. These sums and debts were secured by various deeds executed by Sir Simeon and charged upon those estates. In the month of January 1848, Dame Frances M. Stuart, the tenant for life, died, and Sir Simeon became entitled to the estates in possession. In the month of March of that year, he executed a disentailing deed, and conveyed the property to the plaintiff for ninety-nine years to secure the money due to him, and gave him a power of sale. In December 1848, the original bill was filed. On the 22nd of December 1848, Sir Simeon conveyed the fee simple of all his estates to trustees for the plaintiff, to secure the money due to him, and on the 22nd of April 1849 he executed a further deed, which was duly enrolled, confirming all the alienations for value which he had already made. These deeds, which however I do not think it necessary more particularly to refer to, are put in issue by subsequent supplemental bills.

The question is, whether the deeds of lease and release of the 23rd and 24th of January 1832 are voluntary, and consequently void under the 27 Eliz. c. 4. as against a subsequent alienation for value. The plaintiff, when he advanced his money, had full notice of the settlement of January 1832; but this, as it is admitted, is immaterial, if in truth this deed cannot be supported by any valuable consideration. It is admitted

also by the plaintiff, that the estates of Sir Simeon are liable to make good the guarantee to Sir Charles Saxton, and consequently that the appointment of an apportionment of the 5,000*l.* made in July 1842 on the marriage of one daughter with Mr. Long, and another similar appointment made in November 1845 on the marriage of another daughter with Mr. Gale are valid and effectual charges on the estate, in priority to any claim by the plaintiff. But it is contended, that subject to this charge of 5,000*l.*, and subject also to the jointure of 800*l.* per annum, which is now at an end by reason of the decease of Lady Georgiana Stuart in 1840, all the limitations of the estate are voluntary and void as against subsequent purchasers. In support of this view, it is contended, first, that no valuable consideration was given for the settlement of the 24th of January 1832, by Sir Charles Saxton; and, secondly, that even if a valuable consideration was given by Sir Charles Saxton, this would not support the settlement in favour of the children, because they are not to be treated as purchasers; and *Johnson v. Legard* and other cases of that description were referred to for the purpose of supporting that proposition.

I will consider the latter of these propositions first. There is no doubt a large class of cases which establish indisputably that persons collaterally related to the husband and wife are not within the consideration of the marriage contract, and there is no question either, that the consideration of marriage is the highest known to the law; but these cases do not, in my opinion, apply to the case of a purchase for money. If one man purchases land from another for value, the seller, having received the value for it, cannot contend that the sale is voluntary because the purchaser directed a conveyance of the estate to be made to a person who has not contributed towards the purchase-money. It is true that such a transaction may create various questions, such as that of advancement between a parent and child, but these are all questions between the purchaser and the person to whom, or for whose use, the estate is conveyed; and whatever may be the rights subsisting, or the questions which may arise between the purchaser and the person

to whom the estate is conveyed, the seller, who has received his price for the land, cannot complain or contend that the sale is not for a valuable consideration. I know of no principle of law or equity which would have prevented Sir Charles Saxton from purchasing the estate and causing it to be conveyed by the vendor, to uses for the benefit of Sir Simeon Stuart and his family; nor could the vendor, if he had received valuable consideration for the conveyance, be heard to complain of that part of the transaction which gave the conveyance to one who had paid nothing. This distinction is well drawn in the case of *Heap v. Tonge*, by Sir George Turner, who points out that in the case of marriage, the wife cannot be considered to purchase anything on behalf of the husband's relations, but that if there is a person who distinctly purchases on behalf of collaterals, the limitations so purchased are good and binding against subsequent purchasers for value, as in the case of *Pulvertoft v. Pulvertoft*.

I am, therefore, of opinion that, if it shall appear that Sir Charles Saxton gave a valuable consideration for the settlement, the settlement itself will be supported in favour of the objects of that settlement against a subsequent purchaser for value, with notice of its existence.

This established, it is, on the part of the plaintiff, contended that it gives peculiar force to the argument urged on his behalf, that the nature of the consideration to Sir Charles Saxton to support this deed must be such as would have supported it if it had been a conveyance of the Stuart family estate to him, Sir Charles, in fee simple; and that in such a case it would have been set aside on the ground of inadequacy of consideration. It will, in my opinion, be convenient to consider the question in the first place without reference to the plaintiff, and to examine how the matter would stand between Sir Charles Saxton and Sir Simeon Stuart alone, and on the assumption that the recital contained in the deed of the 24th of January 1832 is a correct statement of the agreement made between them. Could, in that case, Sir Charles Saxton have maintained a bill for specific performance of that contract as against Sir Simeon Stuart? This Court will not

assist a volunteer; and, consequently, if the agreement was voluntary, no suit for the specific performance of it could have been maintained. The state of the case was this:—on behalf of and for the benefit of Sir Simeon, Sir Charles had borrowed 5,000*l.*; he had made his Berkshire estate liable to the repayment of it with interest; and he had by his covenant made himself personally liable to pay it. He had agreed to do this in consideration of Sir Simeon undertaking to indemnify him against the consequences, and also in consideration of his settling his estate upon his sons in manner already stated. No doubt could be entertained that if the contract had stopped with the agreement to indemnify Sir Charles Saxton against the consequences of his having borrowed this money for the benefit of Sir Simeon, and by which he had actually obtained the 5,000*l.*, and if the agreement had not in addition contained the subsequent provision for the settlement of such an estate, no doubt could have been entertained that such a contract would have been enforced by Sir Charles. But no matter is more fully settled in this Court than that a contract cannot be specifically performed in part. It must be wholly performed, or not at all; and a part of a contract may be of such a nature as to vitiate the whole. Is then the circumstance that in addition to the indemnity to which Sir Charles Saxton was entitled, he had contracted for a settlement to be made on the family of Sir Simeon, such a circumstance as to deprive Sir Charles Saxton of the rest of his contract, and to make him a loser to the extent of 5,000*l.* and interest which he had borrowed for the benefit of Sir Simeon and paid to him? I am of opinion that it cannot be so regarded; but that Sir Charles would, in the case I have supposed, have been entitled to a decree, enforcing in specie the whole of the contract he entered into. This Court could not have permitted Sir Simeon to resist the performance of it on the ground that this ulterior part of the contract is a matter in which the other party to the contract had not any interest or concern; and that, though he had contracted for it, he was not to have it performed.

It is, however, contended that as soon

as Sir Charles obtained the indemnity from Sir Simeon, which was completed on the 21st of January 1832, from that moment Sir Charles was placed in the same position as if he had never borrowed the money, and that in truth nothing further remained to restore him to his former condition, and that all beyond this is voluntary. But this does not appear to me to be so. It is not, I think possible to sever the different parts of the transaction, and to regard them as forming separate and distinct contracts. The four deeds, though bearing date on consecutive days, are necessarily connected together, and, in my opinion, form one transaction. Nor is the position of Sir Charles, even in substance, the same after the deed of the 21st of January was executed as it was before, when he borrowed the money. He still remained liable to an action at law from the trustee of the 5,000*l.* His Berkshire estates were still liable to make it good, and were fettered by that charge upon them so as to render them less marketable and less available for all the purposes connected with the transfer of land or the raising of money. The next day, the trustee might have commenced an action upon the covenant against Sir Charles. The trustee might besides have brought ejectment to obtain possession of the Berkshire estates, and he might in addition have filed a bill of foreclosure in this Court. The expenses of all these proceedings, and of raising the money necessary to defray them, would have fallen on Sir Charles. It is true that he is indemnified out of the Stuart estates, but those estates were in the possession of the tenant for life, who might live a great length of time, and who did in fact survive this transaction sixteen years; and in attempting to make the base fee vested in Sir Simeon, subject to that life estate, available for the purpose of enforcing the indemnity given to him, Sir Charles might have been compelled to embark in long and complicated legal proceedings, the expense and delay of which no experience could adequately predict. It is impossible to say, in such circumstances and with the difficulties which might arise with respect to the title of the Stuart property or any portions of it, that it is certain that the indemnity would be perfect. Still less

could it compensate for the temporary loss and anxiety which might have been occasioned by Sir Charles having to repay the sum so borrowed from Mr. Henry before the Stuart estate could be made available for that purpose.

It is to be observed that by reason of Sir Charles consenting to become bound and joining in this transaction, great advantages also were derived to Sir Simeon—greater facilities and more advantageous terms were afforded to him than he could otherwise have obtained. He had no estate in possession. When he afterwards borrowed money, he was compelled to do so on very disadvantageous terms. Arthur Henry could not have lent the trust money to Sir Simeon on those terms on which he obtained it, or indeed on any terms which did not give the trustee a present ample security to which he might resort, if called upon to divide the 5,000*l.* between the younger children of the marriage before the death of the tenant for life.

Taking all these matters into consideration, and having regard to the objections which I have already referred to relative to the adequacy of the consideration, and without expressing any opinion on the question, not that I think that there is much doubt upon the point, whether it would have been sufficient to support a sale to Sir Charles Saxton for his own benefit; considering also the nature of the transaction, and that it was one in which a proper and reasonable settlement was made of the family estate—I am of opinion that the consideration, even if it were inadequate for the purpose of supporting a sale between strangers, is sufficient for the purpose of supporting the settlement so made; and consequently that as between Sir Charles Saxton and Sir Simeon Stuart, upon a bill filed for that purpose, if after Sir Simeon had received the 5,000*l.* he had refused to execute the deed of the 24th of January 1832, this Court would have made a decree compelling the specific performance of the agreement stated in the recital to the deed,—assuming it to have been proved that that agreement was duly made and entered into by Sir Charles on the one side and Sir Simeon on the other.

If I am right in the view I have taken

as between Sir Charles Saxton and Sir Simeon Stuart, the next question is, whether the plaintiff can stand in a higher position than Sir Simeon would have done, and I am of opinion that he could not, and that the determination of this question is involved in the conclusion to which I have already arrived. This Court could not have compelled Sir Simeon to have made a settlement, for he could on the next day have defeated it by selling the property to a purchaser for valuable consideration. In this case the plaintiff does not complain of any fraud. He was perfectly well aware of the existence of the contents of the settlement of the 24th of January 1832, when he advanced his money, and though this does not affect his right, it is satisfactory to reflect that he has not through misrepresentation been induced to advance his money upon a security supposed to be free from question. The cases which have been cited do, on the whole, support the view I have taken in this case. *Doe d. Baverstock v. Rolfe* is, I think, explained in *Heap v. Tonge*, and the case of *Roe d. Hamerton v. Mitton* is a strong case in favour of the view I have taken, and is cited with approbation by the Lord Chancellor in *Myddleton v. Lord Kenyon*.

Hitherto, I have assumed that the recital to which I have referred contains a correct statement of the facts between the parties. I have to consider whether this be so in fact, and if it be not, whether Sir Simeon or the plaintiff, as claiming under him, can dispute the correctness of that recital. The defendants have gone into no evidence except putting in the deeds in question. The plaintiff has gone into evidence, but no part of it negatives the fact that Sir Simeon had entered into such an agreement with Sir Charles Saxton as is stated in the recital in question. It is contended that the evidence of the deeds themselves disprove that agreement as stated in that recital, but I am not of that opinion; and even if evidence had been given on behalf of Sir Simeon or the plaintiff to disprove the fact of any such agreement having been entered into, I should have been of opinion that I ought not to have attended to it on their behalf,—at least I should have entertained very

serious doubt whether I ought to have entertained it on their behalf. I have not considered it so fully, as there is no evidence upon it. The fact of whether such an agreement had been entered into between Sir Charles and Sir Simeon must have been known to them at the time they executed the deed of the 24th of January 1832, and they both executed a deed containing a solemn assertion on their part that they had entered into that agreement; and both are, I think, from that time, and in a matter relating to this deed, estopped from alleging that recital to be false, unless they can shew the recital was introduced into the deed executed by them under circumstances which would not make it binding against them. The plaintiff does not, I think, in this respect stand in a different position from that in which Sir Simeon stands under whom he claims; and the result of this is, that in my opinion the deeds of the 23rd and 24th of January 1832 are valid and binding deeds, and that they are not void against a subsequent purchaser for valuable consideration,—and consequently that this bill fails, and that it must be dismissed as against the first set of defendants and their trustees with costs, but without costs as against Sir Simeon Henry Stuart and the other defendants who support the plaintiff's view of the case.

TURNER, V. C. }
 1851. }
 Dec. 20, 21. }
 1852. }
 Feb. 18. }

LONG v. STORIE.

Pleading—Usury—Mortgage—Principal and Interest—Abated Suit—Second Suit—Costs.

It is not usury to reserve interest on a mortgage debt secured on real estates at 5l. per cent. per annum from a day anterior to the day of actual payment of the principal, if from delay not occasioned by the mortgagee the payment of the principal is postponed, and if it was the bonâ fide intention of the parties to have paid and received the principal on the day from which the interest is reserved; and, à fortiori, if, under the cir-

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cumstances, less than the legal amount of interest has been paid.

Thus where a proposed mortgagee agreed to advance a certain sum to pay off two existing incumbrances, upon having, amongst other securities, a transfer of those incumbrances, and accordingly duly paid off the second incumbrancer and took a transfer from him, but from delay in the execution of the transfer from the prior incumbrancers he did not pay off their incumbrance until six weeks after the day of payment to the second incumbrancer, as and from which day it was agreed between the mortgagor and proposed mortgagee the deed of transfer from the prior incumbrancers should be dated and interest calculated, it being the bonâ fide intention of all parties that both the incumbrances should have been then paid off, and the proposed mortgagee, under an agreement in the mortgage deed to accept interest at the rate of 4l. per cent. on punctual payment, having received less for the first half-year's interest than the amount would have been at the rate of 5l. per cent. per annum from the day on which the prior incumbrancers received their principal,—it was held that the transaction was not usurious within the statute of 12 Anne, c. 16.

A mortgagee instituted a foreclosure suit, in which he was ordered to pay the costs of an interlocutory motion, but died before payment and before the hearing of the cause. His representatives filed an original bill of foreclosure without noticing or reviving the abated suit of the mortgagee. The Court refused to allow the plaintiffs their costs in the second suit unless they submitted to pay the costs of the motion in the first suit ordered to be paid by their testator.

This was a suit for foreclosure by the executors of Capt. John Long deceased. The defendants were thirty-eight in number, and a prior suit for foreclosure had been filed by Capt. Long in his lifetime, which had become abated by his death, and had not been revived, nor was it referred to by the plaintiffs in the present suit. The principal points in the argument and judgment related to the several questions of usury and costs.

It appeared from the pleadings that the defendant, the Rev. John George Storie, by indenture of mortgage of the 15th of

May 1843, appointed the advowson of St. Giles, Camberwell, (except as therein excepted) to secure the repayment of 7,500*l.* with interest at 5*l.* per cent. per annum to trustees for the Norwich Union Assurance Society. By another indenture of mortgage of the 29th of the same month, the defendant conveyed the advowson to Mr. Cockell for securing the repayment to him of 5,000*l.* and interest at 5*l.* per cent. per annum. By an agreement of the 26th of December following, Capt. Long agreed with the defendant Storie, for the purpose of paying off the above mortgages, to advance for ten years the sum of 12,500*l.* at interest at the rate of 5*l.* per cent. per annum (reducible to 4*l.* per cent. if regularly paid within one month after it should from time to time become due) on the security of a mortgage, with power of sale, when the interest should be in arrear for two months, of the advowson, transfer of the above mortgages, and assignment of certain policies on the life of the defendant Storie for assuring 12,000*l.*

On the 25th of March 1844 notice was given that Capt. Long had deposited with his solicitors his cheque for the 12,500*l.* to be paid upon the execution of the transfer of the existing mortgages. The payment of the 5,000*l.* and interest to the second mortgagee (Mr. Cockell), and the transfer by him of his security to Capt. Long, were respectively made and executed on the 29th of March 1844; but in consequence of some delay in the preparation and execution of the deed of transfer by the trustees of the Norwich Union Assurance Society, the 7,500*l.* and interest were not paid to them until the 4th of May following. The deed of transfer from the trustees of the society bore date the 29th of March 1844, pursuant to an agreement of that date between the defendant Storie and Capt. Long, whereby, after reciting that a deed of transfer to Capt Long of the mortgage debt due to the society had been prepared but not then executed, and that Capt. Long was prepared with the amount of the debt (which was the first charge on the advowson), the defendant Storie undertook that the deed of transfer should bear date, and that interest should be calculated and payable to Capt. Long from that day, and that interest on the

7,500*l.*, according to the rate mentioned in the said deed, should be calculated and payable to Capt. Long as and from that day. The mortgaged debts and securities were transferred by separate instruments, and the provisoes for redemption in both of them were made subject to the payment of the respective principal sums and interest at the rate of 5*l.* per cent. per annum; the transferee covenanting by each deed to accept interest at the rate of 4*l.* per cent. per annum if paid within thirty days of the 29th of March and the 29th of September in every year.

It was proved in the cause that the 7,500*l.* was paid by Capt. Long to the trustees of the society on the 4th of May 1844, and that interest up to that time was then paid to them by the defendant Storie. Capt. Long duly received the first half-year's interest (due at Michaelmas 1844) on his principal at the rate of 4*l.* per cent. per annum.

The transaction, so far as it related to the transfer from the society to Capt. Long, was impeached by some of the defendants as usurious, on the ground that interest at 5*l.* per cent. per annum, notwithstanding it was reducible to 4*l.* per cent. on punctual payment, was reserved from a day six weeks anterior to the day on which the principal was actually advanced.

Mr. Bethell, Mr. Follett and Mr. Bazalgette appeared for the plaintiffs; and

Mr. Roll, Mr. Tripp, Mr. Shebbeare, Mr. J. H. Palmer and Mr. Schomberg, for the several defendants.

Mr. Follett replied.

Feb. 18.—TURNER, V.C.—after a preliminary statement of the facts—said—Such being the state of circumstances on the 29th of March 1844, and Capt. Long being unable, in consequence of the deed of transfer not being executed, to pay the mortgage money with safety to the trustees of the Norwich Union Assurance Society, the memorandum of that date was given and signed by Storie. Here the matter rested until the 4th of May following, when, the deed being then executed, Capt. Long paid the 7,500*l.* to the Norwich Union Assurance Society, and the securi-

ties were duly transferred to him. It was argued that the non-payment of the 7,500*l.* until six weeks after the day of the date of the deed and the reservation of interest from the date of the deed, brought the transaction within the terms of the statute of Anne (1). Now, it is to be observed that Captain Long did not, in the result, take more than 5*l.* per cent. interest. He actually received, on the 29th of September 1844, under the terms of the deed, interest at the rate of 4*l.* per cent. from the 29th of March; and the greatest amount which by the Statute of Anne he was entitled to take was interest at 5*l.* per cent. from the 4th of May, which would be a greater sum than what he actually received, and, therefore, there was no taking of usurious interest within the Statute of Anne; and whatever interest may have been reserved there was not a larger amount actually taken than the statute permits. Then, was there a larger, *i. e.* an usurious, interest reserved? The words of the statute are, that all bonds, &c. whereupon or whereby there shall be reserved or taken above the rate of 5*l.* for every 100*l.* for a year, are to be void. It is clear that on the face of the deed itself there is no reservation of usurious interest; no reservation above 5*l.* for every 100*l.* for a year; because the clause of redemption stipulates for the legal amount of interest, *viz.* 5*l.* per cent. per annum. But it was said that the deed does not represent the real, or at least the entire, contract between the parties, because no money was paid until May; and that the real contract was to be found in the agree-

ment contained in the memorandum of the 29th of March 1844, which stipulates that the interest to be paid shall be calculated according to the rate mentioned in the deed. This is the same contract as the contract in the deed, except as to the period from which the interest is to run, and, therefore, on the face of the contract there is no usury.*

Now, what is the meaning of the word "reserved" in the statute? The cases ~~have~~ perfectly settled this point. In *Floyer v. Edwards* (2) Lord Mansfield says (p. 599), "An actual borrowing of money, with a penalty on forbearance, is no usury, if the party borrowing can discharge himself by payment within the time. And the case in *Croke* (3), which says, this, is much stronger than the present case, by the difference of the penal sum which is greater. In *Hawkins' Pleas of the Crown*, book 1, ch. 29, sec. 36, it is expressly laid down, that where it is in the election of the party borrowing to discharge himself, and so avoid paying the increased interest, it is not usury." And so in *Burton's case* (4), it being in the election of the grantor to have paid and frustrated the rent, this is not usury. Another important case (not cited in the argument) is *Tate v. Wellings* (5). There the obligor of a bond had applied to the obligee for the loan of a sum of money, which the obligee agreed to let him have, but said he should expect the same interest which he was receiving in the short annuities, *viz.* 8*l.* 10*s.* per cent., which being assented to, it was agreed that the money should be raised by a sale of short annuities to the amount of 912*l.* 12*s.* 6*d.*, and a bond was drawn up, dated the 1st of September 1784, by which the obligor was bound to replace that amount in the same stock on the 1st of September 1785, but that if it were not replaced by that time, he was to repay 912*l.* 12*s.* 6*d.* on the 1st of January 1786, and to pay in the mean time such interest as the stock would have produced; and it was held, that because he had in the first year the option to replace the stock, and so relieve himself, it saved the ulterior contract, by which after

(1) 12 Anne, stat. 2. c. 16. Section 1. enacts to the following effect:—That no person, after the 29th of September 1714, upon any contract which shall be made after that day, shall take, directly or indirectly, for loan of any monies, wares, merchandise or commodities whatsoever, above the value of 5*l.* for the forbearance of 100*l.* for a year, and so after that rate for a greater or lesser sum or longer or shorter time; and that all bonds, contracts and assurances whatsoever, made after the time aforesaid for payment of any principal, or money to be lent, or covenanted to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the hundred as aforesaid, shall be utterly void; and that all persons who shall, upon any such contract, take by way or means of any corrupt bargain, loan, &c., or by any deceitful way or means, or by covin, engine or deceitful conveyance, a larger amount of interest than 5*l.* per cent., shall forfeit treble value.

(2) *Lofft*, 594.

(3) *Roberts v. Trenayne*, Cro. Jac. 507.

(4) 5 Rep. 69, a.

(5) 3 Term Rep. 531.

the first year he was bound to replace the principal and interest beyond 5*l.* per cent. The Lord Chief Justice says (p. 537) "I have had some doubt in my mind in the course of the argument, whether, as the defendant had no power to replace the stock after the expiration of the year, it did not become a loan of money from that time, with a reservation of usurious interest, and that the pretence of transferring the stock was merely a colour for the usurious transaction. But my doubt is now removed; for this case ought not to have a colour imputed to it which is expressly negatived by the finding of the jury. If, then, this transaction were legal during the first year, is there anything superadded to make it usurious? I think not." And Mr. Justice Buller says, "In order to support the defence set up, it must be shewn that the contract was usurious at the time when it was entered into; for if it were legal at that time, no subsequent event can make it usurious." I therefore am of opinion that neither in the deed nor in the memorandum in this case is there a usurious reservation of interest within the statute. I do not say that such a construction might not be put on the deed and agreement if there were any evasion, if this were a mere contrivance, if there had been an agreement that the money should be paid at the day of the date of the deed, or if there had been anything to indicate an intention to secure or to take more than the legal rate of 5*l.* per cent. per annum. There is, however, nothing in support of such a case; on the contrary, the whole evidence is against it. In *Banglay's case* (6) a warrant of attorney was given for securing repayment of 600*l.* and interest from the 25th of March. It was said by Lord Eldon, that if the 600*l.* was not paid on the 25th of March, but was, in fact, advanced in parcels at different times, the last of which was on the 1st of June following, it would have been impossible to say that the transaction was not usurious. But in the present case the evidence clearly shews that the intention was to advance the money immediately, and that the only reason why the money was not advanced on the execution of the deed was, because

the borrower was unable to carry out his part of the agreement. This brings the case within the subsequent expressions of Lord Eldon, which explain what was meant by the part just quoted—"It has been said that Banglay had the 600*l.* ready, that the bankrupt might have had it, and the case has been assimilated to that of a banker: and if that was in fact the agreement, and the transaction was *bona fide* that the money being as it were paid to the bankrupt, and repaid by him to the lender, or left in his hands to be drawn out as he [the bankrupt] wanted it, I do not think that the money not being ready at a subsequent time, though a breach of the contract, would affect it with usury." And here the money was left in Capt. Long's hands (if in his hands at all) for the express purpose of being paid to the Norwich Union Company at the time.

Independently, however, of the grounds upon which it may be held that the deed itself is not usurious, the effect of the agreement and the dealings of the parties might be that the contract might be void although the deed itself was not usurious. Now, if we look at the position of the parties, we find Capt. Long to have procured a transfer of the second mortgage from Cockell for 5,000*l.*, but that the first mortgage for 7,500*l.* was still subsisting in the trustees for the Norwich Union Company. The effect would be, that interest on the first mortgage was running on and erecting itself into a charge on the land as against those claiming under the second mortgage. A stipulation, therefore, that the deed of transfer of the first mortgage should bear date on the day of the date of the transfer of the second mortgage would not necessarily be a usurious stipulation. It might have this construction, that Storie undertook to pay this interest so as to prevent it being a charge on the land; and it is evident that something of this sort was intended, for otherwise, why is any mention made of the second mortgage? What is the meaning of the recital of there having been that security entered into, and of the transfer of it, and then the agreement that the deed of transfer of the first mortgage for 7,500*l.* shall bear date as of that day, namely, the 29th of March, and that interest thereon shall be payable from that date, not under

(6) 1 Rose, 171.

the deed, but calculated according to the rate mentioned in the deed?

Objections were also taken to the frame of the suit, and it was contended that no relief could be given in it under the following circumstances:—It appears that Capt. Long had in his lifetime instituted another suit for foreclosing the mortgages; that in that suit a motion had been made for a receiver, which had been refused, the costs of the motion being reserved; that an appeal from that decision had been dismissed with costs. These costs have never been paid, Capt. Long is dead, and the suit is therefore abated, and the present bill, taking no notice of these proceedings, is filed by his executors. Now, to this bill, thus instituted, two objections have been taken; first, that no decree can be made in this suit, because the proper mode of proceeding was to have revived the original suit; and, secondly, that at any rate no steps will be allowed to be taken, and all proceedings taken will be set aside as irregular, until the costs ordered to be paid by the decree on appeal in the abated suit have been satisfied. In the first place, what would have been the course if the existence of the first suit had been pleaded in bar to the present suit? (I say nothing on the question, whether an abated suit can or cannot be pleaded.) There would have been a reference to the Master to inquire whether the two suits were for the same object, and then if the first suit had been after that report proceeded with, it is true that all the expense of the present suit would have been avoided. But if the defendant Storie had pleaded the previous suit, it would have been in the power of the Court to have dealt with both suits, according to the justice of the case; and if the second suit had been found better adapted to the justice of the case, the Court would have ordered payment of the costs in the first suit already directed to be paid, and stayed all further proceedings in it; and the second, the present suit, to be proceeded with. The existence of the old suit, therefore, is not necessarily a bar to the prosecution of this suit, and I cannot dismiss this suit on the sole ground of the pendency of the former.

Then, on the question of expense, the defendants allowed all, or nearly all,

the expenses in the second suit to be incurred before they took the objection that the first suit was still pending. They have not, therefore, made the proper use of the objection, such as it is. On the other hand, the line of conduct of the plaintiffs is certainly not such as ought to be encouraged. They might have revived the old suit, and, for all that appears to the contrary, might have obtained in it all the relief which they seek by their new bill. The plaintiff in the old suit had made two motions, the costs of one of which were reserved, and the costs of the other the present plaintiffs would have to pay. In order to avoid that, they filed the present bill. They had power to do so, but I shall give them no costs in this suit unless they submit to pay the costs ordered to be paid by the plaintiff in the original suit.

L.C.
1851.
April 29, 30;
May 2.
1852.
Feb. 26.

MONRO V. TAYLOR.

*Specific Performance — Sale of Lands
"partly Freehold, partly Leasehold"—Un-
certainty of Boundaries—Renewal of Lease.*

In a contract for sale the lands were described as partly freehold and partly leasehold. The title deeds did not clearly define the boundaries and extent of the two properties; but the uncertainty did not arise from an instrument incapable of legal construction in that respect:—Held, that such an uncertainty was not an objection to a decree for specific performance.

The vendor of leaseholds, held under an ecclesiastical corporation, previously to his contract for sale was in treaty with the lessors for a renewal of the lease, and continued such treaty after the contract:—Held, that this did not throw upon him the obligation of procuring such renewal for the benefit of the purchaser.

The bill was filed for the specific performance of a written agreement, dated the 31st of July 1845, in the following words:—

"Memorandum, that G. L. Taylor, of &c., agrees to purchase of Robert Monro, of &c., the premises called Belmont House, partly freehold and partly leasehold, for the sum of 7,750*l.*, the purchase to be completed on the 1st day of November next, possession to be given on signing the formal agreement, to be drawn up agreeably to the terms of this minute, when the sum of 2,750*l.* is to be paid by Mr. Taylor on account of the purchase-money. [Provision, that the residue is to be secured by mortgage on the premises]. Mr. Taylor agrees to take the same title as Mr. Monro took on purchasing from the devisees and executors of the late Duke of Brunswick. [Provision, that Mr. Taylor should also purchase certain stables, fixtures, barges, &c., and have the option of purchasing any part of the furniture at a valuation]. Mr. Monro to bear such expenses as are usually borne by a vendor, and Mr. Taylor those usually borne by a purchaser; and each party to pay the expense of his own surveyor."

No other agreement was signed, nor was any part of the purchase-money paid.

In the conveyance of the premises from the Duke of Brunswick to the plaintiff in December 1832, the freehold portion was described as a "messuage or tenement, being one of the two into which the capital messuage called Belmont House was formerly divided [describing the appurtenances], situate and being on the north-west side of the road leading from London to Wandsworth, near Vauxhall aforesaid, and abutting south-east upon the said road; and also all that plot, piece, or parcel of land or ground, being part and parcel of a large piece or parcel of ground formerly occupied," &c.; "which said plot, piece, or parcel of land or ground, containing in front towards the east, next the turnpike-road leading from Vauxhall to Wandsworth, twenty-nine feet by admeasurement, little more or less, bounded on the south by the messuage hereinbefore described, and the forecourt and garden thereof, and on the north by the said premises, formerly occupied," &c. The leasehold portion was described as "all that piece or parcel of ground situate, lying, and being at the back part of the freehold messuage or tenement and premises,

now or late in the occupation of Enos Smith, at Vauxhall, called Belmont House, and forming part of the garden belonging to the said premises, extending down to the River Thames, and on the north side thereof next and adjoining ground and premises heretofore belonging to," &c.; "and then running in an oblique direction across the said garden, at the upper end thereof, next and adjoining the freehold part of the lawn or garden late of the said Enos Smith, then running in a line down the River Thames on the south side of the said premises, abutting on the wall dividing the said premises late of the said Enos Smith from premises late belonging to D. Pratbernon," &c., "which said premises were some time since sold by the devisees in trust of Sir J. Mawbey," &c.; "and were, with certain other parcels, demised by the Dean and Chapter of Canterbury to the said Sir J. Mawbey and D. Pratbernon respectively, comprised in Lot 4 of the particulars of sale." The description in the lease of June 1831, under which the premises were then held, and in the lease of June 1838, under which the same premises were held at the date of the contract between the plaintiff and the defendant, was substantially the same as that contained in the assignment to the plaintiff. The term in each lease was twenty-one years, reserving a yearly rent of 2*s.* The premises were not assignable without the licence of the dean and chapter.

The plaintiff had applied for a renewal of the lease by the dean and chapter before the contract with the defendant, and the dean and chapter had required that in the proposed new lease a plan of the demised premises should be inserted, shewing the boundaries and dimensions thereof. Whilst the correspondence with reference to the plan was going on, it was discovered that, in an old surrendered lease of the same premises, of the date of 1810, there was a plan, drawn on a scale of a chain to an inch, stating the superficial quantity to be two roods. Two surveyors, one for the plaintiff and the other for the dean and chapter, thereupon met, and a plan, marking the boundaries of the leasehold premises, so as to make the same contain exactly two roods, was prepared by such surveyors, on the 13th of May 1846. By

comparison of the boundaries set out in the plan thus prepared, with the boundaries in the plan on the lease of 1810, measured according to the scale there stated, it appeared that the superficial contents of the demised premises were represented as greater in the old than in the new plan. The dean and chapter were advised that the quantity of two roods mentioned in the old plan was an approximation only, and that the actual dimensions ought to be determined by admeasurement, according to the scale; and that, therefore, in any renewed lease, the plan should be drawn in strict conformity with that of 1810, but omitting the superficial quantity of two roods.

A correspondence had taken place between the solicitors of the plaintiff and the defendant on the subject of the negociation with the dean and chapter. On the 17th of June 1846 the plaintiff's solicitors informed the defendant's solicitors that the dean and chapter having declined to accede to the plan settled by the surveyors, they feared there was no alternative but to accept the lease as tendered by the dean and chapter, and obtain the licence to assign. The defendant's solicitors, on the 9th of July, replied that they would advise their clients, the Western Gas Light Company (on whose behalf the defendant stated that he had purchased), to complete the purchase if the plaintiff would obtain a renewed lease in all respects the same as the lease of June 1838, except as to dates. The dean and chapter objected to grant the renewed lease in the form thus required, and intimated that the licence should be conditional on the new lease containing the approved plan. On the 21st of July the defendant's solicitors wrote to the plaintiff's solicitors:—"If you can obtain a licence for assigning to our clients the existing lease without any condition, so that we may hereafter object to any unreasonable deviation, we think they ought to be satisfied, and therefore we shall recommend it." On the 6th of August 1846 the defendant's solicitors wrote to the plaintiff's solicitors, "that as the leasehold and freehold portion of the property have not been defined as requested, and as the licence to assign has been refused, the company have no alternative but to

abandon the contract and hold your client responsible for compensation." The plaintiff declined to accede to the abandonment of the contract, and intimated that the licence would be forthwith obtained. Various modes of settlement, during the months of September, October and November, were proposed but not acted upon; and in December 1846 a bill for specific performance of the contract was filed. The cause was heard before Wigram, V.C., who made a decree, dated the 26th of June 1848, declaring that the plaintiff was entitled to specific performance, subject to his making a good title; and the usual reference was directed.

The Master by his report found that the plaintiff could make such good title, and that he first shewed such good title on the 3rd of November 1849, the day when an attested copy of the lease of 1810 and the plan thereto annexed was produced by the plaintiff's solicitor and left in the Master's office. To this report the defendant excepted, on the ground that a good title could not be shewn; and on the other hand, the plaintiff excepted, on the ground that a good title was shewn, and that before the filing of the bill.

The cause came on to be heard before Vice Chancellor Wigram on these exceptions and further directions; and a decree was made on the 20th of February 1850, whereby the exceptions of both parties were overruled; and the Master was directed to compute the purchase-money due to the plaintiff, and to compute interest on the 5,000*l.*, part of the purchase-money, for three years, commencing from November 1845, at the rate of 5*l.* per cent. and on the residue of the purchase-money for three years, at the rate of 5*l.* per cent., and the whole of the purchase-money from the expiration of the three years from the date of the report, according to the agreement; and the Master was to take an account of the rents and profits from the 1st of November 1845, and that what should be coming on the account of rents and profits should be deducted from what should be due to the plaintiff for interest; and upon the plaintiff executing a proper conveyance, it was ordered that the defendant should pay to the plaintiff what should remain due for principal and inter-

est. Against this decree the defendant appealed.

The Solicitor General and Mr. Amphlett, for the plaintiff.

Mr. Rolt, Mr. Malins, and Mr. Micklethwait, for the defendant.

The following cases were cited—

Freme v. Wright, 4 Madd. 364.

Grove v. Bastard, 2 Phill. 619; s. c. 17 Law J. Rep. (N.S.) Chanc. 351.

Taylor v. Brown, 2 Beav. 180; s. c. 9 Law J. Rep. (N.S.) Chanc. 14.

King v. Wilson, 6 Beav. 124.

And as to costs—

Long v. Collier, 4 Russ. 269.

Scoones v. Morrell, 1 Beav. 251.

Sidebotham v. Barrington, 5 Beav. 261.

Feb. 26. — The LORD CHANCELLOR (TRUMBO), after stating the facts of the case, proceeded as follows :—It has been objected that the agreement ought not to be enforced on account of the generality of the expression “partly freehold and partly leasehold;” but I think this objection is groundless. I am not aware that it ever has been held that a contract for the purchase of a freehold and leasehold property must define the precise boundary of what it is of each; nor do I think, on principle, the indefiniteness of such a description in the contract ought to be deemed a justifiable reason for not enforcing it. If the boundaries are known to the parties at the time of the contract, the indefiniteness of the description is manifestly immaterial; and even if it is not known at the time, and the purchaser should find the quantity of freehold is less than he expected, and this should be prejudicial to him, still if, as in the present case, there is no proof of concealment or misrepresentation on the part of the vendor, the purchaser would only have to blame himself for his own imprudence in not inquiring what were the relative quantities of the freehold and leasehold premises before he entered into the contract. As to the statement that representations respecting the boundaries were made prior to the contract, I think there is no sufficient proof of that. But it is alleged that the correspondence shews that the original contract had been abandoned, and a treaty for a

new agreement had been entered into. This, however, I do not think is the case. The letters merely amount to a mode of obviating the difficulty, which, in the opinion of the purchaser, stood in the way of completion of the purchase.

It is further said, that the defendant gave notice of abandonment of the contract, and that notice had the effect of putting an end to the contract: but it appears to me, from a passage in the evidence, that that notice was afterwards waived by the subsequent conduct of the defendant's solicitors; but besides, the circumstances of the contract were not such as, in my opinion, to entitle the defendant to give a notice of abandonment.

It is objected that this dispute respecting the division between the freehold and leasehold portion of the estate, is a reason why this Court should not enforce the agreement: but I cannot assent to that. I will assume for the purpose of the argument that a vendor, who contracts to sell property described as “partly freehold and partly leasehold,” and in the absence of specific stipulations relieving himself from the obligation, is obliged to shew the purchaser what part is freehold and what part is leasehold; and that in the present case, the stipulation that the purchaser should take the same title as the vendor had from the devisees and executors of the Duke of Brunswick does not remove that obligation, for a knowledge of the tenancy of the different portions of the estate may be of the utmost importance as regards the beneficial use of the property. But, assuming this to be the law, I think that by the production of the lease of 1810 the vendor sufficiently fulfilled his obligation to shew what part was leasehold and what part was freehold, even supposing it to be wholly uncertain whether the specification of “two roods” is to be taken as against the dean and chapter, or whether the dimensions ought to be determined by the application of a scale, and the larger quantity be thereby determined to be leasehold. I put out of the question the argument that the uncertainty is only an uncertainty in law, and an uncertainty that could be determined by a decree when pronounced, which would determine what the contract was from the beginning, and

I will assume that there is an uncertainty which could not be thus determined, and assuming this, is it such an uncertainty as ought to be raised as a ground for refusing specific performance under the circumstances of the case?

It is agreed on all hands that the leasehold part occupies the whole of the river frontage, and that the freehold occupies the whole boundary of the turnpike road. The only uncertainty is what is the exact position of the division line between the freehold and leasehold, and consequently, whether the leasehold is only two roods, or somewhat more—say two and a half roods. I lay no stress on the smallness of the quantity claimed by the dean and chapter, and I will suppose it to be of the utmost importance to the purchaser that the leasehold should consist of two roods only. Supposing this to be so, and assuming, nevertheless, that the additional part which is claimed by the dean and chapter really is freehold, and assuming what certainly may not be more prejudicial to the purchaser, that it is wholly uncertain whether that part is freehold or leasehold, and such an uncertainty can never be removed, the purchaser has sustained no damage—he has all that the vendor had and all that the purchaser contracted to buy; for, considering the value of the good-will of a tenant holding under the dean and chapter, he was satisfied to take the estate without stipulation as to the respective quantities of freehold and leasehold. All he has to do is, to see that the leasehold embraces the larger rather than the smaller of the two quantities of which it is admitted to consist, and to deal with the estate accordingly for the purposes to which he might think fit to apply it. After such a contract as that entered into, if two and a half roods had been the quantity mentioned in the body of the plan of the lease of 1810, it cannot be contended that the purchaser would be entitled to resist the specific performance, when it was under a general description which did not define the relative positions of the freehold and leasehold, and when there is no proof that any representations were made to him as to the quantity of the one or the other, or the boundaries between them: and how then can it be maintained that the pur-

chaser is entitled to resist the specific performance, merely because the quantity mentioned in the body of the plan was two roods, while the scale on the plan from the dean and chapter gives about two and a half roods when he purchased under a general description of “partly leasehold and partly freehold,” and when there is no proof that at the time of the contract he was ever led to suppose, or had any reason to suppose, that the leasehold consisted only of two roods, or the boundary line between the freehold and leasehold was of the one portion rather than of the other? To resist the specific performance upon these grounds, when it could not have been resisted if the quantity specified in the body of the plan had been two and a half roods, is to resist the specific performance merely on account of the possibility of the quantity of the freehold being greater, and the bargain somewhat more beneficial in the present case than it would have been if the quantity mentioned in the body of the plan had been two and a half roods, and there had been no doubt that the leasehold consisted of as great an amount.

As to the notice mentioned in Mr. Finch's (the agent of the dean and chapter) letter of the 25th of July, which was to this effect:—“That the fine set and paid for the renewal of the lease was expressly on an understanding that the new lease should contain such a description and plan of the proposed premises as should be approved by the dean and chapter:”—that furnishes no reason why the contract should not be performed; for independently of the consideration that the defendant purchased without any stipulation as to the relative quantities of the leasehold and freehold, the letter of Messrs. Phillips & Son (the defendant's solicitors) of the 1st, renders that notice immaterial: for they say—“If you can obtain a licence for assigning to our client the existing lease without any condition, so that we may hereafter object to any unreasonable deviation, we think they ought to be satisfied, and shall, therefore, recommend it.” If the dean and chapter should hereafter insist, when a renewal is applied for, that the plan in the lease of 1810 should be adopted, omitting the specification of the quantity, and that the leasehold should be

stated to amount to the quantity for which the dean and chapter has contended, that would merely be a demand which the defendant would be prepared to expect, and notwithstanding the expectation of which in this case, his solicitors expressed their willingness to accept the assignment of the lease.

But it is further contended that the delay which has taken place, and the position of the company on whose behalf the defendant purchased, furnishes a reason why the Court should not enforce the agreement. It is submitted by the answer that by reason of the serious and prejudicial delay that had arisen previous to the month of August 1846 in the completion of the purchase, which would prevent the company from commencing the manufacture of gas, and proceeding with building operations which were absolutely necessary, and which had been determined on by the company on the defendant entering into the contract, the defendant was justified in abandoning the contract, and the more especially as the company had been compelled by reason of such delay to purchase other and less advantageous premises for the purpose of carrying on the manufacture of gas. There does not appear to me to be any evidence of this, or that the plaintiff or his solicitor was aware of the purpose for which the defendant or the company made the purchase. But even if that were otherwise, the defendant might have at once put an end to the delay by assenting to the claim of the dean and chapter, which he might have done without having any stipulation or understanding as to the quantity of the leasehold.

Another objection urged by the defendant is, that the plaintiff contracted and was bound to procure a renewed lease for the defendant. But this is not so. It is true the plaintiff, prior to the contract, was in treaty for a new lease, and he made an exertion to procure it; but the contract itself is silent in respect of any renewal, and the plaintiff in the absence of express words must be taken only to have assigned what he himself had, either in law or in equity, unless there were special circumstances creating an obligation independent of the contract. It was expected that the

plaintiff would endeavour to procure a renewal, if it were only with a view to his own benefit in the event of the contract breaking off. But admit he did so for the benefit of the purchaser alone, (and from the general tenor of the correspondence, that would appear to be the case), that did not create an obligation on the part of the plaintiff to procure such a renewal. There is no proof of its being for any consideration; and, therefore, it is not one which a court of equity would enforce even if it had not been waived by the defendant, as it seems to me to have been by the letter of 1846.

With reference to the defendant's exceptions, I am of opinion, for the reasons I have already given, that a good title is shewn notwithstanding the uncertainty as regards the boundary line to which I have adverted.

With regard to the plaintiff's exception to the report as to the time when a good title was shewn, I think the exception ought to be allowed. Looking at the correspondence, I conceive that the defendant or his agent must be deemed to have known in the course of the correspondence, before the institution of the suit, what was the precise point in dispute between the plaintiff and the dean and chapter; and, consequently, for the reasons I have already given, the dispute did not shew that a good title could not then be made, and I think that interest ought to be allowed from the time fixed for the completion of the contract.

With regard to the costs, even supposing that a good title was not shewn until the attested copy of the lease of 1810 was produced in the Master's office, I agree with the Vice Chancellor that the same kind of litigation would have arisen, even if the lease of 1810 had been produced before the filing of the bill, and the plaintiff is therefore entitled to the costs of the suit.

Appeal of the defendant dismissed, with costs; and the plaintiff's exceptions to the Master's report allowed.

M.R.
Jan. 19, 20, 21; }
Feb. 7, 9. } MONEY v. JORDEN.

Injunction—Debt—Promise to forego—Irrevocable Engagements contracted.

The Court will restrain a party from enforcing a legal claim where promises have been made to the person legally liable not to enforce it, upon the faith whereof obligations have been entered into.

L. M. while a feme sole became the owner of a bond and warrant of attorney, upon which judgment had been entered up, which the plaintiff, J. W. B. M., had given to secure the repayment of 1,200l., and she repeatedly promised not to enforce the securities, upon which the plaintiff, J. W. B. M., contracted irrevocable engagements. L. M., after her marriage, jointly with her husband, took proceedings at law against J. W. B. M. to enforce payment of these securities; and upon a bill filed by him,—Held, that as L. M. had by her representations induced J. W. B. M. to enter into irrevocable engagements, she could not repudiate her assurances, and the Court granted a perpetual injunction to restrain her proceedings to enforce payment, and directed satisfaction to be entered up on the judgment, with costs.

The facts of the case are sufficiently stated in the judgment, where most of the cases cited are also referred to.

Mr. R. Palmer and Mr. Bates appeared for the plaintiff, James William Bayley Money.

Hammersley v. the Baron de Biel, 12 Cl. & F. 45, 61, 78.

Neville v. Wilkinson, 1 Bro. C.C. 543.

Hobbs v. Norton, 1 Vern. 136.

Pearson v. Morgan, 2 Bro. C.C. 388.

Cross v. Sprigg, 6 Hare, 552; s. c. 19 Law J. Rep. (N.S.) Chanc. 528.

Flower v. Marten, 2 Myl. & Cr. 459; s. c. 6 Law J. Rep. (N.S.) Chanc. 167.

Wekett v. Raby, 2 Bro. P.C. 386, Toml. ed.

Kirk v. Clark, Prec. Ch. 275.

Maunsell v. White, 1 Jo. & Lat. 539, 557, 567.

Mr. Willcock and Mr. F. T. White appeared for the defendants, William Prue Jorden and Louisa his wife.

Doe d. Sweetland v. Webber, 1 Ad. & E. 733; s. c. 3 Law J. Rep. (N.S.) K.B. 208.

Haigh v. Brooks, 10 Ad. & E. 309, 323; s. c. 2 P. & D. 477; 9 Law J. Rep. (N.S.) Q.B. 99, 194.

Longridge v. Dorville, 5 B. & Ald. 117, 123.

The MASTER OF THE ROLLS.—The plaintiff in this case seeks to restrain the defendants from enforcing execution on a judgment entered up on a bond and warrant of attorney, given by him in November 1841 and February 1842 to Charles Marnell, the brother of the defendant, Mrs. Jorden. The plaintiff brings forward two distinct grounds for the relief which he seeks: first, he alleges that the defendant, Mrs. Jorden, the legal personal representative of the obligee in the bond, is estopped from enforcing any money due upon it, by reason of her solemn declarations and assurances that she would never attempt to do so, and on the faith of those assurances irrevocable obligations have been entered into between him and third persons, in which all the parties to these obligations have acted on the truth of such declarations and assurances. Secondly, the plaintiff alleges that the father of the plaintiff, and the defendant, Mrs. Jorden, then Miss Marnell, entered into an agreement by which, in consideration of his giving up to her a house at Midnapore in the East Indies, of which she received the benefit, instead of settling it upon his son's marriage, she agreed not to attempt to enforce payment of anything from the plaintiff on this bond or warrant of attorney; and a third point is brought forward by the plaintiff, which is subordinate to the other two,—that in case the Court should be of opinion that the defendant is entitled to recover on the judgment, the plaintiff then insists that the amount to be recovered ought to be limited to one-third of the sum nominally secured by the bond and warrant of attorney. The facts, so far as I consider it necessary to refer to them for the purpose of explaining the conclusion to which I have come, are as follows:—

The plaintiff in the year 1841, then a young and inexperienced man, was induced by two persons, of the names of

Patrice Gougis and Crouy Chanel, to engage in a speculation in the stock market for the purchase and subsequent sale of Spanish bonds, in the expectation of a rise in those securities. At the same time, a gentleman of the name of Hooper, who was a friend of Mr. Marnell, was induced to concur in the transaction. Mr. Marnell, the brother of Mrs. Jorden, then Miss Marnell, was applied to, to furnish funds for this speculation, which he agreed to do to the extent of 1,200*l.* on the condition that at his option he should either have interest on his advance at the rate of 30*l.* per cent. per annum, or one-eighth of the profits realized. According to this arrangement, I see nothing to countenance the idea that he was in any event to be liable for any loss, if any should be incurred by the transaction. He subsequently elected to take the one-eighth of the profits. The speculation turned out a failure, and the profits nothing, and consequently he was entitled only to be repaid the 1,200*l.* capital he had advanced. He applied to have this money repaid, and three bills of exchange for 500*l.* each, drawn by Hooper on and accepted by the plaintiff, were indorsed by Chanel and were given to Marnell. In November 1841, Marnell insisted on the plaintiff and Hooper giving him a joint and several bond for the 1,200*l.* due, which they accordingly did on the 23rd of November 1841, and the three bills were given up, and on the 4th of February following, Mr. Marnell obtained from the plaintiff a warrant of attorney, on which, shortly afterwards, on the 23rd of that month, judgment was entered up against him for the amount due. Mr. Marnell was the intimate friend of the plaintiff's father, whose family had, as it is alleged, and seems to me to be proved, received considerable benefits from him. During the whole course of the transaction the father was absent in Spain, and many observations have been made on the supposed advantage taken of this young man, inexperienced in the ways of the world, and deprived of that protection which his father's presence would have afforded. I am, however, of opinion that I cannot regard any such observations. Mr. Marnell had advanced the 1,200*l.* to the four persons engaged in this transaction, and he was entitled to be

repaid this amount by them, and they, on the facts as they appear before me, were jointly and severally liable for the whole amount.

The case made by the bill is not, although it contains a suggestion to that effect, that the securities given by the plaintiff ought to be delivered up and cancelled, on the ground that they were obtained from him by any of the means which induce a court of equity to interfere to prevent deeds from being made available against the persons who execute them, nor, in truth, if such a case had been brought forward, could it have been successfully maintained on the admitted facts. Whether, having regard to his intimacy with the family and the youth and inexperience of the plaintiff, Mr. Marnell ought not to have warned this young man against the transaction he was about to embark in, instead of lending him money to carry it on, whether there was want of delicacy, or whether even threats and pressure were employed in the mode in which the bond and warrant of attorney were obtained from him, are questions on which I express no opinion. Whatever opinion I may entertain, looking at them in a moral aspect, I cannot for the reasons I have stated on the present occasion regard them judicially, except so far as they may throw a light on the subsequent acts of Miss Marnell, and assist in explaining the motives by which her conduct seems to have been guided. Mr. Marnell did not long survive this transaction. He took no steps to enforce the payment of the amount due on the securities.

At that time the plaintiff was possessed of no property beyond his commission; some negotiation took place after his return from Spain between the father of the plaintiff and Mr. Marnell, for the delivery up of the bond on payment of one-third of the principal sum due, but this negotiation ended in nothing, and on the 28th of January 1843 (in less than a twelvemonth after the warrant of attorney had been given) Mr. Marnell died. By his will he left all his property to his sister, now the defendant Mrs. Jorden, and he made her and the father of the plaintiff the executors of his will.

The will was proved by Mrs. Jorden, who made no attempt to recover any money

from the plaintiff on this bond or judgment until the commencement of the year 1850, and after her marriage with the defendant Mr. Jorden, which took place in 1848. In August 1845 the plaintiff married a Miss Poore, and it was in anticipation of this event, and previously to its taking place, that the declarations of the defendant, Mrs. Jorden, are alleged to have been made, on which the plaintiff rests his first ground.

Before I examine the evidence on this subject, I think it is desirable to state what I consider to be the principles of equity which govern cases of this nature, and I shall then consider whether the evidence brings the case within the principle on which relief can be granted. It is a principle of the common law, to be discovered in the earliest cases, and more particularly in the action for deceit, that a man is responsible for the truth of the assertion which he makes, and if a man makes a statement to another knowing that statement to be false, and with the view of thereby inducing the person to whom he makes the statement to do an act whereby that person receives an injury, an action will lie at his suit against the person who made the statement, although he derived no profit or advantage from it, or from the act he thereby induced the other to perform. This was the case of *Pasley v. Freeman* (1) which has been followed by a long series of decisions. It does not affect the principle I am now considering that a statute, 9 Geo. 4. c. 14, was subsequently passed, which, in order to prevent the Statute of Frauds, 29 Car. 2. c. 3, from being rendered nugatory, enacted that in certain cases the statements must be made by writing, and unless so made an action could not be maintained upon them. The principle of the law was, that a man was responsible for his solemn statement, if made with a view of inducing another to act upon it. The doctrine of the common law in matters of warranty is but another branch and illustration of the same principle. Equity in following this doctrine of the common law has, I apprehend, done so to this extent. It does not stay to inquire whether in such cases the statements made were false or true, but if a deliberate statement be made by one person to another,

who believing that statement to be true, and upon the faith of it, enters into engagements, the person who made the statement shall not be permitted by any act of his to falsify it: nay more, he shall be compelled, so far as lies within his power, to make good the statement he has asserted to be true. The cases on this subject are numerous. I will refer shortly to some of them.

In *Gale v. Lindo* (2), where a man had given a sum of money to his sister in order to make her a portion sufficient to induce a man, who afterwards became her husband, to marry her, and had taken her bond for the payment of the sum so lent, although the husband had died without issue and ignorant of the transaction, the Court would not allow the brother to enforce this bond against his sister, the widow. In *Montefiori v. Montefiori* (3), which is cited somewhat differently from Mr. Filmer's notes in *Neville v. Wilkinson*, in order to assist his brother's marriage, a man stated he owed his brother a sum of money on the balance of a partnership account, and gave a note for that amount to be shewn to the friends of the lady, on the faith of which the marriage took place. Shortly afterwards, the brother of the husband reclaimed the note, and the matter having been referred to arbitration, and the arbitrators having directed the note to be delivered up, two applications were made to the Court of King's Bench, one for an attachment for non-performance of the award, and another to set it aside. Lord Mansfield discharged the rule for the attachment, and made absolute the rule for setting aside the award. His observations are very pertinent. They are to this effect:—"The law is, that where, upon proposals of marriage, third persons represent anything material in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it. It shall be as represented to be; and the husband alone is entitled to relief as well as when the fortune so misrepresented has been specifically settled on the wife, for no man shall set up his own iniquity as a defence, any more

(1) 3 Term Rep. 51.

(2) 1 Vern. 475.

(3) 1 W. Black. 363.

than as a cause of action. The arbitrators, therefore, being clearly mistaken in point of law, the award must be set aside." In *Neville v. Wilkinson*, the defendant being employed to make out a full and complete list of all the debts and liabilities of the plaintiff, and to deliver it when made out to the father of the lady whom the plaintiff was about to marry, consented at the request of the plaintiff (who stated his apprehension that the disclosure of the whole truth would prevent his marriage) to omit from the list the amount due from the plaintiff to himself, the defendant. The marriage having taken place, the Lord Chancellor granted an injunction to restrain the defendant from enforcing payment of that debt, and declared his opinion that the defendant could never recover against the plaintiff, Mr. Neville. In *The Vauxhall Bridge Company v. Earl Spencer* (4), Lord Eldon, speaking of *Neville v. Wilkinson*, says he "remembers arguing the case with obstinacy, but Lord Thurlow thought, that having made a misrepresentation, a court of equity must hold him to it, and that although the plaintiff was a *particeps criminis*." The case of *Scott v. Scott* (5) and many other cases might be referred to illustrating the same subject, and establishing the principle I have already stated, that a man who, by his deliberate assertion, induces another to enter into obligations, cannot afterwards by his acts negative the truth of that assertion.

The next point I have to consider is, whether the evidence in this case establishes that Miss Marnell, now Mrs. Jorden, did, on the marriage of the plaintiff in 1845, make such solemn assertions and declarations respecting her own conduct and intention as to bring her within the rule of equity enforced by this Court which I have already stated. I may observe that the evidence of the intention of Miss Marnell, previously to the marriage of the plaintiff, is material only so far as it corroborates the evidence respecting the statements of Miss Marnell at the time of the plaintiff's marriage, on which this case must stand. It is also to be observed that no statement is alleged to have been made by the defen-

dant directly to the plaintiff, or to Lady Poore, or to any relative of the lady about to be made the wife of the plaintiff. In order, therefore, to support the plaintiff's case, it is necessary that the statements relied on should have been made with the knowledge, or in the belief, that they would be communicated to the plaintiff and his intended wife, or to the mother of the lady.

I proceed to consider the evidence for the purpose of considering whether it establishes, first, that the defendant, then Louisa Marnell, did, at the time when the treaty for the marriage between the plaintiff and his present wife was pending, make any statement to the effect that she would never sue the plaintiff on the bond or enforce the money due from him on that security. Secondly, whether such declarations were made in the belief and expectation, and with the view and for the purpose of their being communicated to the plaintiff and his intended wife, or to Lady Poore and the friends of the lady, previously to his marriage; and thirdly, whether such declarations were, in fact, so communicated and the marriage contract regulated upon them and on the belief of their truth. Unless these three propositions are established, the case of the plaintiff on this head, at least, must fail.

With regard to the first of these propositions, the material part of the evidence is to this effect. The defendant Pulcherie Money states, in answer to the thirtieth interrogatory, "That on the occasion of a morning visit of Louisa Jorden to me, on her being about to quit Brighton, in August or September 1844, I had a conversation with her on the subject of the bond and my son William Money's then intended marriage; when I said to the defendant, Louisa Jorden, 'You have long given up the debt, so it's only a nominal thing, and it's no use your keeping a paper you have long since promised you would never enforce.' She replied, 'I will be trusted;' to which I replied, 'Who talks of not trusting you? But you may marry, and then you will be at the command of your husband.' She then said that she wanted to keep the bond in case she could ever use it against Hooper. I replied, 'If you will give it to me I shall ensure it never can be used against William,

(4) Jacob, 64.

(5) 1 Cox, 366.

and I promise to return it to you if ever you require to use it against Hooper.' To this she said, 'I give you my word of honour that I will never use it against William, but I will be trusted, and I will keep it; besides,' she added, 'you know very well that I have made my will, and that William is heir to everything I possess.' The evidence of this witness is distinct as to the making of such statements. The account given by the defendant in her answer of the same conversation is to this effect. The defendants say, "They admit that in the year 1845 the plaintiff was engaged to be married, and that prior to the marriage, Pulcherie Money, the mother of the plaintiff, had some, but not many, conversations with the defendant Louisa Jorden, with reference to the marriage of the plaintiff; but the defendant Louisa Jorden says, and the defendant William Prue Jorden believes, that Pulcherie Money had not many or any conversations with the defendant Louisa Jorden with reference to the worldly interests of the plaintiff, or with reference to the fortune of his then intended wife, or with reference to, among other things, the said bond; and that Pulcherie Money did not ask the defendant Louisa Jorden why, since she had long since given up the said debt, she did not execute a formal release to the plaintiff of the said debt; but the defendant Louisa Jorden says, and the defendant William Prue Jorden believes, that the said Pulcherie Money on one occasion referred to the said bond and debt, and to the expressed intention of the defendant Louisa Jorden not to distress the plaintiff, and to the subject of her will in his favour, and urged the defendant Louisa Jorden to give up the bond to her, Pulcherie Money, to keep, which the defendant Louisa Jorden refused to do; and stated in the course of such conversation that she would not be doubted (meaning as to her intention not to distress the plaintiff), and also stated, in the course of such conversation, that she should retain the said bond as a security against John Hooper."

This passage is, in my opinion, after carefully comparing the two, a strong confirmation of the evidence of Mrs. Money; in fact, it differs little from it except by

clothing it with that species of qualification and explanation which arises from its passing through the hands of counsel. It derives, also, strong confirmation from various other circumstances. It is obvious, up to that time (being upwards of two years after the death of her brother) Miss Marnell never intended to enforce payment of that debt. She had before that period expressed such to be her intention to no less than seven witnesses, who all depose to that fact. That fact is still further confirmed by the circumstance that she made an affidavit, on the 30th of July 1845, for increasing the amount of duty on the probate of her brother's will, being one day before the marriage of the plaintiff; and she omits from such affidavit all notice of this debt as forming part of her brother's estate; and she passes the residuary account on the 8th of August following, being seven days after the marriage, omitting all reference to this debt, and thereby gives further evidence of her opinion and intention, corroborating that this debt did not form and was not to be treated as forming any portion of her brother's property. That she and her family had been under considerable obligations to the father of the plaintiff, that she had always expressed herself grateful for such obligations and desirous to repay the debt of gratitude; and, actuated by those feelings, she looked with favour on the plaintiff and with disfavour on the persons who had induced him to incur the liability in question, are facts proved beyond all doubt and question. In this state of circumstances, being made acquainted with the intended marriage of the plaintiff, it is no improbable circumstance that she should, with a view to that event, repeat her former and still subsisting intention. Mrs. Money distinctly swears that she did so, and she did so with reference to this marriage. The statement of the defendant herself is the admission of a conversation on the subject; an admission that she never expressed any intention to sue the plaintiff, an admission that one of the reasons she gave for her refusal to give up the bond, was that she would not be doubted, "meaning" (says the answer) "as to her intention not to distress the plaintiff." Those words,

"not to distress the plaintiff," have no sensible meaning unless they refer to not enforcing payment of the debt; and lastly an admission that the other reason which she gave for her refusal to give up the bond was, that she wished to retain possession of it as a security against Hooper. This admission of the defendant, Mrs. Jorden, as well as the evidence of Mrs. Money, and the other evidence in the cause to which I have referred, concur in my mind in establishing the first proposition, and in satisfying me that the defendant, Mrs. Jorden, did at the time when the treaty for the plaintiff's marriage was pending, make a statement to the effect that she would never enforce from the plaintiff payment of the debt due on the bond.

The observations I have already made, and the evidence I have stated in support of the first proposition do, at the same time, establish the second proposition. It is proved that Mrs. Jorden was one of the first persons informed of the proposal of the plaintiff to Miss Poore; and the evidence of Mr. and Mrs. Money is distinct as to conversations having taken place with Mrs. Jorden with reference to the proposed marriage of the plaintiff. The passage in the answer of Mrs. Jorden, to which I have already referred, states the conversation in question as having occurred on the occasion of one of those conversations which the defendant admits took place between herself and Mrs. Money prior to the plaintiff's marriage, and with reference to it; the natural and necessary inference, or rather meaning, is, that the conversation which took place with reference to a marriage, took place with a view to the arrangement to be made on the marriage; that is, to enable the plaintiff himself and the friends of the lady to know what was his real situation in life, his means of support, and his future prospects, and to enable them to deal with the property both of his intended wife and that which his father might settle on him in accordance with such knowledge. I cannot doubt that this was the mutual feeling on both sides, and that on both sides this was the understood object of the communication that took place.

With regard to the third proposition, the evidence of the various members of the family of the plaintiff shew, that the declarations of Miss Marnell were communicated to the plaintiff, and that the arrangements of the marriage were settled on the faith of their truth; and this proposition is further conclusively established by the evidence of Lady Poore, who, in answer to the 32nd interrogatory, deposes to this effect:—"I depose that a settlement was executed on the marriage of my daughter with the plaintiff in August 1845. The first life-interest in the property of my daughter was settled on the plaintiff by such settlement. I had on various occasions previously to the plaintiff's marriage with my said daughter heard of the bond in the pleadings mentioned, and the particulars connected therewith, and of the abandonment of the debt in such bond mentioned. I first heard of such abandonment of the debt from the plaintiff, and afterwards from his brother George Money; and I spoke to the plaintiff's father on the subject, who informed me that the debt was entirely at an end, and that the said Louisa Jorden had given up or abandoned the debt in consequence of the kindness George Money, the father, had shewn to Louisa Jorden and her brother when they were in India; and I was so informed by the aforesaid persons, at my residence at Cuffnells, and afterwards at Wetham, in the county of Wilts, the residence of George Money, the father. The plaintiff did marry on the faith of the abandonment of the debt, as I know from the statements he and his father and brother made to me at the time and previously to the preparation of the settlement, and it was upon the faith of the debt being so abandoned that I consented to the first life-interest in the property of my daughter being settled upon the plaintiff, and I would not have permitted such settlement to be executed if I had not confided in such abandonment."

In my opinion this evidence proves clearly that the declarations of the defendant, Mrs. Jorden, were communicated to Lady Poore; and acting on the belief of the truth of these representations, the settlement made on the marriage was made

so as to confer on the plaintiff property which otherwise would have been protected from all liability to payment of any portion of the debt secured by the bond and judgment in question. In truth, the strong inclination of my opinion is, that so far as concerns Mrs. Jorden, she has never intended to put this bond or judgment in force against the plaintiff, and that but for a communication made by the plaintiff in 1849 to Mr. Jorden, neither the proceedings at law nor the suit in equity would have ever been heard of. I entertain, therefore, no doubt that Mrs. Jorden was quite sincere when she expressed her intention not to enforce the payment of the debt; but this circumstance is not material to be inquired into, as it does not alter or affect the principle of equity, which is, that as the plaintiff and other persons have acted on the faith of those representations, and as trusting to their truth they have entered into irrevocable engagements, the defendant who has knowingly induced or permitted them so to act cannot afterwards repudiate her assurances, and by her conduct negative the truth of the statement she so made.

I forbear to express any opinion on the second ground on which the plaintiff rests his case for relief in equity, namely, the father's forbearance to settle the Midnapore property on his son's marriage, in consideration of the defendant Mrs. Jorden's agreeing never to enforce from the plaintiff any payment in respect of the bond and judgment. As in my opinion the plaintiff is entitled to the decree on the other point, into which I have gone at length, it would be needless to discuss the matter. I forbear doing so more readily, because if this case should go to a higher tribunal I should not then have prejudiced the case, by an expression of opinion on a point on which I have not rested my judgment.

This is a case in which, if possible, I should avoid giving the costs of the suit on either side, but I cannot discover any principle which would enable me to do so, and the costs must follow the usual course, and be paid by the unsuccessful to the successful party.

M.R. }
1851. } THE GENERAL LYING-IN HOS-
Dec. 6, 20. } PITAL v. KNIGHT.

Legacy—Misdescription of Legatee—Evidence.

A bequest of 500l. to the Westminster Asylum for pregnant women,—Held, upon extrinsic evidence, and the context of the will, without any inquiry, a gift to "The General Lying-in Hospital."

William Jacob Sandrock, by his will, dated the 31st of January 1850, gave legacies of stock to several charities, and among them said—"I give and bequeath unto the Westminster Asylum for pregnant women the sum of 500l. stock, from the 3 per cent. reduced annuities." The testator further said, "I direct that public notice may be given for the information of the charities herein named," and he appointed John Knight and David McNeil his executors. The testator died on the 31st of January 1850.

This claim was now filed by the president, vice-presidents and governors of the General Lying-in Hospital against the executors, stating that they were constituted a body corporate by charter or letters patent of His Majesty George IV. dated the 18th of January 1830, called the President, Vice-Presidents and Governors of the General Lying-in Hospital, and by that name to have perpetual successors, and by the same to sue, &c. in all actions, &c.

That the corporation was a charity which was instituted in 1765, under the name of "The Westminster New Lying-in Hospital," in the Westminster Bridge Road, in the parish of Lambeth, and had continued from that time to be an asylum for &c., but that on the 21st of July 1818, it was resolved at a meeting of the governors that the Hospital should, after the 1st of January 1819, be named "The General Lying-in Hospital," though it was still frequently called "The Westminster Lying-in Hospital."

That there was no other hospital of that name, and no hospital or asylum for pregnant women by the name of the Westminster Lying-in Hospital, or by any

other name within the city or liberties of Westminster.

The corporation alleged that they were the legatees, and asked for payment of the legacy with interest, or otherwise for an account and administration of the estate.

The statements in the claim were verified by several affidavits and exhibits, and also by an extract of proceedings before the Master in a suit of *West v. Lockley*, in which, under a bequest in the will of Anne Stevenson, they were declared entitled to a legacy given by descriptions in the will of "The Westminster Lying-in Hospital," and in the codicil of "The Westminster New Lying-in Hospital."

Mr. Campbell and *Mr. Dickinson*, for the plaintiffs.—The description of this charity is erroneous owing, no doubt, to their having changed their original name; but where the description of a legatee was erroneous, but no reasonable doubt existed as to the legatee, whether a corporation or an individual, who was intended to be described, then the mistake will be rectified by the context, and will not be allowed to defeat the bequest. In this case the name was wrong, but the description in the will expressed the purposes of the charity, and there was no similar charity in Westminster.

Mr. Winstanley, contra.—The name of the plaintiffs differed altogether from that in the bequest. The purpose of the charity could not be allowed to controul the gift. It was applicable to any similar charity within the city or suburbs; presumptions were not to be made for ever, because at some distant period a particular name had been used. In this case there was nothing in the evidence to connect the mind of the testator with the General Lying-in Hospital; the context of the will supplied merely the purpose of the charity; the locality was not in Westminster, and any charity in the suburbs would as well satisfy the description and entitle such a charity to the gift: an inquiry therefore ought to be directed.

No reply.

The MASTER OF THE ROLLS.—There being no similar charity in Westminster, and the plaintiffs having at one time borne a name something similar to that by

which the gift is made, I think without further inquiry I may declare that the General Lying-in Hospital was intended by the testator when he made the bequest to the Westminster Asylum for pregnant women, and make a decree for payment of the legacy, with costs.

See *Stockdale v. Bushby*, 19 Ves. 381; *Case 44*, 3 Leon. 18; *Masters v. Masters*, 1 P. Wms. 421, 425; *Beaumont v. Fell*, 2 Ibid. 141.

M.R. }
1851. } LETHBRIDGE v. THURLOW.
Dec. 12. }

Annuity—Legacy—Satisfaction—Income Tax.

An annuity of 500l. given by a father to a son, by will, and made payable generally out of the rents of real estate,—Held, to be no satisfaction of an annuity given by deed and charged upon real estate.

The gift of an annuity "clear of legacy duty and every other deduction whatsoever," or "without any deduction for legacy duty or otherwise," will not authorize the payment of the income-tax out of the testator's estate.

This was a special case under the 13 & 14 Vict. c. 35.

On the 20th of January 1838, Sir Thomas Buckler Lethbridge, by deed, granted to his son, Ambrose Goddard Lethbridge, the plaintiff, and his assigns for life, an annuity of 100l., payable out of the impropriate rectory and tithes of Ash Priors, in the county of Somerset, to commence from the 20th of January 1838, and covenanted for its payment; but as the plaintiff and his servant occasionally resided and boarded at Sandhill Park, free of expense, it was agreed that the annuity should not be, and it was not, required of Sir T. B. Lethbridge during his life.

Sir T. B. Lethbridge, by his will, dated the 28th of December 1848, devised and appointed all his manors, messuages, lands and hereditaments whatsoever and where-soever, whether in possession, reversion, remainder, or expectancy (except trust and mortgaged estates in Cornwall), unto

Sir Francis Astley, Charles Tynte, and the Rev. W. Barnard, their heirs and assigns, upon trust, out of the rents and profits of such estates to pay the following annuities :—To his wife, Dame Anne Lethbridge, and her assigns during her life, if she should so long continue his widow, an annuity of 700*l.* a year, “clear of every deduction,” over and above the clear yearly rentcharge of 600*l.*, secured by her marriage settlement; unto his eldest son, the defendant, Sir John Hesketh Lethbridge, and his assigns, during his life, an annuity of 1,000*l.*, over and above such sum or sums of money as he, the said testator, might, at his decease, be under engagement, by settlement or otherwise, annually to pay to him, the same to be payable half-yearly, “clear of legacy duty and every other deduction whatsoever.” Unto his second son, the plaintiff, and his assigns, an annuity of 500*l.* during his life, the same to be payable half-yearly, “clear of legacy duty and every other deduction whatsoever.” Unto his grandson, the defendant, John P. Lethbridge, and his assigns, (the eldest surviving son of Sir J. H. Lethbridge,) during the joint lives of himself and his father, an annuity of 200*l.*, the same to be payable half-yearly, “clear of legacy duty and every other deduction whatsoever;” and in case both should survive the testator, and his said grandson should outlive his father, an additional annuity of 100*l.* during the then remainder of his life, by like half-yearly payments, and “clear from deductions as therein aforesaid.” The testator, then, after giving some special directions respecting his estates, bequeathed unto Lucy, the wife of the defendant Hugh Fitzroy, Fanny, the wife of the defendant Charles Augustus Thurlow, and Emma, the wife of Sir F. Astley, an annuity of 100*l.* each, for their respective lives, and to his granddaughter, Agatha, the wife of J. Pratt, an annuity of 50*l.*, and to his granddaughter Annette, the wife of Gerard Rugby Collins, an annuity of 50*l.* for their respective lives; and his will was, that the five several annuities should commence at his decease, and be paid half-yearly, “without any deduction for legacy duty or otherwise.” The testator also bequeathed to Sir F. Astley, Charles Tynte, and W. Barnard

the sum of 100*l.* each, and to the defendants, Hugh Fitzroy and C. A. Thurlow, the sum of 500*l.* each, and to each of his servants living with him at the time of his decease, who might have been in his service three years and upwards, one year's wages, “free of legacy duty,” over and above their wages, and to Anne Edwards an annuity of 25*l.* for her life, to Samuel Woolcott an annuity of 20*l.* for his life, to George Wright an annuity of 10*l.* for his life, and to Robert Vincent an annuity of 10*l.* for his life; the said four last-mentioned annuities to be paid half-yearly, “free from legacy duty and every other deduction.” The testator then gave the residue of his personal estate and effects to his executors, to be applied in payment of his funeral and testamentary expenses and debts and the charges and incumbrances on his estates, and in payment of his legacies, and of the duty on such of them as he desired to be paid duty free; and next in keeping down the several annuities given by his will, which he had not expressly directed to be paid out of the rents and profits of any part of his real estate, and of the duty on such of them as he had directed to be paid duty-free, and then in keeping down the annuities and other annual sums which he had directed to be paid out of the rents and profits of his real estate.

The testator appointed the plaintiff and T. P. Lethbridge his executors, and died the 18th of October 1849, and questions were raised whether the plaintiff was entitled to the annuity of 500*l.* given to him by the will, and also to the annuity of 100*l.* a year granted to him by the deed of the 20th of January 1838, or whether the annuity given by the will was in satisfaction of that given by the deed, and whether the legacies and annuities were bequeathed free from legacy duty, and whether the annuities were to be paid by the executors and trustees, without deducting the proportion of property or income-tax to which the same would respectively be otherwise liable.

Mr. Kinglake, for the plaintiff.—When a parent provides an income for a son, he must be considered to do so in the performance of a duty, and not for the

purpose of dispensing a bounty; and where the benefit is pecuniary, it has been held to be redeemed by the subsequent gift of a legacy, but this does not apply to the gift of a residue or to a devise of real estate. If, also, a parent gives furniture to his son, a subsequent gift of money could not deprive him of that. In this case the father has given an annuity by deed, duly delivered, charging it on real estate; this, therefore, cannot be redeemed by the bequest of a legacy—*Davys v. Boucher* (1); there is also no apparent intention to alter the arrangement—*Wood v. Wood* (2), *Hales v. Darrell* (3): the gift of the 100*l.* a year, therefore, was complete; it was not susceptible of ademption, and the provision in the will was incapable of satisfying it; and, lastly, there is upon the face of the will no indication that the legacy was considered to be in satisfaction.

Mr. Pigott, for Sir F. Astley and others.—The provision made for the plaintiff by the testator in his lifetime was voluntary, and was never paid, and this Court will lean against such voluntary gifts; the presumption of law is against double provision.

Chancey's case, 1 P. Wms. 408.

Weall v. Rice, 2 Russ. & M. 251; s. c. 9 Law J. Rep. Chanc. 116.

Hartopp v. Hartopp, 17 Ves. 184.

Mr. Engleheart, for the other defendants contingently interested in the estates, said it was of consequence to them that no more than necessary should be paid out of the rents and profits—*Bellasis v. Uthwatt* (4). In *Earl Glengall v. Barnard* (5) a gift by will was held to be a satisfaction of a portion secured by settlement, though the limitations were different from the deed, and in this case the legacy must be held to have redeemed the annuity granted by deed.

(1) 3 You. & C. 397.

(2) 7 Beav. 183.

(3) 3 Ibid. 324; s. c. 10 Law J. Rep. (N.S.) Chanc. 10.

(4) 1 Atk. 427.

(5) 1 Keen, 769; s. c. 6 Law J. Rep. (N.S.) Chanc. 25.

The MASTER OF THE ROLLS.—This is not a case in which I can hold that the annuity given by the deed is satisfied. The testator had executed a deed under which, by agreement, no benefit was to be received during his life: the grant was secured upon real estate, and the personal estate of the grantor was made liable to pay it. By his will the testator made all the trust estate liable to pay all the annuities which his estate was liable to pay, of which this 500*l.* was one, and the general words apply to it as if he had specified them all, and gave annuities out of all for each of his sons; he then provides that they shall be paid generally until the debts and legacies are paid, and so it was to be until they were to cease; but by express words he has directed the first annuity granted by deed to be paid out of his general estate. I think, therefore, that the first annuity was not satisfied, and that both must be paid.

Mr. Kinglake.—The words “clear of all deductions” will, no doubt, exempt the annuities from the payment of legacy duty; but the question is, whether they will not also free them from the income-tax; the gift is free from legacy duty and every other deduction whatsoever. What was the operation of this statute? The tenant was first to pay out of his rent the landlord's income-tax, and he was to deduct it from the landlord, who was compelled to allow it, and the statute was so graspingly anxious, that it makes it penal—nay, in fact, criminal—to refuse: thus, every person was bound to allow the payment by another on his behalf; it was thus an annuitant was taxed, and he was bound to allow it. A testator, however, was not restrained from counteracting the expressed words of this statute, which being highly penal, must be construed strictly, and he may prevent that traverse of the money which makes it income. He may say, “You shall not allow income on so much rent payable to me, but you shall, if he is liable, pay it upon the annuity, and make the deduction as a charge upon the estate, and not as income to me.” It was, therefore, open for the testator to portion out his income, and leave the statute to draw the tax from other sources; and the

question was, whether the testator had not used words to that effect. Were it not for the case of *Wall v. Wall* (6), decided in 1847, there was not much doubt; but there the annuitant was in possession of the estate, so that the testator had nothing with which he could deal, as the tax fastened itself upon the property.

Mr. Piggott and *Mr. Engleheart* also insisted that the income-tax was not payable by the annuitant.

The MASTER OF THE ROLLS.—The property-tax was not a deduction which the act permitted to be dealt with; the legacy duty, on the other hand, might be paid out of the property, and the executors would have to pay it under the words used by this testator, as they related to the purposes of the will and the administration, but the income-tax was itself a charge upon the property out of which he takes the annuity, and to say that it could be deducted under general words would restrict the operation of the act; it would, however, have been included if it was among the taxes which could be excepted, but it falls here on the property taken as income, and it also in like manner falls upon the property of the party out of whose hands it comes; I, therefore, think that the legacy duty is not payable, but that these bequests are not free from the income-tax.

M.R. }
March 11. } HILL v. TRAVIS.

Jurisdiction—Party in Contempt.

A party in contempt in a suit in another branch of the Court will be ordered to be brought up if wanted for examination.

Mr. G. A. Young moved in this suit to bring up before the taxing Master a party who was in prison for contempt in a suit of *Hill v. Crafts*, which was marked before Vice Chancellor Parker to explain items in his bills of costs.

(6) 15 Sim. 513; s. c. 16 Law J. Rep. (n.s.) Chanc. 305.

The MASTER OF THE ROLLS.—I think my jurisdiction extends to that. You may take the order.

M.R. }
March 27. } CLARINGBOULD v. CURTIS.

Vendor and Purchaser—Chattel—Specific Performance—Contract.

Specific performance of a contract for the sale of a barge, stores, &c., decreed in equity upon a claim.

Joseph Curtis, by an agreement in writing, dated the 25th of October 1851, contracted to sell to Alfred Claringbould, on conditions contained in printed particulars specifically referred to in the agreement, a barge, called the *Providence*, of London, for the sum of 40*l.*; and by the third of the conditions it was provided, "that the purchaser shall immediately after the sale pay into the hands of the auctioneer a deposit of 20*l.* per cent. on the amount of and in part payment of his purchase, and sign an agreement for paying the remainder of the purchase-money to William George Westlake, of Sheerness, on or before Saturday the 1st of November next, when the purchaser will be entitled to full possession of the vessel and her stores, agreeably to inventory as she now lies, alongside the pier, with all faults, hazards, damage, and risk from the day of sale."

In compliance with this condition, the plaintiff paid 8*l.* by way of deposit, and by his agent, duly authorized, signed an agreement to pay the remainder of the purchase-money. On the 27th of October 1851 the defendant's alleged agent gave possession of the barge to the plaintiff, with all her papers, including the certificate of registry.

An application was made to the defendant before the 1st of November 1851, requesting him to execute a bill of sale of the barge, &c. to the plaintiff, which he refused to do, and in consequence this claim was filed for a specific performance.

The defendant by his affidavit said, that being sole registered owner of the barge,

he, on the 22nd of November 1850, in consideration of 100*l.* then paid, executed a bill of sale of the barge and stores to William Smerden, which was duly registered at the Custom Office on the 23rd of November, and that he had not since exercised any act of ownership over the barge, &c. on his own behalf. That William Smerden, soon after the sale, allowed the defendant, Joseph Curtis, to look after the barge, and that he appointed James Rains, a mariner, to navigate it, and that in October the barge went aground off Sheerness batteries, and was taken possession of by the boatmen, who, by throwing out a part of the cargo, floated her and kept possession till the sale; that a Mr. Edgecumbe had authorized the sale, and that he believed it was not a *bond fide* sale.

There was no evidence by whose authority or on whose behalf the sale was ordered, or by whose authority or on whose behalf the contract was signed.

Mr. Wickens, for the plaintiff.—After the sale to the plaintiff, upon an apparently clear certificate of registry, the plaintiff was informed that a previous sale had been made to Mr. Smerden, but that was no answer to the contract.

Mr. Rudall, for the defendant.—Joseph Curtis was the owner until the 22nd of November 1850, but he was not the owner at the time of the sale. William Smerden was then the owner under a bill of sale, which had been registered nearly a year before. The barge, &c. was worth much more than 40*l.* and had been in the management of the defendant on behalf of W. Smerden, but he had never authorized a sale. Whatever had been done was under a mistake, and as specific performance is a subject for the discretion of the Court, it will not entertain this claim, and as a bill will not lie for the recovery of a chattel, so neither will a claim.

1 *Madd. Chanc. Prac.* 402, 2nd ed.

Lynn v. Chaters, 2 Keen, 521.

Mason v. Armitage, 13 Ves. 25, 37.

Mr. Wickens was not heard in reply.

The MASTER OF THE ROLLS.—No decree that I make can affect William Smerden, who is no party to this claim. I think, however, the plaintiff is entitled to a decree

for the specific performance of the contract with costs, and I must refer it to the Master to settle the bill of sale in case the parties differ (1).

M.R. } GRAY v. HAIG.
June 25, 28. } HAIG v. GRAY.

Evidence—Original Suit—Admissibility in cross Suit.

Evidence taken in an original suit may be read in a cross suit under the common order, the Court having judicial notice of both causes.

The bill in this case was filed by Mr. Gray to obtain an account of dealings and transactions in which the plaintiff had been engaged as agent for the defendants, Messrs. Haig & Son, in the sale of malt and grain spirits, and in this suit Mr. Rikey was examined as a witness for the defendant to prove allegations of fraud. Mr. Haig also filed a cross bill, charging Mr. Gray with frauds in the transaction, and Mr. Rikey's examination was taken in the original suit after the institution of this cross suit, but before replication. Mr. Haig obtained the common order to read this evidence at the hearing in the cross cause.

Mr. Lee and *Mr. Williams*, for Mr. Gray, objected to this evidence being received in the cross suit on the ground that it was not taken in the cause, and had no relation to matters alleged and charged in the cross suit.

Price v. Berrington, 2 Beav. 285.

Christian v. Wrenn, Bunb: 321.

Pascall v. Scott, 1 Phill. 110.

Welford v. Beazely, 3 Atk. 503.

Mr. R. Palmer and *Mr. Haig*, for Messrs. Haig & Son.

Mit. Plead. 82, 4th ed.

Wyatt Prac. Reg. 87.

(1) See *Pusey v. Pusey*, 1 Vern. 273; *Errington v. Aynealy*, 2 Bro. C.C. 341; *Flint v. Brandon*, 8 Ves. 163; *Nuthbrown v. Thornton*, 10 Ves. 161; *Buxton v. Lister*, 3 Atk. 383; *Cud v. Rutter*, 1 P. Wms. 570; *Pooley v. Budd*, 14 Beav. 34.

The MASTER OF THE ROLLS.—I think this evidence is admissible. I cannot decide the first cause without a judicial knowledge of the second. The evidence in both cases must therefore be before me, and I cannot reject it or refuse to hear it applied to the merits of this cross cause.

M.R. }
July 20. } DAVIES v. DAVIES.

Claim—Multifariousness.

The joining in a claim parties whose interest is contingent, to ask for the preservation of a fund is not multifarious, or a misjoinder of parties.

Quære—If an objection to a claim is to be raised by motion to take it off the file.

This was a motion to take a claim off the file for irregularity, on the ground of multifariousness and for misjoinder of parties.

The claim was filed by Peter Thomas Davies on behalf of himself, and as the next friend of his children, against the widow and executrix of his brother, who was also tenant for life under the will of the testator, David Peter Davies, which contained the following bequest:—"On the death of my beloved wife, and on the death of my father and mother, I will that all my property may be divided among my four sisters and brother, if either be alive, or their children, share and share alike." And it asked to have the property got in and secured. The testator's father and mother were both dead.

Mr. R. Palmer and Mr. Elderton, for the defendant, Anne Davies.—The present application is a substitute for a demurrer; the interests of the parties are inconsistent, as while the father lives he represents the fund.

Fulham v. M'Carthy, 1 H. L. Ca. 703.

Witherden v. Mercer, 14 Jur. 613.

Mr. James, for the plaintiffs.—The whole of these parties have an interest in this fund and in its preservation, but assuming the mode of taking the objection regular, the objection itself is nothing. The motion ought, therefore, to be refused.

The MASTER OF THE ROLLS.—I do not think that the interests of the parties, or the claims made by them, are inconsistent, or that it is incumbent upon them to consider whether others are entitled. They all have an interest in having the funds ascertained and secured, as until the death of the tenant for life no question can arise respecting the division. I also doubt whether this is the proper mode of taking an objection to a claim, assuming it to be wrong. In the case of *Witherden v. Mercer* there were other objections besides multifariousness.

M.R. }
July 24. } JONES v. BEACH.

Principal and Surety—Promise to pay—Liability extending.

A surety, upon being informed that proceedings are contemplated against himself and his principal, states by letter his intention to pay the debt:—Held, after his decease, that the letter was a promise to pay; that his undisputed right to payment was a sufficient identity of the plaintiff, whose address was not set out in the claim; and that the forbearance to sue was a sufficient consideration for the promise.

This was a claim by Andrew Jones against Milborough Beach, the executrix of John Beach, deceased, to obtain payment out of the estate of J. Beach of the sum of 300*l.*, secured by three several promissory notes, given and signed by J. Beach, deceased, and W. Stubbs for the sum of 100*l.* each, bearing date respectively the 2nd of June 1842, the 1st of August 1842, and the 2nd of March 1846, upon which interest had been paid to A. Jones down to the 8th of July 1850.

J. Beach died in August 1850, and the defendant, M. Beach, was his widow and executrix.

The facts as stated in the claim were echoed by the plaintiff in his affidavit: he also swore that J. Beach in his lifetime repeatedly promised to pay the debt, with interest, particularly in a letter dated the 21st of June 1850.

The signature of the notes was admitted by M. Beach, but she said that J. Beach

was only a surety, and that he did not receive any of the money or any advantage. That Charles Pumpfrey, the plaintiff's solicitor, wrote to J. Beach as follows:—

"Droitwich, June 20th, 1850.

"Sir,—Mr. Stubbs is here, and I am about making him a bankrupt, but I find I cannot proceed against him without coupling you in the affair. I have no desire to proceed against either, and in order to avoid this I ask you whether you will join Mr. Stubbs in a fresh note for 300*l.*, payable jointly and severally. As the notes in my possession are made payable on demand, and are not jointly and severally, you had better see your solicitor hereon immediately. I shall await your reply a post or two, and if I have no reply I shall at once proceed against both of you. Yours, &c.

"Charles Pumpfrey."

John Gwillim, the solicitor of J. Beach, wrote to Charles Pumpfrey the following letter:—

"Hereford, June 21st, 1850.

"Sir,—Mr. Beach of this city has brought me your letter, and has instructed me to inform you that it is his intention to pay off the 300*l.* due to your client, on the joint note of himself and Mr. Stubbs. I shall be glad if you will let me know the amount due for interest, and Mr. Beach will be prepared to remit the money in the course of a post or two. I presume you have the notes. I remain, &c.

"John Gwillim."

That further negotiations were stayed by the death of J. Beach, and finally the claim was filed either to obtain payment of the debt, or for the administration of the estate of the deceased.

It also appeared that Mr. Stubbs had become insolvent.

Mr. J. H. Palmer, for the plaintiff, insisted upon his right to have the estate administered in this court for payment of the demand.

Ex parte Kendall, 17 Ves. 514, 522.

Thorpe v. Jackson, 2 You. & C. 553.

Mr. Willcock and *Mr. C. Hall*, for the defendant.—A joint security will not be extended in equity beyond the legal operation, there being no previous equity to

entitle the party to a several security from each—*Sumner v. Powell* (1). And where the surety is jointly bound with the principal, nothing will be done to extend it as against the personal representative of the surety. The rule against extending the liability against a surety is stringent, and in this case the letter was no proof that there was any debt owing, and no consideration was given for it.

Burn v. Burn, 3 Ves. 573.

Rawstone v. Parr, 3 Russ. 424, 539.

Richardson v. Horton, 6 Beav. 185; a.c. 12 Law J. Rep. (N.S.) Chanc. 333.

Wilmer v. Currey, 2 De Gex & Sm. 347.

Crossley v. Dobson, Ibid. 486.

Laythorpe v. Bryant, 2 Bing. N.C. 735, 742; s.c. 5 Law J. Rep. (N.S.) C.P. 217.

Mr. J. H. Palmer, without reply.

The MASTER OF THE ROLLS.—I think the plaintiff is entitled to a decree upon the letter without further reference to the original notes. Mr. Beach was told that it was intended to make Mr. Stubbs a bankrupt, and that he was an interested party, but that there was no desire to proceed if he would join in giving a several as well as a joint liability, and in order to correct the defect he was asked for a joint and several note: the answer through a solicitor was, that he intended to pay all that was due upon the joint note of himself and Mr. Stubbs. If there is any difficulty upon the form of the claim, the Court will allow the claim to be amended; it is not so strict with these forms of proceeding as with bills: it did not, however, appear necessary. It was said that the plaintiff was not sufficiently described, but I think he was, as the right of the plaintiff to payment was admitted. Then as to the consideration, forbearance to sue was quite sufficient; had it not been for the letter, proceedings might have been commenced, and at the death of Mr. Beach final judgment might have been obtained, and he might have been made liable in a manner which would have been binding upon his personal representative. Upon the whole, I think the plaintiff has a right to recover.

(1) 2 Mer. 30.

M.R.	}	
1851.		
Dec. 16, 17, 18, 19,		COCKELL v. TAYLOR.
22, 23.		PRESTON v. COLLETT.
1852.		COLLETT v. PRESTON.
Jan. 12.		

Mortgage — Sub-mortgages — Notice — Chose in Action — Necessitous Borrower — Expectancy — Loan of Money on Conditional Purchase.

The purchase of a piece of land at an exorbitant price will not be allowed to stand when made the condition of a loan of money to a party whose necessities compelled him to borrow.

A mortgage of a fund in court in a suit of Collett v. Maule, by W. G. C, the purchaser of the land, to secure 6,000l., the purchase-money, to G. W. F, the vendor, set aside, on the ground that the transaction was fraudulent.

An assignment of a chose in action must be taken, subject to all prior claims. Sub-mortgages of the fund in court, made without noticing G. W. F, were therefore set aside, as his title was either void or subject to the prior equity of W. G. C, notwithstanding he had been induced to create or countenance such sub-mortgages.

The acts of W. G. C. in joining to create the sub-mortgages were not a recognition of or an acquiescence in the sub-mortgages, as they were done in entire ignorance of his rights, and under the idea that the original transaction with G. W. F. was unimpeachable.

The suit of *Collett v. Preston* was instituted the 14th of January 1850, by W. G. Collett, to set aside an agreement, dated the 25th of October 1848, for the purchase of a piece of land near Hammersmith Bridge, and a deed of the 13th of December 1848, conveying the same land to him, and also the mortgage of the one-fourth share of W. G. Collett, and Sarah his wife, in the personal estate of Sarah Hyatt, deceased, which was in question in a suit of *Collett v. Maule*, and asking that the mortgage might be delivered up to be cancelled, and that the claims of various sub-mortgagees in the mortgage debt of 6,000l., created by an indenture of the 14th of December 1848, were void

as against W. G. Collett and Sarah his wife; or if they should be declared entitled to anything, then that Messrs. Preston & Finch might pay it, or that the plaintiffs might pay it and hold the land in the conveyance of the 13th of December 1848 as a security.

The suit of *Cockell v. Taylor* was instituted in March 1850, by Edward Whitehead Cockell, to redeem a mortgage, dated the 10th of May 1849, made by Henry John Preston and George William Finch, to secure the repayment of a sum of 573l. 6s., which they had borrowed of George Taylor. This mortgage comprised the sum of 6,000l., which William George Collett and Sarah his wife had secured to Henry John Preston, by the indenture dated the 14th of December 1848, assigning the one-fourth share of the personal estate of Sarah Hyatt to secure the payment, and which share was also assigned to George Taylor in the mortgage made to him. The plaintiff E. W. Cockell also asked that W. G. Collett, and Sarah his wife, Henry John Preston, G. W. Finch, Joseph Ivimey, and Frederick Harrison might redeem a mortgage made to him on the 1st of March 1849, by H. J. Preston, with the consent of W. G. Collett, of the fourth share of W. G. Collett, and Sarah his wife, on the personal estate of Sarah Hyatt, to secure the repayment to him of a sum of 2,700l. and interest, and in default that they might be foreclosed, or otherwise that accounts might be taken, and that the other defendants might redeem them.

The suit of *Preston v. Collett* was instituted on the 27th of June 1849, by Henry John Preston, under the agreement dated the 25th of October 1848, and another dated the 15th of December 1848, to obtain from W. G. Collett an assignment of a sum of 1,884l. 6s. 8d. and interest, which was secured to William Piercy Dimes upon trust for W. G. Collett.

The facts of these several suits, together with the arguments, are so fully stated in the course of the judgment, that it is deemed unnecessary further to set them out.

Mr. Roupell and *Mr. Tripp*, for Edward Whitehead Cockell; cited—

Mangles v. Dixon, 1 Hall & Twells, 542; s. c. 1 Mac. & Gor. 437; 19 Law J. Rep. (N.S.) Chanc. 240.

Mr. Willcock, Mr. Daniel, and Mr. Terrell, for William G. Collett and Sarah his wife, cited—

Wood v. Downes, 18 Ves. 120.

Prosser v. Edmonds, 1 You. & C. 481, 496.

Hunter v. Daniel, 4 Hare, 420 ; s. c. 14 Law J. Rep. (N.S.) Chanc. 194.

Strachan v. Brander, 1 Eden, 303.

Earl of Chesterfield v. Janssen, 1 Atk. 339.

Gwynne v. Heaton, 1 Bro. C.C. 1, 8.

Matthews v. Wallwyn, 4 Ves. 118, 126.

Hamil v. Stokes, 4 Price, 161.

Daubeny v. Cockburn, 1 Mer. 626, 638.

Roddy v. Williams, 3 Jo. & Lat. 1.

Kennedy v. Green, 3 Myl. & K. 699.

Mr. Fooks, for Joseph Ivimey.

Hobbs v. Norton, 1 Vern. 136.

Govett v. Richmond, 7 Sim. 1.

Jones v. Smith, 1 Phill. 244 ; s. c. 12 Law J. Rep. (N.S.) Chanc. 381.

Mr. R. Palmer and Mr. Headlam, for G. W. Finch and Jacob Connop.—

Attwood v. Small, 6 Cl. & F. 232.

Low v. Barchard, 8 Ves. 133.

Mr. Walpole and Mr. Martindale, for F. Harrison.

Mr. Hallett, for Thomas Collingwood Ker.

Mr. Smythe, for H. J. Preston.

Mr. Lloyd and Mr. Grove, for George Taylor.

THE MASTER OF THE ROLLS.—These three suits are separate and distinct, by different plaintiffs, seeking separate and independent relief; yet they all arise out of the same transaction, and the relief to be afforded or the decree to be made in each must, in a great measure, depend upon the validity of a deed of mortgage, which is impeached in the suit of *Collett v. Preston*. As the burden of proof lies upon the person contesting that validity, and as, unless the plaintiff W. G. Collett can succeed in proving that mortgage deed to be invalid, the persons claiming relief in respect of it are entitled, as a general consequence, to the relief they ask, I shall first express my opinion in the suit of *Collett v. Preston*.

In this suit the plaintiff seeks to set aside a transaction for the sale of land at Hammersmith, in the course of which and as a consideration for such sale, a mortgage deed was executed by the plaintiff, William George Collett, to the defendant, George William Finch, by which 6,000*l.* was charged upon the share to which W. G. Collett claimed to be entitled of a fund in court in a suit of *Collett v. Maule*. If the plaintiff succeeds to this extent, he then, in the second place, seeks to have two mortgages, one to the defendant Edward Whitehead Cockell and another to the defendant George Taylor, declared to be void on the ground that those mortgages were a purchase of a chose in action, and that being such it must be taken by the persons who bought it, subject to the equities which attached to it.

The first and main question is, whether the transaction which constituted the original mortgage is fair and valid; if that cannot be impugned, all the subsequent dealings with the interests so created are valid and effectual. If, however, the original mortgage is set aside, it will still remain a question to be decided, whether the sub-mortgages of their interests to persons ignorant of and in nowise implicated in the original transaction can be touched. The original mortgage was given by W. G. Collett to G. W. Finch as the consideration for the purchase of a plot of land near Hammersmith Bridge, belonging at that time to G. W. Finch, which he had purchased as part of a larger portion from the West Middlesex Waterworks Company two years before. The plaintiff, W. G. Collett, alleges that this mortgage deed was obtained from him under such circumstances and by such means that this Court will declare it to be void, and order it to be cancelled; and this is the issue which he undertakes to prove.

The position of W. G. Collett at this time was this: he was in a humble rank of life; he had formerly been in the employment of Mr. Cubitt as bricklayer; he afterwards kept a greengrocer's shop, and is described last as being out of employment. His wife, the other plaintiff, was distantly related to a gentleman of considerable property, who had died intestate, and to whose estate the Crown

had taken out administration. W. G. Collett had instituted a suit in this court, claiming a fourth portion of the estate of the intestate. His resources for carrying on the suit were none, except such assistance as might be derived from persons who were convinced of the correctness and ultimate success of his claim; and accordingly he, together with the other plaintiffs, early created a charge on the gross fund expected to be recovered, for the purpose of paying the expenses of the suit. This want of funds was possibly the reason of the change of solicitors, which occurred twice in the conduct of the cause; it being obvious that a solicitor, whom the law does not permit to take security for costs hereafter to be incurred, cannot be expected to make large advances for an indefinite time, on the strength of his client being likely or even being sure ultimately to succeed.

In 1848, previously to the transaction in question, Mr. Leate was the plaintiff's solicitor in the cause of *Collett v. Maule*. The contest in that suit before the Court was so far concluded that the Master, although he had not made his report, had expressed his opinion that the plaintiff had made out his case; but the Master found it might and probably would be contested both by the Crown and by an adverse claimant of the name of Susannah Brassington. The opposition of the Crown might be disposed of if the Court should express its concurrence in the opinion found by the Master, and the opposition of the adverse claimant might probably be bought off; but, if not, great additional expense would necessarily have to be incurred in the trial of the issue.

This was the state the parties themselves conceived matters to stand in, as appears by an opinion of counsel on the case of the plaintiff. It was evident in this state of things that money was essential for prosecuting the plaintiff's case; and that, except his right to a portion of the fund in court he had no security to give or means of obtaining any advance of money. The rule of court I have already referred to made it impossible for Mr. Leate himself to advance the funds required; and accordingly Mr. Collett applied to Thomas Collingwood Ker, a solicitor of this court

with whom he had formerly had dealings, to advance or procure for him the money required. Whether this was done with or without the knowledge of Mr. Leate does not appear, nor is it very material. T. C. Ker, through the instrumentality of W. G. Collett, applied to G. W. Finch, who was then and is now a solicitor of this court; he was the real owner of the eighteen acres of land on the south side of Hammersmith Bridge, which he had purchased from the West Middlesex Waterworks Company in the year 1846 for the sum of 5,000*l.*, although the conveyance had been taken in the name of Henry John Preston, who was the nominal owner of it and agent for G. W. Finch in this matter. Before any arrangement was come to, G. W. Finch took the precaution of ascertaining from the counsel for W. G. Collett in the suit of *Collett v. Maule* the probability W. G. Collett had of succeeding in that suit. I see no impropriety in his taking that course. If the transaction was a simple loan of money on the security of the share of W. G. Collett in the fund in court, it was a prudent and proper course to ascertain that such fund existed, and that W. G. Collett had and probably would speedily establish a right to it. The answer he obtained from the plaintiff's counsel was conclusive as to the ultimate success of W. G. Collett, but doubtful as to the amount of expense which might be required for that purpose; which expense would depend on the extent of resistance which might be offered by the Crown and by the adverse claimant, Susannah Brassington. Having obtained this opinion, the position of the parties was this: both the plaintiff and John Leate, his solicitor in the cause on one side, and G. W. Finch on the other, knew that an advance of money was essential to enable W. G. Collett to succeed in establishing his right. They also knew that W. G. Collett had applied for and was in every way endeavouring to raise money for this purpose, and that he had no security to give except his share of the fund, his right to which was to be established by means of this very advance of money.

This was the state of the case when the agreement of the 25th of October 1848 was entered into between G. W. Finch,

nominally, as the agent for H. J. Preston on the one part, and the plaintiff, on his own account, on the other part. It does not appear to be very material that G. W. Finch did not communicate to W. G. Collett the fact that H. J. Preston was not the party really contracting, but that he, G. W. Finch, was himself the contracting party, which was, undoubtedly, the case. It is, however, of great importance, bearing in mind the state and condition of the plaintiff, and his wants at this time, to examine the nature and effect of the agreement itself. The document bears date the 25th of October 1848; it recites that W. G. Collett is desirous of raising 1,000*l.* for his immediate use, to be secured upon the after-mentioned funds, and is also desirous of purchasing from Preston the after-mentioned piece of ground; that Preston agrees to lend or to procure to be lent to Collett 1,000*l.*, with interest at 5*l.* per cent., to be secured upon a certain sum of 1,884*l.* 6*s.* 4*d.*, which, by the indenture dated the 8th of May 1845, is secured to be paid to William Piercy Dimes, in trust, for W. G. Collett, out of certain shares in the funds in the Chancery suit; that sum of money is the charge before mentioned as having been made by the persons interested in this fund, for the purpose of carrying on the suit. Then the agreement proceeds subsequently thus: to agree that it should be carried into effect; that this sale should take place, and that the mortgage should be made upon the fund in court to the extent of the purchase-money. The formal recitals in this document seem to me to point to the raising of money as a primary and leading object, and my opinion derived from the circumstances I have already referred to, and those to which I am about shortly to refer, is, that in this affair the plaintiff was simply desirous of raising money to prosecute successfully the suit of *Collett v. Maule*; he had no funds at his disposition to buy land, or to enter into any building speculation, and he was much pressed for money to establish his rights in the suit of *Collett v. Maule*. Whatever might have been his disposition to indulge in projects of that description, to do so before he had realized the funds in that suit, would have been folly, little below

insanity. That he did entertain any such disposition, or that he either desired or took any active steps to procure land and enter on a building speculation, is not supported by any evidence in this cause; on the contrary, all the evidence before me, and the construction and form of the agreement itself, confirm the view of the case I have already stated, and leave no doubt that the real object of the agreement of the 25th of October 1848, so far as the plaintiff was concerned, was not to buy land, but to obtain an advance of money to carry on the suit of *Collett v. Maule*; or, in other words, that the transaction was one of loan, in which the purchase of the land was not the primary object on the part of the plaintiff, but was made by G. W. Finch a condition for advancing the money required. In regarding this transaction, therefore, I do not look upon it as a simple case of purchase and sale of land between two persons, one willing to sell, and another desirous to buy, but as a transaction in which one party is desirous to borrow, and the other consents to lend, provided the borrower will consent also to become the purchaser of a particular parcel of land; a transaction involving elements for consideration distinct from those which would enter into the simple case of the purchase and sale of land.

On the 13th of December 1848 the conveyance of the land was executed, and on the following day, the 14th of December 1848, the mortgage was executed of the fund to be recovered in *Collett v. Maule*. Why the final completion of the transaction was delayed until this time—seven weeks after the date of the contract—does not distinctly appear. It is suggested that the reason for the delay was that which occurred in the Master's office, whose report in *Collett v. Maule*, in favour of the plaintiff, was not signed until the 11th of December 1848. No money passed at the time of the transaction. 1*l.* had been paid by G. W. Finch to W. G. Collett on the 12th of December 1848; 10*l.* on the 21st of that month; and 12*l.* on the 6th of January following, for which the plaintiff gave G. W. Finch his I O U. This appears from documents in the handwriting of the plaintiff given in evidence on the part of the defendants.

G. W. Finch appears not only to have paid W. G. Collett no money at or before the time of the execution of the deeds, but so far as can be gathered from the facts of the case, he does not appear to have had the means of doing so, for with the exception of these three sums, amounting to 23*l.*, it was not until he obtained money from G. Taylor and E. W. Cockell, on the security of the plaintiff's mortgage, that he paid him the further instalments, making up the sum of 1,000*l.* The last of these instalments was paid on the 10th of March 1849. The land itself, the condition and consideration for making this loan, was sold at a price greatly exceeding its real value. The evidence on this subject is all on the part of the plaintiff, and although the defendant, G. W. Finch, must have been advised that it was a material part of the case, he has not gone into any evidence on the subject. The evidence on the part of the plaintiff puts the real value of the property sold at about one-tenth part of the price contracted to be paid for it. It is true the Court looks with suspicion at evidence of value derived from mere opinion given by surveyors, unsupported by any other circumstance; but in this case that evidence is not without corroboration. In the first place, the plaintiff's witnesses, three in number, give the grounds on which they proceed, and agree tolerably nearly in the result. In the next place, the result of their valuation agrees with the value of the price given by G. W. Finch for the property, or if it varies therefrom, it does so only in the manner most favourable to the defendants by putting too high a value on the property sold. Two years before the transaction in question, Finch had given 5,000*l.* for the eighteen acres, sold by the West Middlesex Waterworks Company; there is no evidence given or circumstances suggested to shew that the land had either been sold by the company at an under value, or that it had become enhanced in value in 1848. If each acre of land were of equal value, the fair price per acre would be about 278*l.*: and of one acre and a quarter, the extent of the property sold to the plaintiff, the value would be 347*l.* There is some evidence that this portion of the land, by reason of its having a river frontage, was more valuable than the rest,

and accordingly the surveyors of the plaintiff estimate the value at sums varying from 600*l.* to 700*l.* Taking all these circumstances into consideration, this does not appear to be an under estimate of the value of the acre and a quarter sold to the plaintiff; and if so, as I have already stated, the price given for the property was little less than ten times its real value.

Now, coupling this inadequacy of price with the circumstances of the case, the question I have to determine is, whether this is a transaction which the Court will allow to stand. It is not my intention to lay down that any inadequacy of price, unaccompanied by other circumstances, will avoid a contract, unless perhaps it is similar to the case referred to by Lord Hardwicke in *Chesterfield v. Janssen* (1), as having occurred in the case of *James v. Morgan* (2), where a man who supposed he was buying a horse for a few barleycorns had in reality contracted to give 500 quarters of barley for a horse worth 8*l.* It is, in fact, evidence of a fraud, though, standing alone, by no means conclusive evidence, and if a purchaser with his eyes open, without concealment or deception on the part of the seller, chooses to give ten times the value of the property, it is far from my intention to say anything that can lead to the supposition that the transaction can be impugned in a Court of Chancery. That, however, is not now the case. The purchase here is the condition for the loan. The plaintiff had neither the means, nor, as far as any proof goes, the inclination, either to buy land or to embark in any building speculation. What he wanted was money for the purpose of prosecuting this suit of *Collett v. Maule*. He was in humble circumstances, without the power of obtaining money, except so far as his claim to one-fourth of the fund in court enabled him to give security, and this a very unmarketable one. And although no imputation can be cast upon his capacity, yet the document proved to be in his handwriting bears marks of his being an illiterate person; coupled with those circumstances, the evidence of over-price is of great weight. And if the case

(1) 1 Atk. 352.

(2) 1 Lev. 111.

had stood here the transaction could not be supported.

But there are additional circumstances which confirm my view of the case. In the first place, Mr. Leate was the solicitor of Collett in the cause of *Collett v. Maule*; he knew that W. G. Collett was endeavouring to raise money for prosecuting the cause. G. W. Finch had communicated with him upon the subject, and wrote two letters to him; one on the 26th of October 1848, and another on the 3rd of November following, and in neither did he hint a word about the purchase of the land, nor does it appear at any time that any person other than T. C. Ker was consulted on the part of the plaintiff in the transaction; and the real nature of it appears to have been kept back and concealed from Mr. Leate.

I say nothing about the form of the conveyance or the circumstance that the document was executed in the name of H. J. Preston, who was the agent for G. W. Finch in the matter. I see nothing in that part of the transaction which would have induced me to have come to that conclusion; neither do the observations made by counsel on the delivery or examination of the abstract of title weigh with me. But upon the other facts on which I have commented, I am of opinion that this was a transaction in which advantage was taken of the necessities of the plaintiff, and that so far as regards the contract subsisting between the plaintiff and the defendant G. W. Finch, it is wholly void, and must be set aside, except so far as money may have been actually advanced to the plaintiff by G. W. Finch, upon the security of the indenture of mortgage of December 1848.

I stopped the argument upon the objection raised to this transaction on the ground of champerty; and little need be said upon the subject. If this were the case of the sale of a right to sue, as for instance, if the plaintiff W. G. Collett had, before the institution of this suit of *Collett v. Preston*, sold to another any right he might have to set aside the deed of December 1848, it might have been affected by the rule of law which relates to champerty. But this deed is the sale by a person of his interest in a fund in court. The distinc-

tion between those cases is pointed out in *Prosser v. Edmonds*. The right of selling or mortgaging interests such as that which was mortgaged by the deed of December 1848 has been recognized and established in *Wood v. Griffith* (3) and numerous other cases. If there had been nothing in this case but champerty, I should not have felt any difficulty in supporting the deed of the 14th of December 1848.

Having decided that this indenture is void as between those persons, it becomes necessary to consider whether the sub-mortgages must fall with the original mortgage, or whether they can be supported on separate grounds. The validity or invalidity of the sub-mortgages must be considered separately as, to some extent, they rest on different or distinct facts. They, or at least all that remain now to be adjudicated upon, are two in number, namely, the mortgage to Edward Whitehead Cockell and that to George Taylor; all the others which existed at the commencement of the suits having been settled during the prosecution of them.

I will consider the case of George Taylor first, principally because that is not embarrassed by any complication of circumstances, but rests upon legal principles, deducible from a few plain facts. On the 10th of February 1849, George Taylor advanced the sum of 500*l.* to G. W. Finch and H. J. Preston, on the security of the indenture of mortgage of the 14th of December 1848, which was deposited with him as a security, and of this 500*l.* 300*l.* was afterwards advanced by G. W. Finch to the plaintiff, and it formed one of the instalments of the 1,000*l.* paid to the plaintiff. The defendant, G. Taylor, was not in the slightest degree cognizant of any fraud or irregularity having been practised towards W. G. Collett; he had no notice of anything doubtful or questionable in the transaction creating the mortgage, and it is not alleged that he either knew or was set upon inquiry whether the transaction was a good or a bad one; and he, therefore, contends that he is entitled to hold the original mortgage security as valid and effectual for the sums advanced by him

(3) 1 Swanst. 43.

to G. W. Finch, on the security of that deed.

On the other hand, it is contended, that admitting the facts as above stated to be correct, still that the rule of equity is, that a man who purchases a *chose in action* does so subject to all the equities which attach to it, and that consequently he bought G. W. Finch's interest in the share of the plaintiff in the fund of *Collett v. Maule*, subject to the possibility of its being proved thereafter either that another person had a better title to this fund than G. W. Finch or that his security was itself worth nothing. The rule relative to the equities which attach to a *chose in action* has been discussed and established in many cases. It has not been disputed here, nor can it be doubted, that a purchaser of a *chose in action* does not stand in the situation of a purchaser of real estate for valuable consideration without notice of any prior title; but that the purchaser of a *chose in action* takes the thing bought subject to all the prior claims upon it. If, therefore, the share of the plaintiff, W. G. Collett, in the fund in court had been charged with another sum to another person unknown to Mr. Taylor, he would have taken the interest in the fund subject to that charge. The question here raised arises from the circumstance that the prior equity is an equity in the assignor of the *chose in action* to dispute and set aside that assignment on the ground of fraud. And it is suggested that although there is not any doubt or question as to the general rule, yet that this must be taken with some qualification when the person himself who asserts the equity has created the interest under which the assignee of the *chose in action* claims it. But I have not come to that conclusion. I cannot, on this ground, draw any distinction between the different sorts of equities affecting a *chose in action* or alter their priorities. Assuming, as I do, for the purpose of the present argument, that the plaintiff, W. G. Collett, had a prior equity to this *chose in action*, and that the title to it of the person through whom G. Taylor claims is either void or subject to that of the plaintiff, the circumstance that the plaintiff has been induced to create or countenance such a title by an instrument which the Court

holds to be void, will not postpone or alter his original title. In saying this, and in assuming that the plaintiff has this equity now subsisting, (and I must for this purpose assume that the conduct of the plaintiff has not affected this right, which is a question still remaining to be considered; but,) assuming that I am right in my decision, that the original mortgage of the 14th of December 1848 is void as against the plaintiff, and that he has done nothing to countenance any subsequent dealing with it, I am of opinion that third persons cannot, by innocently dealing with the person who improperly obtained the mortgage, acquire any equity against the plaintiff. This was decided in *Bridgeman v. Green* (4), which is cited with approbation by Lord Eldon in *Huguenin v. Baseley* (5). "There is no pretence," says Lord Chief Justice Wilmot, "that Green's brother or his wife was party to any imposition or had any due or undue influence over the plaintiff; but does it follow from thence that they must keep the money? No; whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift. His partitioning and cantoning it out amongst his relations and friends will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a corrupt, polluted channel, the obligation of restitution will follow it." I am of opinion, therefore, that in the absence of any conduct on the part of the plaintiff prejudicing his right, his title is paramount to that of G. Taylor.

I will now consider how far the conduct of the plaintiff may have affected his right, that is, whether the plaintiff has done or has omitted to do anything by which his title is impaired, or that of G. Taylor is to be preferred. As regards G. Taylor, the conduct of the plaintiff if it has such an effect must consist in what he has omitted to do, for there has been no action proceeding on his part. Doing nothing, however, may in certain circumstances have made it inequitable for W. G. Collett to contest the

(4) Wilmot's Opinions and Judgments, 64.

(5) 14 Ves. 273, 289.

title of the defendant G. Taylor. I have decided that at the close of the year 1848 the plaintiff had a right to set aside the mortgage deed of the 14th of December 1848, or, in other words, that his right to the fund in court was not affected by that instrument. If, being aware of this, he allowed any person to advance money to G. W. Finch on the security of the deed which he knew or believed could not avail against him—if he did this, then, on the ground of his own personal conduct, this Court will not allow him to set up this title against the person whom he has permitted to be misled by the belief that no such title existed. As between G. Taylor and the plaintiff I am unable to find any such case established. I attended carefully to the evidence, and I have since perused it with a view of discovering when the plaintiff first became aware that the deed of the 14th of December 1848 might be set aside, but I have found nothing to lead me to the conclusion that he was aware of the imperfection of that instrument before his solicitor in the cause was made acquainted with its existence, and the circumstances connected with its execution. Now, the earliest period at which it appears that the solicitor in the cause of the plaintiff became acquainted with the deed of mortgage was in May 1849, when the petitions were presented in the cause of *Collett v. Maule*, for the purpose of obtaining stop orders on the fund in that suit. Mr. Leats knew that Collett was raising money: that the mortgage deed itself or the circumstance that the money secured by it was the consideration for the purchase of land at Hammersmith was never disclosed to him or to J. C. Dalton, and nothing is even suggested to have occurred in the interval between the execution of that deed and the presentation of the petitions, which could have induced the plaintiff to believe the deed was not a valid or effective instrument.

It has, it is true, been argued before me, that it is immaterial to consider when W. G. Collett first knew that deed of the 14th of December 1848 was impeachable, for that every man is to be held to be cognizable of the law; that the deed is by law either void on account of the circumstances attending its execution, or that it is not; that if it is not void the plaintiff con-

fessedly has no case; that if on the other hand the law is that the deed is void, W. G. Collett must be taken to have been cognizant of that fact, and by his subsequent acts to have acquiesced in the validity of it notwithstanding such knowledge. It is evident, however, that this argument proceeds on a misconception of the principles of our jurisprudence which attributes to a man a knowledge of the law. It is no more than that every man shall be held to be cognizant of the legal consequences of the act which he does, which is correctly expressed in the maxim *ignorantia legis non excusat*. Unless that were so, crimes would remain unpunished, contracts broken with impunity, and civil obligations remain unperformed from the impossibility of establishing beforehand that every man knew the legal consequences of his acts. But this doctrine is inapplicable to the case where equity forbids a man to contest the validity of an act which, knowing he had the means to prevent, he has permitted to be done. Equity so interposes on the ground of personal misconduct or *quasi* fraud of the person who stands by, and this misconduct or fraud consists in his abstaining from preventing that to be done which he knew he could prevent. Without that actual knowledge, misconduct does not exist. To hold a man guilty of an active fraud by fixing him with constructive knowledge, or knowledge with intent to defraud, would be to pervert the rule of equity, which enforces a high principle of moral conduct, into a barren technicality. I am of opinion, therefore, that as regards G. Taylor, the plaintiff has not been guilty of any acquiescence or laches which can affect or impair his title to the fund.

I now come to consider the case of Edward Whitehead Cockell. That stands partly on different grounds from those on which the mortgage of G. Taylor rests. So far as it rests on any conduct of the plaintiff consisting in what he has omitted to do, the cases are the same, and the observations I have made on G. Taylor's mortgage will apply equally to the case of Cockell's mortgage. But in addition to those, the plaintiff has done various acts with relation to E. W. Cockell's mortgage, which are relied upon as establishing his title as against the plaintiff. Those acts are, first,

and principally that he has executed the deed of the 1st of March 1849, by which E. W. Cockell advanced 2,700*l.* to G. W. Finch on the security of the mortgage of the 14th of December 1848. And further, besides doing so, that at the time when the deed of March was executed, and for the purpose of the execution of that deed, he admitted the validity of the deed of mortgage. Further, that he was asked separately and distinctly, first by James Cockell the brother of E. W. Cockell, and by Joseph Ivimey, his solicitor, whether it was true that he owed Finch 6,000*l.*, and that in answer to such questions he affirmed that he did, and he also said at the time of the execution of the deed of mortgage that he supposed he was not charging his property beyond the 6,000*l.*, thereby again admitting or affirming the fact that the charge of 6,000*l.* was a valid or subsisting charge on the fund in court.

In examining the effect of those expressions, and his act of executing the deed, it is most material to ascertain and consider whether at the time of so speaking or acting W. G. Collett knew or believed that the deed of the 14th of December 1848 was a valid or an invalid deed. As I have already observed with reference to the arguments addressed to me as to the constructive knowledge to be imputed to W. G. Collett, the value of those expressions depends principally on whether they were uttered with the knowledge that the deed of the 14th of December 1848 could be impeached. If the plaintiff sincerely and *bonâ fide* believed that he was bound by that deed, his conduct in saying that he owed 6,000*l.* to G. W. Finch on the security of the fund in court is neither reprehensible nor fraudulent, but it is merely a statement of what he believed to be the truth. I have already stated that up to this time I see no reason for supposing that W. G. Collett believed himself not to be bound by the whole transaction of December 1848; and at this time, when he was about to concur in the sub-mortgage to E. W. Cockell, and when he was using expressions intended to bind him as admissions of the validity of the transaction of 1848, the real nature of that transaction by which he became, or believed that he became, a debtor to Finch for the sum of

6,000*l.* is not inquired into. He is not even asked whether the whole sum of 6,000*l.* had really been advanced to him, or whether any equivalent in lieu of money had been given as a consideration. In fact, no inquiry is made for the purpose of ascertaining whether the original charge is valid. The execution by W. G. Collett of the deed of the 1st of March 1849 in the situation in which he was placed, and in the belief that the deed of the 14th of December 1848 was valid, is a natural, and indeed a necessary, consequence of that belief.

In order to bind W. G. Collett by his acquiescence, according to the rule of equity I have already referred to, and which cannot be laid down too strongly, it is necessary, as I before stated, to shew that W. G. Collett understood what it was he assented to, and that if his confirmation of the deed of the 14th of December 1848 is relied upon, it must appear that he thought he was doing something beyond the mere formal act, or that without such confirmation the deed of December 1848 would not be available against himself.

With reference to this subject it is also to be observed, that the plaintiff had no solicitor in this transaction: that E. W. Cockell did not even know that the deed of the 1st of March 1849 had been fully explained to him, but rested satisfied with the statement to that effect by G. W. Finch, who had obviously, on any hypothesis, the strongest motive to avoid any suggestion of doubt as to the validity of the deed of the 14th of December 1848. If that deed was valid, the plaintiff joining in the deed of March was useless, unless for the purpose of confirming it. If the deed of the 14th of December 1848 was invalid, the concurrence of the plaintiff in March 1849 is not material for the purpose of confirming it, unless he knew or believed, or with reasonable and proper diligence he might or ought to have known, that the deed of the 14th of December 1848 could be successfully impeached. The facts of the case in my opinion negative the proposition, that the plaintiff stood in any such position, or had any such means of knowledge; and that being my opinion, I am bound to regard this transaction of March 1849 exactly in the

same way as I should have looked at it if the deed of the 1st of March 1849 had been the first and only deed in the transaction, and to consider whether it could then have bound the plaintiff's interest in the fund in court to the extent of 2,700*l.*, or, indeed, to any extent beyond the money he actually received. I am of opinion that it could not, and that this deed of the 1st of March 1849 is of no effect as against the plaintiff.

I have already stated that the deed of the 14th of December 1848 ought to stand as a security for the sums actually advanced to W. G. Collett, and I have had to consider whether G. Taylor or Edward Whitehead Cockell are now entitled to rely on their securities for the amount of so much of the money advanced by them as was actually received by the plaintiff. But I am of opinion that they neither of them advanced any money to the plaintiff,—neither of them dealt with the plaintiff. They both dealt with G. W. Finch, and with him only, and it is only as regards him that they have any right or claim. G. W. Finch might have employed the money as he thought fit, but as he has paid a portion of it to the plaintiff, as between himself and the plaintiff, G. W. Finch is entitled to rely on the deed of December 1848, for so much money as was actually advanced by him to the plaintiff, but this does not apply either to G. Taylor or Edward Whitehead Cockell.

The result is, that in my opinion the plaintiff W. G. Collett is entitled to relief, and that the decree must “declare that the agreement of the 25th of October 1848 is void, and it must be delivered up to be cancelled.”

Declare that the indenture of the 13th of December 1848 being a conveyance of the hereditaments comprised in the said sale is void, and ought to be set aside.

Decree the plaintiff to re-convey the estate to G. W. Finch, or as he shall direct, the conveyance to be settled by the Master in case the parties differ.

Declare that the mortgage indenture of the 14th of December 1848 is to stand as a security only for the sums which have been advanced to the plaintiff by the defendant G. W. Finch, and which remain unpaid.

Refer it to the Master to take an account of what is due to the defendant G. W. Finch in respect of the sums so advanced in case the parties differ as to the same, and let the Master also inquire who has been in receipt of the rents of the hereditaments sold since December 1848, and if the plaintiff has been in such receipt let an account be taken of the rents received, and if the plaintiff has been in the actual possession of the land, or of any part of it, then the Master must fix an occupation rent, and upon that there must be the usual redemption decree against G. W. Finch on payment of what shall be found due to him from the plaintiff on taking that account.

Declare that the sub-mortgage of the 1st of March 1849 to the defendant E. W. Cockell is void as against the plaintiff, and that the defendant G. Taylor is not entitled to any charge or lien on the fund in court in the suit of *Collett v. Maule*, as against the plaintiff W. G. Collett in respect of the deposit made to G. Taylor by G. W. Finch of the deed of the 14th of December 1848.

With respect to the costs, I am of opinion that G. W. Finch must pay the costs of the suit up to and including the hearing. Subsequently to that period I will make the usual redemption decree, and if the state of the account cannot be agreed upon the further costs will abide the event in the usual manner in suits for redemption.

W. J. Preston was a necessary party to the suit in respect of his legal estate in the land, but no case of fraud is established against him; I am of opinion, therefore, that he must have his costs, and that the bill must be dismissed as against him, but that the plaintiff is to add those costs to his own costs, and have them over again against the defendant G. W. Finch.

I am of opinion, also, that I must make the decree against Edward Whitehead Cockell with costs, so far as the costs of the suit have been increased by his insisting on the validity of his sub-mortgage of the 1st March 1849 as against the plaintiff, and that I must make a similar decree as against the defendant George Taylor.

The defendants Joseph Ivimey and Frederick Harrison were made parties in respect of certain charges on the fund of which the plaintiff contested the validity, and

which the defendants by their first answer both insisted upon. Those charges have since been paid off, and those defendants now disclaim all interest, and therefore no evidence has been adduced or issue raised on this subject at the hearing, and, consequently, I have no means of ascertaining whether their claims were well or ill-founded; the question, in truth, having been withdrawn from the consideration of the Court pending the progress of the suit. The bill must, therefore, be dismissed without costs as against J. Ivimey and F. Harrison.

As against J. Connop, T. C. Ker and J. Cockell the case is different. They do not, and never have claimed any charge on the plaintiff's fund, or any interest in the subject-matter of the suit. The first two have been made parties, being participators in the transaction by which the mortgage of December 1848 was obtained from the plaintiff. Whether the charges for this purpose are or are not struck out of the bill is immaterial. The evidence fails in proving that they were parties to any fraud practised on the plaintiff. I fully concur in the rule laid down by Lord Cottenham in *Attwood v. Small* (6). Those parties are, in truth, nothing more than persons who might have been called as witnesses in the cause on the one side or on the other. It does not appear that they derived the least advantage from the transaction. J. Cockell is even still less connected with any part of it, for all that he did, or is alleged to have done, is, that he asked a question of the plaintiff, whether he executed the indenture of the 1st of March 1849. The bill must, therefore, be dismissed with costs as against J. Connop, T. Collingwood Ker, and J. Cockell; and the plaintiff is not to be at liberty to add these costs to those which he is to have against the defendant G. W. Finch.

In stating that I consider myself bound to make the decree with costs to the extent I have already stated against E. Whitehead Cockell and George Taylor, that is, so far as the suit relates to the setting aside of their sub-mortgages, I think it right to repeat that I do not consider either of those gentlemen in the least degree con-

nected with the original transaction, which I have considered fraudulent and void.

The bill in *Cockell v. Taylor* must be dismissed with costs.

The bill in *Preston v. Collett* was good so far as regards the 1,000*l.* advanced to W. G. Collett; but this having been paid, and there being, in truth, nothing now remaining to be done in that suit, that bill must be dismissed, but without costs.

M.R. }
Jan. 28; } COULTHURST v. CARTER.
Feb. 9; }
March 29. }

Will—Condition—Substitution—Words
“Then living,” “Dying,” “Shall die.”

A testatrix gave her real and personal estate to trustees, in trust for her niece for life; and after the decease of her niece, without issue, (which happened,) and of her niece's mother, she directed the real estate to be converted; and as to one moiety of her residuary estate she gave it amongst the child and children of A. A, and the issue then living of any child or children of A. A. dying in the lifetime of the niece, and to their respective executors, administrators and assigns; and in case all or any of the children of A. A. should die without issue in the life of the niece, the share of him, her, or them so dying was to go “amongst the child and children of M. H. living at the decease of the niece, and to their respective executors, administrators and assigns.” The niece died in 1830 unmarried and without issue, having by will given her personal estate to her mother, who died in 1850. A. A. had seven children, but two alone, H. C. and M. H., married and had issue. H. C. was alive at the date of the will, but died in 1847, leaving J. C. her husband and J. A. C. and R. L. her two only children. M. H. died in 1820 in the life of the testatrix and of both the niece and her mother. Seven of her children were still living, and this moiety of the residuary estate was claimed by J. C. as the husband and personal representative of H. C., by J. A. C. and R. L. as children of H. C., by the children of M. H. and the personal representative of the niece:—Held,

as to one-half of this moiety that the children of M. H. were entitled, and as to the other half of the moiety that it was undisposed of, and passed to the next-of-kin of the testatrix.

This was a special case under the 13 & 14 Vict. c. 35.

Eleanor Wainman, by her will, dated the 15th of December 1825, devised and bequeathed to John Nicholas Coulthurst, William Sedgwick, and Thomas Kendall, since deceased, all her real estate, and also all her personal estate not specifically disposed of, to hold to them and the survivor of them, his heirs, executors, administrators and assigns, upon trust, to pay debts, &c. out of the personal estate and invest the remainder; and pay or otherwise permit the testatrix's niece Mariana Wainman during the term of her natural life, and from and after her death her (Mariana Wainman's) mother during the term of her natural life (if she should survive her daughter and she left no issue her surviving) to receive and take the rents arising from the testatrix's real estate, and the interest of the residue of her personal estate, the same to be paid and payable to or received by her niece, and after her death without issue, to or by her mother during their respective lives when and as the same should from time to time be received or payable, and after the decease of her niece, and also after the decease of her mother, in case the estate limited to her mother should take effect, upon further trust that the said trustees or the survivor of them, or the heirs, executors, or administrators of such survivor, should sell the testatrix's real estate.

The will then proceeded as follows:—
“And I do hereby direct that the money to arise by such sales shall become part of my residuary personal estate, which I dispose of as hereinafter mentioned, that is to say, in case my niece shall die leaving issue, then I give and bequeath my said residuary personal estate, and every part thereof, unto, between, and among all and every the child and children, and the issue of any deceased child or children of my niece Mariana Wainman living at her decease, equally to be divided between them, share and share alike, and to their respective

executors, administrators and assigns, the issue of such deceased child or children nevertheless taking only the share or shares to which their parent or parents would have been entitled if living at the decease of my said niece. And I order and direct that my said trustees and the survivor of them, and the heirs, executors and administrators of such survivor, do pay and deliver and transfer the same accordingly. And in case my niece Mariana Wainman shall die leaving no issue” (which happened), “I will and direct that my said trustees and the survivor of them, and the heirs, executors and administrators of such survivor, shall and do within six months after the death of the survivor of my said niece and her mother, pay out of my personal estate the legacy of 100*l.* among such of the children of Abraham Margerison as shall be then living equally, share and share alike. And as to all the residue of my said personal estate and effects whatsoever in the event of the death of my said niece leaving no lawful issue her surviving, I give and bequeath the same from and after the death of the survivor of them my said niece and her mother as follows, namely, one undivided moiety for the children of Richard Margerison, deceased, as therein mentioned, and the other undivided moiety unto, between, and amongst the child and children, then living, of Ann Armitage, deceased, the sister of my late father,” and “the issue then living of any child or children of the said Ann Armitage ‘dying’ in the lifetime of my said niece, and to their respective executors, administrators and assigns, share and share alike, the issue of any such deceased child or children of the said Ann Armitage nevertheless taking only the share or shares that their respective parent or parents would have taken if living at the death of my said niece. And in case all, or any one or more of the children of the said Ann Armitage ‘shall die’ without issue in the lifetime of my said niece, then I give and bequeath the share or shares of him, her, or them so dying, unto, between, and amongst the child and children of Mary Haigh, niece of my late father, who shall be living at the decease of my said niece, and to their respective executors, administrators and assigns, equally to be divided between them, share and share alike. And I order

and direct my said trustees to convey and assure, pay, deliver and transfer the same accordingly." And the testatrix appointed her trustees executors of her will.

The testatrix died on the 27th of December 1825, and her will was proved by all the executors on the 27th of March 1826. She was the owner of some freehold and copyhold estates, all of which passed by her will.

Mariana Wainman was the niece and heiress-at-law, and also the heiress according to the custom of the manor of which the copyhold estates were holden. She was also her sole next-of-kin at the time of her death.

On the 15th of July 1830 Mariana Wainman died without ever having been married.

On the 13th of January 1850 her mother Ann Wainman died.

There were seven children of Ann Armitage: four sons and a daughter died without issue before the 15th of December 1825; but of the other two children, Hannah Armitage became Hannah Carter, and Mary Armitage became Mary Haigh, and she was mentioned by that name in the will. Hannah Armitage was the only child of Ann Armitage living when the testatrix made her will; she married the defendant John Carter on the 11th of August 1805, and died on the 7th of March 1847, leaving two children her surviving, John Armitage Carter and Rebecca, who became the wife of the Rev. W. Lisle, and died in September 1850.

The defendant John Carter took out letters of administration to his late wife. The defendant William Lisle, who was in Australia, had not taken out administration to his late wife, and there was no representative of Rebecca Lisle.

Mary Haigh died on the 19th of September 1820, having had eight children, seven of whom were the defendants James Haigh, John Haigh, George Armitage Haigh, William Haigh, Mary Haigh, Richard Haigh, and Joseph Armitage Haigh. The eighth child, Ann Haigh, died on the 21st of March 1849. There was no personal representative of Ann Haigh, and her seven brothers and sisters were her only next-of-kin at the time of her death.

Mariana Wainman, by her will, dated the 30th of August 1829, bequeathed to her

mother Ann Wainman all her personal estate and effects whatsoever, and appointed her sole executrix and residuary devisee and legatee, and she proved this will on the 30th of January 1831.

On the 2nd of May 1846 Ann Wainman, by her will, appointed the defendants Robert Maillard and Thomas Pulvertoft Thirkill the executors, and on the 29th of January 1850 they proved the will.

J. N. Coulthurst and W. Sedgwick sold all the real estate of Eleanor Wainman, and got in all her personal estate; and the entire residuary fund amounted to 2,086*l.* or thereabouts, one moiety of which was now claimed, first, by John Carter as the personal representative of his late wife; secondly, on behalf of John Armitage Carter and William Lisle in right of Rebecca his late wife, on the ground that John Armitage Carter and R. Lisle were the only children of Hannah Carter who survived her and Ann Wainman; thirdly, on behalf of the defendants the children of Mary Haigh; fourthly, on behalf of the defendants Parnell Robert Maillard and Thomas P. Thirkill, as the personal representatives of Mariana Wainman; and the question was, who was entitled to this moiety of the testatrix's residuary real and personal estate secondly given by her will.

Mr. Roupell and *Mr. Wickens*, for the trustees.—Before the children of Ann Armitage could take any interest in this moiety of the residue, it would seem that they must survive both the testatrix's niece and her mother; if it is so, neither Hannah Carter nor her children can take any interest; but with respect to the children of Mary Haigh the question is more difficult.

Mr. Daniel and *Mr. Hardy*, for John Carter.—Some of the parties insist that there was an intestacy with respect to Hannah Carter's share, but the construction depends upon the event to which the word "then" refers; whether it applies to the death of the niece without issue, at which time Hannah Carter was living, or, as other parties contend, to the death of the survivor of the niece and mother: but it must be borne in mind that this bequest was to dispose of a residuary estate, which

was to include the proceeds of a real estate to be sold at the death of the survivor of the testatrix's niece and her mother.

[The MASTER OF THE ROLLS.—The objects of the testatrix's bounty were the children of Ann Armitage living at the death of the niece and her mother. The word "then" fixing the period, made it a condition that they should survive. Hannah Carter survived the niece, but not the mother, and she had no right to take; and as she died during the life of the niece her children could not take, as they were not children of a child dying in the life of the niece. As to the children of Mary Haigh the question is different.]

Mr. Lloyd and Mr. J. T. Humphry, for the children of Mary Haigh.—In point of time the testatrix put herself in the situation of the legatee and looked upon the events most likely to occur, and it is manifest that the issue was not intended to take by substitution but concurrent with their parent. The expression "dying" in the lifetime cannot mean dying at a period subsequent.

Christopherson v. Naylor, 1 Mer. 320.

Tytherleigh v. Harbin, 6 Sim. 329; s. c.

5 Law J. Rep. (n.s.) Chanc. 15.

Smith v. Smith, 8 Sim. 353; s. c. 6

Law J. Rep. (n.s.) Chanc. 175.

Mr. Walpole and Mr. Turner for the next-of-kin of Mariana Wainman.—The will contained no general gift over until this moiety of the testatrix's estate was actually payable. Does the word "dying" mean any more than dead? It evidently implies prospective death; if it did not, it was superfluous. The children, therefore, of Ann Armitage dead at the date of the will, could not be entitled to this fund, and as Hannah Carter and her children took no interest in the whole it must go to the next-of-kin—*Waugh v. Waugh* (1).

March 29.—The MASTER OF THE ROLLS.—I stated my opinion at the hearing that, as Hannah Carter, the daughter of Ann Armitage, had not survived both Ann Wainman and her daughter Mariana Wainman,

she was not entitled to any interest in the moiety of the residue; at the same time I decided that neither Rebecca Lisle nor John Armitage Carter could take any interest in the residue, for though issue of a child of Ann Armitage, they were not issue of a child who had died in the life of Mariana Wainman, and the fact of Hannah Carter surviving Mariana Wainman and dying before Ann Wainman excluded them from all interest in the residue; but I reserved my judgment upon the question whether the children of Mary Haigh, a child of Ann Armitage who was dead at the date of the will, were excluded.

It is a settled rule that children of a deceased parent who form some of a class, cannot take by substitution where the parent could not have taken according to the terms of the will. Mary Haigh was dead at the date of the will: had she lived till the period of distribution she could have taken only as one of the children of Ann Armitage; she therefore could not have taken under the bequest to the child and children then living of Ann Armitage, the reference being to the death of the survivor of Ann Wainman and Mariana Wainman; so, if it was the proper construction that the issue of a child of Ann Armitage could only take by substitution for their parent, these children of Mary Haigh were not entitled to any interest in the share of the residue. This principle was established by *Peel v. Catlow* (2), *Waugh v. Waugh* and *Christopherson v. Naylor*. But if the construction was that the issue of a deceased child of Ann Armitage did not take by substitution for the parent, but as passing objects of the gift, the case was varied, and then if the only condition expressed by the words of the will was that they shall be issue of a child of Ann Armitage who died in the lifetime of Mariana Wainman, and which issue shall be living at the decease of the survivor of Mariana Wainman, then the children of Ann Haigh answer the conditions; and the circumstance that Ann Haigh died before the date of the will could not affect the right of her children;—such was the principle of the cases of *Tytherleigh v. Harbin*, *Giles*

(1) 2 Myl. & K. 41; s. c. 6 Law J. Rep. (n.s.) Chanc. 176, n.

(2) 9 Sim. 372; s. c. 7 Law J. Rep. (n.s.) Chanc. 273.

v. Giles (3) and *Jarvis v. Pond* (4), which held that if there was a substantive gift to the child of a particular person, and to the issue of such of them as should be dead leaving issue, the issue of a child dead at the date of the will would be entitled to a share. The condition here to entitle the children of Ann Armitage was that they should have survived Ann Wainman and Mariana her daughter; and the condition which was to entitle the issue of the children of Ann Armitage was, that the children should have died in the lifetime of the daughter Mariana Wainman, and that the issue of the children should have survived the niece and her mother. The first part of the gift is to the children "then living" of Ann Armitage and to the issue "then living" of the children of Ann Armitage dying in the lifetime of the niece. The objects, therefore, according to the import of the word "and" are both the children of Ann Armitage living at the decease of the niece and her mother, and the issue of the children of Ann Armitage who might have died in the lifetime of the niece. If this stood alone and uncontrouled, my opinion would have been that there was an original and independent gift to the issue of a child of Ann Armitage who was dead at the time of the distribution, and that consequently the issue of Mary Haigh, having survived the mother and daughter, Ann and Mariana Wainman, would be entitled though Mary Haigh was dead before the date of the will. Upon the words taken alone this appears to be the meaning. The word "dying" does not here import futurity, or require, as a condition to entitle the issue of a deceased child, that the child of Ann Armitage should die after the date of the will, but simply that the child shall have died in the lifetime of the niece, Mariana Wainman.

Is, then, this construction contracted by subsequent words? The latter part of the clause coupled with the state of the family existing at the date of the will, gives rise to doubt. There was only one child of Ann Armitage alive, and of the other children of Ann Armitage who had

previously died, one alone, Mary Haigh, had left issue. My impression at first was, that the bequest to the children of Mary Haigh must receive the construction put on the other clause, but upon consideration I think the words "shall die" in the subsequent part of the clause do import futurity, that is, death after the date of the will, while in the prior part of the clause the word "dying" has not any such effect, but simply imports death at any time prior to the decease of the niece Mariana Wainman, whether before or after the date of the will. The result of this construction is, that the testatrix, when making her will, contemplated that her estate was to be divided into as many shares as there were children of Ann Armitage then living or dead having left issue; that in case a child of Ann Armitage then living should die leaving issue before the niece, the issue who survived the niece and her mother would take that child's share, but that if a child died before the niece without leaving issue, the share would go to the issue of Mary Haigh. To explain this in the actual state of the family, if it were present to the mind of the testatrix when she made her will, would be that her estate was, in the event of the death of Mariana Wainman without issue, to be divided into two portions, one of which was to go to the issue of Mary Haigh who survived Mariana Wainman and her mother, and the other portion was to go to Hannah Carter, but that if she died before the niece, leaving issue, it was to go to the issue, but if she left no issue, that share was to go to the issue of Mary Haigh, who should be then alive. The intention of the testatrix has, no doubt, been defeated by the words used, which, in the case of a child of Ann Armitage living at the date of the will, have made it a condition that the child should have died in the lifetime of the niece before the issue of such children could take. It is obvious she neither anticipated nor provided for the event that has occurred—of the niece Mariana Wainman dying before her mother, and of Hannah Carter, the child of Ann Armitage, surviving Mariana Wainman and dying before Ann Wainman. The words used plainly import a gift over only in the event of Hannah Carter dying in the life-

(3) 8 Sim. 360; s. c. 6 Law J. Rep. (N.S.) Chanc. 176.

(4) 9 Sim. 549; s. c. 8 Law J. Rep. (N.S.) Chanc. 167.

time of Mariana Wainman. There is, therefore, an intestacy as to the half of the moiety which Hannah Carter would have taken had she survived both the niece and mother, and it must go to the next-of-kin of the testatrix; but as to the other half of this moiety, it went to the children of Mary Haigh who survived Ann Wainman.

M.R.
March 10, 29; }
April 2. } IVE v. KING.

Will—Vesting—Substitution.

*A testator, who died in June 1837, by a will made in 1819 directed, after the decease of his wife, that one moiety of his residuary estate should be divided into five equal parts, which he gave to five several parties, whom he named, and in case of the death of any or either of them before his wife, then their respective shares to go to their respective husbands or wives; and if none, to their respective children; and in failure of children, to the survivors of them, share and share alike. And as to the other moiety, he gave 10*l.* thereof to A. E., should she be then living; and as to the remainder of the moiety, he gave it to five parties whom he named, and in case of the death of any or either of them, then their respective shares to their children; and if none, then to the survivors of them, share and share alike. The testator's widow died in 1849. It appeared from the inquiries directed as to the first moiety, that all the five persons named as legatees were alive at the date of the will; three died in the life of the testator, leaving children, six of whom were still living, and defendants to this suit. The remaining two legatees survived the testator, but died before the tenant for life. They both left children, seven of whom were now living, and defendants to this suit. As to the second moiety, A. S., one of the legatees, died before the date of the will, leaving four children, all now living, and defendants to this suit. Two others died in the life of the testator, one without issue, and the other leaving children, two of whom were now alive, and defendants to this suit; and H. K., the fifth legatee, was the only one of the legatees named in the will who had survived the tenant for life:—Held, that the legatees*

took as tenants in common: that children of legatees who would have taken if they had survived the tenant for life, were entitled to their parents' share: that the gift to A. S., who was dead at the date of the will, and in case of her death, to her children, passed her share to her children who were living at the death of the tenant for life: that the legal personal representative of a son of one of the legatees was entitled to participate with the other children of the legatee: that the children of a deceased legatee took vested interests in the parent's share whenever the class of those children was to be ascertained: and that upon the death of C. K., one of the legatees of the second moiety, in the life of the testator, the other legatees then living took vested interests in his share.

John Deverill, by his will, dated the 26th of February 1819, devised a freehold estate at Horsmoor Green to his wife Elizabeth for her life, and bequeathed the dividends from whatever stock he might die possessed of in the public funds, the use of his furniture, and the residue of his estate and effects, after payment of his debts, &c. to his wife for her life, and after her death he devised the Horsmoor Green estate, stock, furniture, and residuary estate to William Ive and Thomas Ashton, upon trust to convert the same into money and retain their expenses, and a legacy of 15*l.*, which he gave to each of them out of the fund, and he then bequeathed his residuary estate as follows:—
“Whatsoever may be then remaining in their hands, I direct may be divided into two equal parts; the one moiety or half share thereof I give in five equal shares; that is, one share to Elizabeth, the widow of my late brother George; one share to my brother William; one share to my brother Thomas; one share to my sister, Mary Merrick; and the remaining share to my sister, Elizabeth Edwards; and in case of the death of any or either of them before my wife Elizabeth, then their respective shares to go to their respective husbands or wives, if any, and if not, then to their respective children; and in failure of children, then to the survivors of them, share and share alike. And the other moiety or half part thereof, I give as follows:—10*l.* thereof to Ann Edwards,

sister of Edward Edwards, of Slough, Bucks, baker, should she be then living, as a token of my wife's friendship for her; and the remainder of the said moiety or half part to my wife's sister Ann Smith, her brother Charles King, her brother John King, her brother Henry King, and her brother Thomas King; and in case of the death of any or either of them, then their respective shares to their children, if any, and if not, then to the survivors of them, share and share alike." The testator appointed William Ive and Thomas Ashton executors of his will.

The testator died in June 1837; and Thomas Ashton having died in his lifetime, the will was proved by William Ive alone, who died in 1847, having made a will, by which he devised all estates vested in him as trustee to the plaintiff, John Goodwin Ive, whom, together with James Wells Taylor, the defendant, he appointed his executors.

Elizabeth Deverill, the widow of the testator, died in 1849, and on her death this suit was instituted; and in August 1849 a decree was made, directing preliminary inquiries, and the usual accounts. The cause now came on for further directions.

The facts with respect to the first moiety were as follows:—

Elizabeth, the widow of George Deverill, died in the testator's lifetime, leaving three children still living.

William Deverill died in the testator's lifetime, leaving no widow, but leaving three children, two of whom survived the testator's widow; the other survived the testator, but died in his widow's lifetime, and was represented by the defendant, Ann Deverill.

Thomas Deverill survived the testator, but died a widower in the lifetime of the testator's widow. He left six children, all of whom survived the testator's widow. He had another child, who survived the testator, but died in his father's lifetime.

Mary Merrick survived the testator, but died a widow in the lifetime of Elizabeth Deverill, his widow, and she left two children, both of whom survived the widow.

Elizabeth Edwards died a widow in the testator's lifetime leaving two children,

Thomas Edwards, who survived the testator's widow, and another child, who survived the testator, but died in the widow's lifetime, and was represented by the defendant, Susannah Gray.

As to the second moiety:—

Ann Edwards, the legatee of 10*l.*, died in the testator's lifetime.

Ann Smith was dead at the date of the will; she left four children, all of whom were parties to the suit.

Charles King died a bachelor in the testator's lifetime. John King survived Charles King, and afterwards died in the testator's lifetime, leaving four children, three of whom survived the testator, but two only survived the testator's widow.

Henry King was still living.

Thomas King survived the testator, and died in the widow's lifetime, leaving four children, all of whom were still living.

Mr. Eddis, for the plaintiffs, the trustees.

Mr. Browell, for the defendant, J. W. Taylor.

Mr. Pownall, for the children of Elizabeth the widow of George Deverill, and the surviving children of John King.—As to the first moiety, Elizabeth Deverill's share did not lapse.

Le Jeune v. Le Jeune, 2 Keen, 701.

Smith v. Smith, 8 Sim. 353; s. c. 6

Law J. Rep. (n.s.) Chanc. 175.

Collins v. Johnson, 8 Sim. 356, n.; s. c.

4 Law J. Rep. (n.s.) Chanc. 226,

Salisbury v. Petty, 3 Hare, 86.

As to the second moiety, the survivorship contemplated related to the period at which the share went over—*Ranelagh v. Ranelagh* (1); and as John King survived Charles King, the one-third of Charles King's share went over to John King's children.

Mr. Smythe, for Thomas Edwards.—

The children alone who survived the tenant for life are objects of the gift, and they take by way of substitution—*Cripps v. Wolcott* (2). The gift to children was made to them as joint tenants. In every view, therefore, no children who did not survive the tenant for life could take any interest in their parent's share.

(1) 2 Myl. & K. 441, 448; s. c. 1 Law J. Rep. (n.s.) Chanc. 183.

(2) 4 Madd. 11.

Mr. Fane, for Susannah Gray.—Notwithstanding Elizabeth Edwards died in the lifetime of the testator, the gift over took effect; it was not essential for children to survive the period of distribution to become the objects of a gift. There were no words of survivorship or anything to indicate that the class was to be ascertained at a future time.

Lyon v. Coward, 15 Sim. 287; s. c. 15

Law J. Rep. (N.S.) Chanc. 460.

Masters v. Scales, 13 Beav. 60.

The children take as tenants in common, as the words "share and share alike" referred to them as well as to the legatees named.

Mr. Baggallay, for Henry King.—The second moiety was given in joint tenancy, and the children of legatees took by substitution, but children of a legatee who died in the testator's lifetime could not take. The whole of the second moiety was consequently divisible *per stirpes* between Henry King and Thomas King's children. If the gift of the second moiety was to the legatees as tenants in common, it took effect as if Ann Smith had not been named.

Christopherson v. Naylor, 1 Mer. 320.

Tytherleigh v. Harbin, 6 Sim. 329;

s. c. 5 Law J. Rep. (N.S.) Chanc. 15.

If also the gift created a tenancy in common, whether in four or five shares, Henry King, as the only one of the five that survived the tenant for life, is entitled to the whole of Charles King's share.

Gray v. Garman, 2 Hare, 268; s. c. 12

Law J. Rep. (N.S.) Chanc. 259.

Miller v. Warren, 2 Vern. 207.

Darrel v. Molesworth, Ibid. 378.

Mr. H. C. Jones, for the children and personal representatives of Thomas King.—The gift to survivors confined it to the particular legatees of the moiety then in the mind of the testator, and also to the legatees of a legatee of that moiety dying without children.

Crowder v. Stone, 3 Russ. 217.

Ranelagh v. Ranelagh, 2 Myl. & K. 441, 448; s. c. 1 Law J. Rep. (N.S.) Chanc. 183.

Watson v. England, 15 Sim. 1.

The representatives of Thomas King were

entitled to participate in the share of Charles King. There was no ground to refer survivorship to the period of distribution. Cases like *Cripps v. Wolcott* did not apply to the present, as they had no reference to the gifts over of the shares of the respective legatees, or their dying under particular circumstances, but to the gift of the entire fund to several persons, or the survivors or survivor of them as tenants in common, in which case "survivors" was of necessity held to mean those who survived some one period.

Mr. Sidebottom, for the children of Ann Smith—*Jarvis v. Pond* (3).

The MASTER OF THE ROLLS.—As to the second moiety, that was given to the five legatees as tenants in common, in equal shares; by alluding to respective shares the testator's intention that each should take a distinct share was evident. Upon the other questions I shall take time to consider.

March 29.—The MASTER OF THE ROLLS.

—As this and the case of *Coulthurst v. Carter* (4) illustrate differently the rules governing the cases in which one legatee in case of death is substituted for another, whether they are prior legatees or legatees specifically named, or whether it is one of a class to be ascertained, I desired to give the judgment in each at the same time.

In the present case the testator died on the 8th of June 1837; his widow, the tenant for life, died on the 24th of January 1849; the five persons named as legatees of the first half of the residue were alive at the date of the will, three died in the life of the testator, leaving children, six of whom are still living and defendants to this cause. The remaining two legatees survived the testator, but died before the tenant for life; they both left children, seven of whom are now living and defendants to this suit. Of the legatees of the other moiety, one of them, Ann Smith, had died before the date of the will, leaving four children, who are all alive and parties to this cause; two others died in the life of the

(3) 9 Sim. 549; s. c. 8 Law J. Rep. (N.S.) Chanc. 167.

(4) *Ante*, p. 555.

testator, one without issue and the other leaving children, of whom two are living and defendants to this suit; the fifth legatee, Henry King, is the only one named in the will who has survived the tenant for life. It is obvious, therefore, that there are four classes claiming as legatees, and a fifth class claiming the personal estate as undisposed of, as next-of-kin of the testator. The first class is that of the legatees who survived the tenant for life, this is confined to Henry King. The second class consists of the children of the legatees who survived the testator, but died during the life of the tenant for life; in this class are the two children of Mary Merrick, and the four children of Thomas King. The third class consists of the children of the legatees who died before the testator; this class includes three children of Elizabeth Deverill, two of William Deverill, two of Elizabeth Edwards and two of John King. The fourth class consists of the children of a legatee named in the will, but who in fact was then dead: this is confined to the four children of Ann Smith.

It was contended in the first place, on behalf of Henry King, that these were gifts in joint tenancy; but at the hearing I expressed my opinion that the legatees took as tenants in common. Henry King is entitled to one-fifth of half the residue, but he is not, either on the ground of joint tenancy or survivorship, entitled to a larger share.

With respect to the second and third classes, the children of the legatees, who would have taken if they had survived the tenant for life, are entitled to take their parents' share. The gift is not to a class of persons to be ascertained at any particular period, in which case, as the class would not be ascertained till a late period either at the death of the testator or the tenant for life, the children of one of that class could have taken by substitution only in the event of its having been possible that the parent could have taken. But this is a case where there are two moieties of the residue, each of which is given in five shares to five named and specified legatees, with a direction that if any one should have died, the wife or husband of the deceased

legatee should take the legatee's share, and that if there should be no wife or husband then that the respective children of the legatees should take the legatee's share. The distinction which is to be found in cases of this description is to this effect—If a testator gives a legacy to a class of persons, such as the children of A, and goes on to provide that in case of the death of any one of the children of A. before the period of distribution, the issue of such child shall take their parent's share, such issue cannot take unless the parent might have taken, and consequently if a child of A. be dead at the date of the will, or at the death of the testator, the issue of that child cannot take anything. This was the principle of *Peel v. Catlow* (5), *Waugh v. Waugh* (6), and *Christopherson v. Naylor*. But if the original legacy is not to a class, but to a person named, with a direction that in case of the death of the legatee before payment the legacy is to go to another person, although the death of the legatee occurs before the death of the testator, the gift over takes effect, upon the presumption that such ulterior legatee was substituted in order to prevent a lapse of the legacy. This is decided in *Miller v. Warren*, *Darrel v. Molesworth*, *Haughton v. Harrison* (7), and *Mackinnon v. Peach* (8). It is this latter principle which applies to the cases of this will, and the terms of this residuary bequest bring it within the case of *Le Jeune v. Le Jeune*. I could not exclude these children in the second and third classes from the share given to the prior legatee without infringing upon this class of cases. In every case, therefore, where the testator specified some individual legatee who was alive at the date of the will, but who had died before the tenant for life, leaving children who survived the tenant for life, in all these cases the children of the legatee are entitled to take the share which the legatee would have taken if then living. It is proper to notice

(5) 9 Sim. 372; s. c. 7 Law J. Rep. (N.S.) Chanc. 273.

(6) 2 Myl. & K. 41; s. c. 6 Law J. Rep. (N.S.) Chanc. 176, n.

(7) 2 Atk. 329.

(8) 2 Keen, 555; s. c. 7 Law J. Rep. (N.S.) Chanc. 211.

a difference which occurs in the wording of the gift over of the two moieties of the residue: one is, "In case of the death of any or either of them before my said wife Elizabeth," and the other is "In case of the death of any or either of them" without specifying any period within which the death was to take place, and which period, therefore, might have reference to the death of the testator or to the death of the tenant for life. But these words in both cases must be held to apply to the same event—the contingency of death before the death of the tenant for life, and no just argument can be deduced from the absence of the words "before my said wife Elizabeth" in the disposition of the second moiety of the residue.

The next question is, how far these observations and principles apply to the case of the children of Ann Smith, who was dead at the date of the will. The cases of *Tytherleigh v. Harbin*, *Giles v. Giles* (9) and *Jarvis v. Pond* do not apply. In those cases, the gift to the children was original, and not as substituted legatees; and it was on that principle that I considered the words of the will in *Coulthurst v. Carter*. I held the issue of a child dead at the time of the will, to take the parent's share. But in this case there is no gift to the children as original legatees; nothing is given to them except by way of substitution, and only in the case of the failure of the gift to Ann Smith. I have not been able to find an authority, but I am unable to draw any distinction between the case of a gift to a person known by the testator to be alive, and in the event of his death to his children, and a gift to a person whom the testator may suppose or believe to be living, but who is in fact dead, with a gift over to his children in case of his death. The principles and reasons applicable to the case of the designated legatees dying in the lifetime of the testator, and which in that event give effect to the gift, apply equally to the case of the legatee being, although it may be unknown to the testator, dead at the time of making his will. In this case, the testator gave

one-fifth of one-half of the residue to Ann Smith, and directed that in case of her death her share was to go to her children. The cases which shew that her children would be entitled under this bequest if Ann Smith had died the day after the will was made, apply equally to the case of her having died the day before, and consequently in the events which have happened the children of Ann Smith who have survived the tenant for life are entitled to the share which Ann Smith would herself have taken if she had survived the tenant for life.

There are two other questions. One is whether the legal personal representative of William Deverill, the son of William Deverill, one of the legatees of the first moiety of the residue, is entitled to share with Mary and John, the other children of William Deverill the father; and also whether the legal personal representative of John Edwards, the son of Elizabeth Edwards, another legatee of the first moiety, is entitled to share with Thomas Edwards, the surviving son of Elizabeth Edwards,—and I think they are. I have decided that the children of a deceased legatee take the parent's share in case of the death of that legatee before the death of the tenant for life, at whatever time that death of the legatee may have taken place: but in case the legatee died before the testator, the class of children of the legatee to take the parent's share is to be ascertained at the death of the testator, and that they then take vested interests in reversion expectant on the decease of the tenant for life as the parent's share, but that when the legatee has survived the testator and died in the lifetime of the tenant for life then that the class of the children of the legatee so dying is to be ascertained on the death of the legatee, and that they then take vested interests in reversion in their parent's share expectant on the decease of the tenant for life. In other words, the children of a deceased legatee take vested interests in the parent's share whenever the class of those children is to be ascertained, and the class of the children of each legatee dying before the tenant for life is to be ascertained at the death of the survivor of the testator and the specified legatee.

(9) 8 Sim. 360; s. c. 6 Law J. Rep. (N.S.) Chanc. 176.

This only applies to the case of the two persons I have mentioned, and I am of opinion that in the case of William Deverill, his legal personal representative takes one-third of the share which his father would have taken had he survived the tenant for life, and that in the case of John Edwards his legal personal representative takes one-half of the share which his mother would have taken had she survived the tenant for life.

The remaining question arises on those words of the will which direct that the shares are to go in the case of death of any or either of them, without children to the survivors of them. The words clearly apply to the five designated legatees, and Charles King, one of them, who died, left no children, and the question is, whether his share is to go to Henry, who was the sole legatee who survived the tenant for life, or whether it goes in part to the representative of Thomas King who survived Charles King and also the testator; and I am of opinion that upon the death of the survivor of Charles and the testator, the legatees of this half of the residue then living took vested interests in the share of Charles King, and consequently in the events which have happened that Charles King's share is divisible between Henry King and the representative of Thomas King.

April 2.—The case was again mentioned.

The MASTER OF THE ROLLS.—Where one of the legatees named in the will dies in the life of the testator, the class of children to take by substitution must be ascertained at the testator's death; but where a legatee survived the testator and died in the life of the testator's widow, the class of children to take by substitution must be ascertained at the death of the legatee; so that in each case the share of a legatee dying before the period of distribution vested in such of his children as survived both their own parent and the testator. And such children took as tenants in common, and their respective interests were not liable to be divested by their deaths during the lifetime of the widow. Where a legatee died childless before the period of distribution, his share vested indefeasibly in such other of the legatees of the same moiety as survived him and

the testator, the class entitled to a share under the gift to the survivor being to be ascertained at the death of the legatee whose share went over, or at the death of the testator, whichever last happened.

TURNER, V.C. }
1851. } CROSSLEY v. CROWTHER.
Nov. 20. }

Solicitor and Client—Authority to institute Suit.

If a suit be commenced by a solicitor without the authority of his client, it will be dismissed on motion, with costs as between solicitor and client, including the costs of the motion to dismiss.

This was a motion on behalf of the plaintiff to dismiss, with costs as between solicitor and client, the claim filed in this suit without his authority; and to tax the costs as between solicitor and client of the defendants who had appeared to the writ of summons, such costs and the costs of the present application, if paid by the plaintiff, to be repaid to him by the solicitor who had filed the claim in the plaintiff's name.

The affidavit of the plaintiff, in support of the motion, was to the effect that the claim had been filed without his knowledge, consent or authority (in writing or otherwise), and had never been acquiesced in or adopted by him.

The affidavit, in reply, of the solicitor and one of the defendants stated that the plaintiff had agreed that the claim should be filed in his name, but that he was not to be liable for the costs. This statement was contradicted by an affidavit of the plaintiff filed in answer.

Mr. Prendergast, in support of the motion, cited—

Wright v. Castle, 3 Mer. 12.

Wiggins v. Peppin, 2 Beav. 403.

Allen v. Bone, 4 Ibid. 493.

Mr. Bagshawe, for the solicitor, contended, first, that the authority was sufficiently proved; secondly, that the plain-

tiff was not entitled to costs as between solicitor and client.

Mr. Piggott appeared for one of the defendants.

Mr. Prendergast replied.

TURNER, V.C., being of opinion that the authority was not proved, said that the claim must be dismissed, with costs, including the costs of the present motion, to be paid as between solicitor and client by the solicitor who had filed the claim in the plaintiff's name,—the order to be in the terms of that made in *Allen v. Bone* (*supra*).

Order accordingly.

TURNER, V.C. } *In the matter of JONES'S*
Jan. 16. } TRUST.

New Trustees—Statute 36 Geo. 3. c. 52. s. 13.—Construction—Legacy Duty.

A testator bequeathed the residue of his personal estate to his executors, in trust for his wife for life, and, after her decease, for his nephews and nieces, whereby legacy duty would be payable at the death of the wife:—Held, that under the 36 Geo. 3. c. 52. s. 13. the executrix of the surviving executor might, during the life of the widow, transfer the trust fund to new trustees of the will appointed by the Court.

This was a petition for the appointment of new trustees. The testator named in the petition bequeathed all the residue of his personal estate to Mr. Hughes and Mr. Bowers, the trustees and executors of his will, upon trust, to convert and invest the same, and to pay the income to his wife for life (who was still living), and, after her death, to divide the principal among his nephews and nieces.

Both the executors had proved the will, and had since died, Mr. Hughes, the survivor, having appointed his wife Mrs. Hughes his sole executrix.

The residuary estate of the testator had been duly invested in consols, and there was not any power in the will for the appointment of new trustees.

Mr. C. J. Simpson appeared in support of the petition.

Mr. Benedict Chapman, for Mrs. Hughes, raised the question whether she could safely retire from the trust, as legacy duty would be payable on the residue at the death of the testator's widow, and Mrs. Hughes was personally liable to pay the proper legacy duty. He referred to the 36 Geo. 3. c. 52. s. 13. (1), and suggested that the words "trustees or trustee or other persons to whom the same shall be payable or paid in trust for the persons entitled in succession," meant the trustees named in the will, and did not apply to those subsequently appointed.

TURNER, V.C. said that the trustees named in the will would be the persons to whom the money was payable. There was also the word "paid," and from the insertion of that word, he thought that the clause took in not only the trustees named in the will, but trustees subsequently appointed.

Order as prayed.

(1) This section, so far as it relates to the present question, is to the following effect:—Where the duty chargeable upon any bequest of residue for the benefit of different persons in succession, shall be chargeable at different rates, so that the same cannot be paid at one and the same time, but must be paid in succession as aforesaid, then and in such case, all and every the person and persons having or taking the burthen of the execution of the will or testamentary instrument in which such bequest shall be contained, shall be chargeable with such duties in succession, in the same manner as such persons would be chargeable with the like duties, in case of immediate bequest; *unless the property bequeathed shall have been paid or otherwise satisfied to or vested in any trustees or trustee or other person or persons to whom the same shall be payable or paid*, in trust, or for the benefit of the persons so entitled thereto in succession, in which case such trustees or trustee, or his, her, or their representatives, shall be chargeable with the duties for and in respect of such property so vested in him, her, or them respectively, in such and the same manner as if he, she, or they had taken the burthen of the execution of the will or testamentary instrument by which such bequest shall have been made.

M.R. }
March 8, 30. } *In re* WAUGH.

Costs—Security for Payment—Taxation—Feme Covert—Separate Estate.

An order of course to tax solicitors' bills of costs obtained by a married woman without the intervention of a next friend,—Held, irregular, and though the solicitors held some security from her for costs, it was discharged, if further security was not given.

This was a motion to discharge an order obtained, by Rosetta Waddell, on the 15th of December 1851, for irregularity, or that security might be given for payment as well of the costs of the application for the order as of the amount which might be found due to Messrs. Waugh & Mitchell upon the taxation, and that in the mean time proceedings might be stayed, and that she might pay the costs.

On the 15th of December 1851, Rosetta Waddell, describing herself as formerly Rosetta Bagster, of Warwick Square, in the city of London, the wife of John James Robert Waddell, obtained an order of course upon Messrs. Waugh & Mitchell, to deliver their bill of costs within a fortnight, and for a reference to the Master to tax the same, and, upon payment of what should be found due, that they might deliver up on oath all deeds, books, papers and writings in their custody.

This order was served on the 19th of December.

It appeared that Messrs. Waugh & Mitchell had for some time acted as the solicitors of Rosetta Waddell, and from notices served it appeared that they had obtained some securities from Rosetta Waddell upon her separate estate, for costs due to them, that the income was about 900*l.* a-year, and was mortgaged to secure 5,000*l.*

Mr. R. Palmer and *Mr. Greene* now moved to discharge this order, on the ground of irregularity, because, being a married woman, it was obtained without the intervention of a next friend—*In re Williams* (1), *In re Taylor* (2).

(1) 12 Beav. 510; s. c. 19 Law J. Rep. (N.S.) Chanc. 422.

(2) 10 Beav. 221.

Mr. Roupell, contra.—The intervention of a next friend on behalf of a married woman is merely as a security for costs; when, however, she has a separate estate and has given security for costs she may present a petition herself, as there is no occasion for a next friend.

[The MASTER OF THE ROLLS. — In answer to a question I sent to the Secretary's office, I am informed that it has been the practice for married women to petition without the intervention of a next friend.]

It is the reasonable practice; if a married woman has no property, there is then nothing out of which to pay costs; but where there is separate estate and money set apart out of it to answer costs, what pretence is there for these gentlemen to require further security? It is assumed that the order was merely waste paper; but if her separate estate goes to pay, she is as to that a *feme sole*, and has a right to tax the bills.

Mr. R. Palmer, in reply. — A next friend is necessary. The separate estate might not be sufficient to liquidate the amount. The application to tax those bills should have been specially made.

March 30.—The MASTER OF THE ROLLS. — It is settled, as in the case of *Murray v. Barlee* (3), that a married woman's separate estate is liable for costs. It has also, I think, been the usual practice in cases of this kind to allow a married woman to apply without a next friend; but the practice is nevertheless erroneous, and, as in all other cases, it is necessary to appoint a next friend to answer for the costs to the party sued, so in this a similar precaution must be taken. There is no intelligible reason why, if this had been the case of special petition, there should not have been a next friend, or why it should be unnecessary where a common order only has been obtained. Whether there are special circumstances in the case, or it is such that a common order is sufficient, the petition in either case must be by a next friend. The liability, however, of the next friend is not extended beyond

(3) 4 Sim. 82; s. c. 3 Law J. Rep. (N.S.) Chanc. 184.

what it would have been in the case of a special petition, but is confined to the costs incurred by reason of the petition. I must, therefore, either direct security for costs to be given or discharge the order. As it has been the practice for many years to give orders of course without the intervention of a next friend, I will give no costs of this application; but will, if it is desired, make the costs abide the result of the taxation.

LORDS JUSTICES. } THE SUTTON HARBOUR
 1852. } IMPROVEMENT COMPANY
 March 29. } v. HITCHINS.

Costs—Suit instituted on the Authority of existing Decisions.

A bill was filed on the authority of The London and North-Western Railway Company v. Smith, and an injunction to restrain the defendant from proceeding under the compensation clauses of the Lands Clauses Consolidation Act was refused, and the bill was dismissed, without costs; but on appeal, (the cause, by consent, being considered as regularly on for hearing,) the defendant had leave given him to apply to the Court as to the costs of the suit if he should, before a given day, establish a right to compensation.

Where a suit is instituted on the authority of a case, and the doctrine upon which the same was founded has been since got rid of, the plaintiff is entitled to have his bill dismissed without costs.

After the appeal in this case on the motion for an injunction had been disposed of by the Lords Justices (1), the defendant gave notice of motion before the Master of the Rolls to dismiss the bill, with costs. The plaintiffs gave a notice of motion to dismiss, without costs. The motions were heard together, whereupon the Court made no order on the defendant's motion, but on the plaintiffs' motion dismissed the bill without costs. From this order the defendant appealed. On the hearing, an arrangement was made, with the sanction of their Lordships, that the cause should be considered as if on for the hearing, the affidavits being treated as de-

positions, it being admitted on the part of the plaintiffs that they were not in a condition to ask for a decree, the case on the authority of which the bill had been filed having been dissented from, and therefore that the argument should be confined to one of costs.

Mr. Bethell and Mr. Terrell, in support of the motion of the defendant to dismiss the bill with costs.—It is said that the case of *The London and North-Western Railway Company v. Smith* (2) was a sufficient justification for the filing of this bill. However that may be, on the mere ground of the decision in that case, the present is so manifestly distinguishable on the point of amount, that the Court ought to visit the plaintiffs with the costs. Perhaps the best commentary on the impropriety of the institution of the suit will be found in the judgment of one of your Lordships, as reported in the *Law Journal*, on the appeal motion of the injunction, where it is said, "Looking at the facts of this case, considering all its circumstances, and seeing that I have come to the conclusion that more litigation, more expense, more delay, more entanglement, and more difficulty will be incurred by interfering than by declining to interfere, I am of opinion that there ought to be no interference, and that there ought to be no injunction." And my Lord Cranworth is stated to have said, "When the legislature has laid down a particular mode of proceeding, it ought to be a strong case to induce us to direct another. It is to be observed that, in the present instance, the amount of compensation claimed is only 15*l.* above the minimum amount for which an arbitration could have been resorted to. I cannot yield to the idea of the naming an arbitrator being conclusive, as suggested during the argument. In *Smith's case*—with the reasoning in which I confess I am unable to concur—the sum was large,—it was 2,000*l.* and upwards; and it might be worth while to see whether there was or was not a claim for anything at all. I admit that, although there is that distinction, it is not a distinction in principle."

(1) Reported *ante*, p. 73.

(2) 1 Hall & Tw. 364; s. c. 1 Mac. & G. 216; 19 Law J. Rep. (N.S.) Chanc. 193.

Mr. Roundell Palmer and Mr. C. Hall, for the company.—The case of *Smith* was quite sufficient to authorize the filing of this bill. Wherever that case has been spoken of in terms of supposed disapproval, the learned persons who have remarked upon it have always distinguished between it and each case before the Court, and in every instance there has been an express disclaimer of any intention to overrule it. The decision to which your Lordships have come is the first which may be considered as having overruled *Smith's case*; and certainly it would be a hard measure of justice to say that a party who finds a reported case decided by the highest tribunal except the House of Lords, and relying on that, institutes a suit, which fails because subsequent decisions have shaken the authority of that case, that, therefore, his bill being dismissed, he shall be visited with the costs of the suit. A directly contrary principle is recognized by one of your Lordships in *Robinson v. Rosher* (3), where a bill was filed on the authority of the well-known case of *Flight v. Bentley*, which was subsequently overruled, and it was held that the plaintiff was entitled to dismiss his bill without costs. The principle deduced from the case seems accurately stated by the reporter in the following words, "If a bill is correctly filed on the authority of a reported case, there being no authorities in conflict with it, and the decision in the reported case is afterwards reversed, the plaintiff in the suit, filed on its authority, is entitled, on motion, to have his bill dismissed without costs" (4).

Mr. Terrell, in reply.—This case and *Smith's case* are not alike; and besides, if the smallness of the amount is considered, it is clear the bill ought never to have been filed.

(3) 1 You. & C. C. C. 7.

(4) See on this subject the following cases:—*Knox v. Brown*, 1 Cox, 359; *Blanshard v. Drew*, 10 Sim. 240; *Allfrey v. Allfrey*, 12 Beav. 295; *Moore v. Greg*, 2 De Gex & S. 306; *Stagg v. Knowles*, 3 Hare, 243; and *Wright v. Barlow*, 15 Jur. 1149.

NEW SERIES, XXI.—CHANC.

LORD JUSTICE LORD CRANWORTH.—We think that the order of the Master of the Rolls was quite right, except that the defendant ought to have had the costs of his motion to dismiss, and with the qualification which I shall mention; for we think that the bill was filed upon the authority of existing much considered decisions, which were sufficient to warrant the plaintiffs in filing the bill, and so to entitle them, as was held by my learned Brother in *Robinson v. Rosher*, to have their bill dismissed without costs. It was argued that this was a special case, and not within the authority of *The London and North-Western Railway Company v. Smith*, but we look in vain for any valid distinction between them. The cases are as nearly similar as two such cases can be expected to be. It has been said that the smallness of the demand ought to induce the Court to say that the bill ought never to have been filed. That, however, is always a difficult question to deal with, and it seems that there were many other persons besides the defendant who would be affected by the question. We think the case was within the authority of *The London and North-Western Railway Company v. Smith*, and as the doctrine on which that case proceeded has been since got rid of, the defendant is entitled to have the bill dismissed, but without costs, so far as that case warranted the institution of the present suit. But there is nothing in that case to lead to the inference that the defendant there would not have had his costs if the case had proceeded, and he had obtained compensation in the action which the Court there held must be brought. And in the present case, if the defendant should establish a right to compensation, he will be in a different position from that in which he now stands. We propose, therefore, to vary the order of the Master of the Rolls, by giving the defendant the costs of his motion to dismiss, and to affirm the order in other respects; but to give the defendant liberty to apply as to the other costs of the suit, if he shall, before the last day of Trinity term next, establish his right to compensation.

LORDS JUSTICES. }
 1852. } COOPE v. CARTER.
 April 29. }

Practice—Trustee—Wilful Default—Further Directions.

A bill was filed against trustees, praying that the amount of the trust fund which the trustees "had, or but for their wilful neglect or default might have, received, might be ascertained." At the hearing, the bill was dismissed as against one trustee, and the amount and particulars of the trust fund were directed to be ascertained. Nothing was said about wilful default, nor did the trustee ask that the bill might be dismissed as to wilful default. The Master made his report, which stated certain facts, and referred to certain documents, from which it was alleged that it would appear that there had been wilful default. At the hearing upon further directions, a decree was made referring it to the Master to inquire whether the trustee "could with due diligence, and without wilful neglect or default, have received" more than a particular stated fund, but upon appeal it was held, that the direction as to wilful default should be struck out of the decree.

As a general rule, in order to obtain a direction for inquiry as to wilful default against an executor or trustee, the bill must allege a case, pray for it, and one case at least must be proved; and

Semble—that if from admission or proof a suspicion arises whether wilful default has or not been committed, and it appears likely that further evidence can be obtained, the Court ought to direct an inquiry short of directing wilful default, but in such a way as to call the defendant's attention to it, with the view to ground thereon a new order, at a future stage, directing an inquiry as to wilful default.

This was an appeal, in three suits, from a decree of the late Vice Chancellor Wigram, made on the 16th of February 1850, at the hearing, upon further directions. The facts are these.—Samuel Walbank, by his will, dated the 21st of November 1803, bequeathed to Dr. Townsend and J. Pitt 2,000*l.*, upon trust to pay the interest of the same to his wife for her

life; then, after giving some specific legacies, he bequeathed the residue of his personal estate and the capital of the 2,000*l.*, after his wife's death, to his children, in equal shares. He appointed his trustees executors of his will. The testator died, leaving his widow and five children surviving; and on the 13th of February 1807, Dr. Townsend and Mr. Pitt proved the will. On the 13th of May 1815 a settlement was executed on the marriage of one of the daughters of the testator, Miss Frances Walbank, with Mr. Edmund Cresswell. By this deed, of which Dr. Townsend and Mr. R. Carter were trustees, the young lady's one-fifth of the residuary estate was assigned to, and vested in, Dr. Townsend and Mr. R. Carter, upon certain trusts, for investment in securities, and trusts were declared of the same for the lady, her intended husband, and the children of the marriage. Of this deed, Dr. Townsend was the sole acting trustee, Mr. R. Carter never having interfered at all. Mrs. Cresswell died in August 1829, and in April 1830 a general release was executed by the testator's four surviving children, and by Edmund Cresswell, to Dr. Townsend and Mr. Pitt as the executors and trustees of the will; and 500*l.*, 4*l.* per cent. annuities, was transferred into the sole name of Dr. Townsend as trustee of the settlement. This stock was afterwards converted into 3½*l.* per cents. Dr. Townsend appointed Mr. R. L. Townsend and Mr. J. Haines his executors, and died in June 1830. In April 1842, the Rev. J. R. Coope and Mr. H. M. Daniel were appointed new trustees of the settlement of Mr. and Mrs. Cresswell. On the 24th of January 1843, the Rev. Mr. Coope and Mr. Daniel, as trustees of the settlement, and the persons beneficially interested under the same, filed a bill against Mr. R. Carter, one of the original trustees of the settlement, and against Mr. R. L. Townsend and Mr. J. Haines, the executors of Dr. Townsend, the other original trustee, which alleged that they (Dr. Townsend and Mr. R. Carter) were, and acted jointly as, the trustees of such settlement, and prayed that the amount of the fortune of Mrs. Frances Cresswell, which had been

received by Dr. Townsend and R. Carter, or which but for their wilful neglect or default might have been received, might be ascertained; and that it might be declared that Mr. R. Carter personally, and Mr. R. L. Townsend and Mr. J. Haines as the executors of Dr. Townsend, out of his personal estate might be decreed to pay or make good the whole or such part of the fortune of Mrs. Frances Cresswell as should not have been duly invested pursuant to the trusts of her settlement. Before the cause came to a hearing, Mr. R. Carter died, and the suit was revived against Mr. W. Carter, his executor. At the hearing on the 19th of January 1846, before Vice Chancellor Wigram, it was shewn, although the allegation in the bill was that both Dr. Townsend and Mr. R. Carter acted jointly as trustees of the settlement, that in fact the latter never did interfere. The decree made was—"Dismiss the bill as against the defendant W. Carter, with costs, to be paid out of the fund and cash in court: refer it to the Master to inquire and state to the Court the amount and particulars of the fortune of Frances Cresswell assigned by the indenture of settlement of the 13th of May 1815, which had been received by the said Dr. Townsend, or by any other person or persons by his order or for his use. And the Master is to be at liberty to state any circumstances specially with regard to the matters aforesaid." At the hearing, no direction of an account was asked as to wilful default, nor was any directed. No application was made on behalf of the executors of Dr. Townsend that the bill might be dismissed so far as it prayed wilful default. In this state the matters went before the Master, who made his report, dated the 7th of May 1849, in which he made various statements, and set forth several documents, and then proceeded to say he found that the amount and particulars of the fortune of Frances Cresswell assigned by the settlement, "which had been received by Dr. Townsend, or any person or persons by his order or for his use," consisted of the 500*l.* stock, appearing by the deed of the 1st of April 1830, to have been transferred into his name as trustee of the settlement. Excep-

tions were taken to this report by the plaintiffs, but they were abandoned. The cause was heard by Sir James Wigram on further directions, on the 16th of February 1850, when the plaintiffs by their counsel insisted that the facts stated and the documents set forth in the report shewed that there had been an unequal distribution among the testator's children, and that if Dr. Townsend had acted properly in the execution of the trust, the share of Mrs. Cresswell would have amounted to 1,000*l.* They, therefore, asked an inquiry in the Master's office as to wilful default, alleging that the Master (Sir William Horne) had been requested to enter into the inquiry, but he had refused, as he considered the liberty to state any circumstances specially was limited by the last words of the order of reference, namely, "with regard to the matters aforesaid,"—none of the matters aforesaid extending beyond an account of the fortune, and therefore not giving him authority to inquire as to wilful default. On that occasion, Sir James Wigram referred it back to the Master to inquire of what the fortune of Frances Cresswell, assigned by the settlement, consisted, "and in case the said Master should find that the said fortune consisted of any other particulars than 500*l.* 3*¼* per cent. annuities in his report, dated the 7th of May 1849, mentioned, then it is ordered that the said Master do inquire and state to the Court whether Dr. Townsend could, with due diligence and without wilful neglect or default, have received any and what part of such particulars." This was to be without prejudice to any question in the cause; and the Master was to be at liberty to state any circumstances specially, &c.; and the Court reserved the consideration of all further directions and costs until after the said Master should have made his report, with liberty for any of the parties to apply. From this decree the executors of Dr. Townsend appealed.

Mr. Kenyon Parker and Mr. T. H. Hall, for the appellants (1).—In a case where the pleadings were framed precisely as

(1) See the rule as to opening an appeal now laid down, *Sims v. Helling*, *ante*, p. 387.

they are here, Lord Langdale refused to direct any inquiry on further directions as to wilful default, on the ground, that as the plaintiffs had taken only a common decree for an account, nothing would be more unjust than to have a new case made in the Master's office—*Garland v. Littlewood* (2). Also in the case of *Green v. Badley* (3), the same Judge, where a bill alleged a breach of trust, and on the decree accounts only were directed, refused, on further directions, to send any inquiry on the subject of the breach of trust.

Mr. Bethell and Mr. Daniel.—It is to be remembered that no relief is now asked beyond what was asked by the prayer of the bill, and it is to be assumed that the Court intended that the inquiries it would ultimately send would depend on the answers contained in the Master's report to the original inquiries sent, and with that view gave liberty to state circumstances specially. Where a prayer for relief has not been exhausted by the original decree, the Court may on further directions, on materials contained in the Master's report, send inquiries to work out the remainder of the relief asked by the prayer of the bill, and which has not been touched by the original decree. In the present case, the new matters appearing upon the Master's report furnish ample materials for the inquiry as to wilful default, and the Vice Chancellor exercised a proper jurisdiction in making the decree upon further directions.

The learned counsel cited and commented on the case of *Rowley v. Adams* (4).

LORD JUSTICE KNIGHT BRUCE.—This suit relates to a case of a trustee who died in the summer of the year 1830, and the suit was not instituted until the month of January 1843. As the bill was framed, it did not state this deceased gentleman (Dr. Townsend) to have been sole trustee, or sole acting trustee; it represented him and Mr. R. Carter to have been, and to have acted as, trustees jointly. The error in the statement would have been of little

importance had Dr. Townsend been alive, as he would have known the facts and circumstances of the case, but his personal representatives could not be supposed to know the facts or circumstances equally well, if at all. They were brought to a hearing, thinking that the acts complained of were the acts equally of Mr. R. Carter and the deceased Dr. Townsend. At the hearing, they find that Dr. Townsend is alone to be made the object of attack; Mr. R. Carter, or his estate, which is the same thing, being dismissed, on the ground, it is to be supposed, that Mr. R. Carter had never accepted the trust. I am not quite sure that, as Dr. Townsend had died before the suit was instituted, that circumstance to which I have just referred, namely, the dismissal of Mr. R. Carter, is not of itself sufficient to support the present appeal. But I would rather not decide the case upon that ground.

When the case came on at the original hearing, an account was directed, of which no complaint was made. Dr. Townsend was a trustee, and he was properly directed to account. Nothing more was done. Of this, though Dr. Townsend's representatives could complain, they did not complain, nor did they take the course which they might have done, namely, that of having the bill dismissed, so far as it prayed wilful default; but no direction was given on that subject. The account was taken, everything was duly accounted for, no complaint was made against Dr. Townsend or his representatives, but certain facts and documents were brought forward in the Master's office, and in consequence, on further directions, the Court sent the inquiry now complained of, which was not founded on any adjudication. Whether the inquiry as to wilful default ought to have been directed, is the point now before us. To go back to the original hearing: I apprehend Lord Eldon often to have said that, as a general rule, in order to obtain a direction for wilful default against an executor or trustee, you must allege a case, pray for it, and prove one act at least of wilful default; and, doing so, you may have a general decree as to wilful default; that is the course of the Court. But this state of circumstances may arise;

(2) 1 Beav. 527.

(3) 7 Ibid. 274.

(4) Ibid. 395.

namely, a case of wilful default may be alleged, and a prayer founded on it; but circumstances appearing, by admission or proof, may raise a case of suspicion in the mind of the Court on the question, whether an act of wilful default has been committed or not. In such a case, I can conceive that the Court, if it is likely that further evidence may be obtained, ought to direct an inquiry, short of directing wilful default, in order to ground upon that a new order directing an inquiry as to wilful default at a future stage; but then the inquiry should be directed in such a way as to call the defendant's attention to the facts to be investigated. For instance, if the allegation be that a sum of 1,000*l.* be lost by wilful default, the inquiry ought to be under what circumstances it was lost, and as to the facts bearing on the loss, and as to the nature of the transaction. Then the evidence will be supplied, and when it comes back to the Court, an inquiry as to wilful default may be directed. I can conceive the propriety, or even the necessity, of such a case, but it is not the habit of the Court, that a trustee, who, although he has acted erroneously, has acted in good faith, should be treated with severity.

That, however, was not the case here. The course taken was tantamount to an adjudication;—it not appearing that there was any wilful default:—that there was no wilful default to be inquired into, because the account was only a general account of the receipts of the trustees. It is said that there was a direction to report circumstances specially, but Sir William Horne, a Master of great learning and experience, said, and said most truly, that with regard to special circumstances, they must be stated with respect to the "matters aforesaid," that is to say, the question of receipts and allowances. All other questions were not before him, and the danger of the consequences of perjury in the event of false evidence being given by witnesses in this case would not arise, because the evidence would not be material, as not addressed to matters in issue. It is said the evidence was documentary here; but the rule is the same; nor were the defendants called upon to address themselves to the evidence before the Master, because

the Master was not to inquire as to wilful default. This decree was so worded as not to enable the Court on further directions to look at the new evidence produced before the Master, inasmuch as it was not evidence for such purpose; the consequence is, in my judgment, without denying that a case may exist in which on further directions an inquiry as to whether wilful default has been committed may be directed, this is not such case, and, in my judgment, if there was nothing more in the case than this, the inquiry had better be erased from the decree. But, assuming that, according to the ordinary practice of the Court, there is nothing to prevent an inquiry being directed, it still remains to consider whether there was matter enough on the facts and documents stated in the Master's report to render the inquiry before the Master probably useful. I am of opinion that, at the utmost extent, they raised a doubt as to an obscure matter, as to which all the persons who could have given information have passed to their graves, and is more or less matter of conjecture. There would be great hazard of a miscarriage of justice if this matter should be gone into. I am of opinion, therefore, that the inquiry had better be struck out.

LORD JUSTICE LORD CRANWORTH—after an elaborate statement of all the facts of the case, and of the statements in and documents referred to by the Master's report—concurred in the judgment already pronounced, chiefly on the ground that, assuming the state of the pleadings and the practice of the Court warranted the inquiry, the facts of the case led irresistibly to the inference that the accounts had been properly taken, and a proper distribution had been made of the testator's estate; and that Dr. Townsend had had transferred into his name the whole of the fortune of Frances Cresswell assigned by her marriage settlement, namely, the 500*l.* 4*l.* per cent. annuities; and that, therefore, there had been no ground shewn for an inquiry as to wilful default.

L.C.	}	NEATE v. PINK. <i>Ex parte</i> FLETCHER AND YATES.
1850.		
Nov. 4, 5, 6, 7, 8.		
1851.		
Nov. 4.		

Trust and Trustee—Unauthorized Management of Trust Estate.

J. H. being possessed of the moiety of an estate in Jamaica, by his will appointed J. P. his executor and trustee, with power to manage, conduct, carry on, and improve his estate. In 1830 J. P. took a lease of the other moiety and covenanted to keep it in the same cultivation, order, repair, and condition, and thenceforward managed the entirety on account of the trust estate. In 1835, in a suit by the cestuis que trust under the will of J. H. Patey & Co. were, by an order of Court, appointed managers and receivers, and both moieties were managed for the trust estate until 1842. No rent had been paid since 1835, and the estate was in a state of utter ruin. Upon petition in the cause by the owners of the other moiety,—Held, that though the taking of the lease was not authorized by the will, yet as it was concurred in by the cestuis que trust and sanctioned by the Court, and had proved beneficial to the trust estate, it must be considered as binding on the cestuis que trust, and that the trust estate was liable for the rent in arrear and the dilapidations.

This was an appeal from an order made by the Vice Chancellor of England. The facts of the case are sufficiently stated in the Lord Chancellor's judgment.

There were two petitions of appeal, the one, the petition of the original petitioners, complaining that the order did not give them all the relief they were entitled to; the other, the petition of the plaintiffs in the suit, insisting that no relief ought to have been given.

Mr. Rolé, Mr. Stuart, Mr. Malins, Mr. Teed, Mr. J. Parker, Mr. Hallett, Mr. J. Bailly, Mr. Piggott, Mr. Terrell, Mr. Hardy and Mr. Eddis appeared for the different parties.

Nov. 4. — The LORD CHANCELLOR (TRURO).—This is an appeal against an

order made by the Vice Chancellor of England, on the petition of the present appellants. The facts of the case are as follows:—John Hiatt, the testator mentioned in the pleadings, was, at the time of making his will as well as at the time of his decease, seised of one undivided moiety of an estate in Jamaica, called the "Fellowship Hall Estate," and the slaves, stock, and plantations, utensils and implements therein, and of other estates in the same island; and the appellants were seised, and are still seised, of the other undivided moiety, called the "Byndloss" moiety. John Hiatt appointed John Pink executor and trustee of his will, with power to manage, conduct, carry on, and improve his residuary estate, to the best advantage. From the death of John Hiatt down to the commencement of the lease, which I shall presently mention, the estate was worked by John Pink, as representing Hiatt's moiety, jointly with Philip Jacquet, the person employed on behalf of the appellants, as the owners of the Byndloss moiety. But dissatisfaction having been expressed by them at the small amount of produce derived from their moiety, John Pink, in a letter to Jacquet, dated the 11th of November 1828, proposed to take a lease of that moiety for the benefit of the claimants under the will of John Hiatt; and by an indenture, dated the 4th of June 1830, John Pink took a lease of the Byndloss moiety for three years, from the 1st of January 1830, at the rent of 600*l.*, and thereby covenanted to keep the demised property in the same cultivation, order, repair, state, and condition. The lease so taken was not, on the face of it, granted to John Pink as trustee of the will of John Hiatt, and, indeed, it contained no reference whatever to the trusts of that will; but, on the face of it, it appears as if it were granted to him in his individual capacity; but it clearly appears that it was, in reality, taken by him in his character of trustee of the will of John Hiatt. Before the expiration of that lease, John Pink proposed to take a new lease for a further term of three years, from the 31st of December 1832, at the rent of 400*l.*, such new lease to be an exact copy of the old lease, with the alteration of the date

and the difference of rent. No lease was executed, but the appellants accepted the terms contained in this letter, and John Pink continued, as such trustee, to hold the Byndloss moiety. John Pink died in September 1833, and thereupon the trusts of the will of John Hiatt devolved on Edmund Pink, as heir-at-law of John Pink; but Edmund Pink never acted as such trustee, and Williams and Mackenzie, the executors of John Pink, entered into possession of the trust estate of John Hiatt and of the Byndloss moiety of the Fellowship Hall estate; and they and their consignees, Davidson and Barkley, always treated that moiety as part of the trust estate of John Hiatt.

In April 1834, the parties interested under the will of John Hiatt filed a bill in this court against the executors of John Pink, praying that the plaintiffs might be let into possession and management of the estate of John Hiatt, and for the appointment of new trustees, and of a manager in Jamaica and of a receiver and consignee in this country. On the 15th of February 1835, in pursuance of an order, dated the 9th of December 1834, Patey, Sewell & Marshall were appointed managers and receivers in Jamaica of the trust estate and premises of John Hiatt, and J. H. Palmer was appointed consignee and receiver in this country. In pursuance of the suit in this court, and in order to enable the receivers to obtain possession of the trust estate, a suit was instituted in the Court of Chancery in Jamaica, in April 1835, by the plaintiffs in the suit in this court, against the defendants to the same suit; and by an order on a petition in the suit so instituted in Jamaica, it was ordered that the mercantile house of Patey, Sewell & Co. and R. H. N. Hemming should be appointed joint receivers and managers of the trust estate and premises of John Hiatt, and that Williams and Mackenzie should deliver up possession of the trust estate and premises to the said receivers, and that the receivers should be at liberty to ship the produce to J. H. Palmer or to sell it, and account for it to him. In pursuance of this order, the executors delivered up to the receivers possession of the trust estate of John Hiatt and of the Byndloss moiety, with the privy of the

solicitors of the plaintiffs in the suit in this Court, and the receivers always treated that moiety as held by them for the benefit of the trust estate of John Hiatt; and in all the reports in the Jamaica suit of the transactions of the receivers in relation to the Fellowship Hall estate (which reports were not made up, filed, or confirmed until all the parties there had been served with the usual notices, giving them ample time to make objections thereto), the following statement is contained as to the Fellowship Hall estate: "One moiety being the property of the trust estate of John Hiatt, and the other moiety held by the said receivers for the said trust estate, at an annual rent of 400*l*." Towards the close of the year 1837 an agreement was come to between the receivers and the attorneys of the appellants that the receivers should continue to pay the rent of 400*l*. a-year, in respect of the Byndloss moiety, from June 1835, until either the terms of a new lease should be agreed on or the appellants should resume possession, subject to certain deductions not necessary to be here stated. No rent has been paid for the Byndloss moiety since June 1835. In September 1838, the appellants commenced an action in Jamaica against the receivers for the recovery of the rent then due, and obtained a verdict, and judgment was entered up in the action. But such proceedings being considered to be a contempt of the Court of Chancery, execution was not taken out; but two applications were made to the Court of Chancery in Jamaica by the appellants in the suit instituted there, for payment of rent, and to be let into possession of their moiety; and by an order of the Court of Chancery there, in January 1842, it was ordered that the appellants might enter into possession, and that rent at the rate of 400*l*. per annum should be paid from the 1st of June 1835 to the 31st of December 1839, (subject to a certain proviso); and that a proper compensation, to be ascertained by the Master, should be paid for the use and occupation of the Byndloss moiety since the 31st of December 1839. Owing to the neglect and mismanagement of the receivers in Jamaica, the Fellowship Hall estate, at the date of the Master's report,

which I shall presently mention, was in a state of utter ruin, although at the date of the lease it was in excellent condition, but the amount of the dilapidations has not been ascertained. The appellants were let into possession in June 1842. But the rent from June 1835 is still due, and there appears to be no fund standing to the credit of the cause in Jamaica; and the Master has certified his opinion to be, that it is impracticable for the appellants to recover in Jamaica any part of the amount due to them in respect of their moiety of the Fellowship Hall estate. There are now standing to the credit of the cause in this Court two sums, arising from the produce of the Fellowship Hall estate, and from compensation money in respect of slaves on the estate of John Hiatt. In June 1845, the appellants presented their petition to this Court, praying that a certain agreement for a compromise might be carried into effect, or for an inquiry as to what was due to them in respect of the matters aforesaid from the estate of John Hiatt, and that the amount thereof might be paid to them out of the fund standing to the credit of the cause; and thereupon an order was made for a reference to inquire whether any and what sum paid into the Bank to the credit of this cause by J. H. Palmer had been paid in respect of the produce and profits derived since the 1st of June 1835 from the Byndloss moiety of the Fellowship Hall estate. On the 13th of July 1849, the Master made his report, to which I have already alluded, whereby he certified to the effect of what I have stated, and that 2,800*l.* was due to the appellants, with interest at 6*l.* per cent. for rent, without including anything for dilapidations, the amount of which was not ascertained by him. No exceptions have been taken to this report. In July 1849, the appellants presented another petition in this cause, praying for payment of the sum so found due; and that the sum of 2,600*l.* claimed by them for dilapidations might also be paid, or that it might be referred to the Master to inquire what ought to be allowed in respect of such dilapidations; and by an order made thereon, the said sum of 2,800*l.* was ordered to be paid, with interest thereon at the rate of 4*l.* per cent. from the 1st of

December 1846. The petitioners have appealed from the order made on their petition, on the ground that the same does not provide for or extend to the whole of the relief prayed by their petition; while the respondents contend that the order in question goes too far.

It being perfectly clear, from what the Master has found, that the Byndloss moiety of the Fellowship Hall estate has, from the time when John Pink took the lease of June 1830 down to the time when possession was delivered up to the appellants, been occupied in trust for John Hiatt's estate, the only question that is necessary to be determined as preliminary to the decision of the present case is this—was that occupation authorized by the will of John Hiatt? or, if not, was it sanctioned by the Court, so as to bind the parties interested in the trust estate of John Hiatt? His will contained no power to take a lease of the Byndloss moiety, and the taking the lease was a speculation not authorized by the general power of management conferred by the will. Still, when I consider that the occupation of the Byndloss moiety was, in itself, a fair transaction, and one which appears, from what the Master has found, to be beneficial to the trust estate of John Hiatt; that it was entered into by the receivers, who are the officers of the Court; that the parties not under disability were apprised of and acquiesced in it; that it was never opposed on behalf of any of the parties who were under disability; that it was in a manner sanctioned by the Court of Chancery in Jamaica, in a suit which was ancillary to a suit in this Court, I am of opinion that the transaction is binding on the parties interested in the trust estate. Such being the case, I think that the order made by the Vice Chancellor as to the rent was right.

But, upon the same principle, I think he should also have given relief in respect of the dilapidations. There was a covenant in the lease to keep the estate in the same cultivation, order, repair, state and condition; and the intended second lease was to be like the first, except as regards the amount; and I conceive that a continued obligation on the part of the receivers to keep up the estate must be implied, and that it would be

contrary to common honesty to allow the appellants to suffer so enormous a loss through the neglect and mismanagement of the receivers. If the persons interested in the trust estate must, for the reasons I have stated, be held responsible for the acts of the receivers in regard to the rent, I consider they must be equally responsible in regard to the dilapidations. There must, therefore, be a reference to the Master to ascertain the amount of dilapidations.

It has been objected that the Master went beyond the terms of the reference. With respect to this, I think that the reference in the first order ought to have been in terms as general as those which are contained in the prayer of the first petition. But I consider that the liberty to state special circumstances authorized him in making the statements he has made. Indeed, to restrict the Master to special circumstances, relating to the precise subject of the specific inquiry, would be, in many cases, needlessly to prevent him from stating circumstances essential to the due administration of justice, and would, in fact, nullify the design of the Court in inserting such words in a decree.

LORDS JUSTICES.

1851.

Nov. 6, 7;

Dec. 15.

KEKEWICH v. MANNING.

Voluntary Settlement—Contract—Assignment of Equitable Reversionary Interest—Trustee and Cestui que Trust—Notice of Settlement—Complete Alienation.

*Stock was standing in the names of A. and B, mother and daughter, as trustees for A. for life, remainder for B. absolutely. B, in contemplation of marriage, assigned her interest, subject to A.'s life interest, to trustees, upon trust for the benefit of herself and her intended husband, for life, and then upon trusts for the issue of the marriage, and for C, a niece of B, and her issue, as B. should appoint, and in default of appointment, among them equally. And it was provided that, if there should be no issue of the marriage, or none who should attain a vested interest, then as to 5,000*l.*, part of the fund,*

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*and 600*l.* long annuities, subject to a life estate, the same should be in trust for C. absolutely, to be vested at twenty-one. A. had notice of the settlement, but was not a party to it. No transfer of the fund was made. The marriage was solemnized, but no issue was born, and the husband died. B. contracted a second marriage, and in contemplation of it she assigned her interest, subject to A.'s life interest, to trustees upon trusts for her benefit for life, and then upon trusts for C. (the niece) and the issue of the second marriage, as she (B.) should appoint by will, and in default of appointment among the issue of the marriage equally, and in default of issue, as to 5,000*l.*, part of the fund, for C. absolutely. No transfer of the fund was made. The marriage was solemnized, and one child was born, and then the second husband died. A, the mother, the original tenant for life, then died, and the fund was still standing in the names of A. and B. C, the niece, married, and a suit was instituted by the trustees of the first settlement, and by C, and her husband, against B, the trustee of the second settlement, and the child of the second marriage, praying a transfer of 5,000*l.* to the trustees of the first settlement, and an injunction to restrain the transfer of the fund by B. to the trustees of the second settlement. The bill was dismissed in the court below; but on appeal,—Held, that, whether or not the first settlement was voluntary (which the Court did not decide) as to the trusts in favour of C, the niece, still it was a complete alienation of the fund by B, and the decree below was reversed, a transfer being directed as prayed.*

This case came on upon appeal from a decree of the late Vice Chancellor Sir James Wigram. Mr. Robert Kekewich, by his will, dated in 1822, bequeathed certain stocks, consisting of 10,500*l.* new 3*l.* 10*s.* per cents. and 500*l.* long annuities, to his wife Elizabeth Kekewich and his daughter, Susannah Kekewich, upon trust for his wife for life, and after her death in trust for his daughter absolutely, and he appointed them executrixes. The testator died; they proved the will, and the funds were transferred into their names, and so they remained down to the institution of the suit and after the mother's death. In 1834, Miss

Kekewich, being about to marry Sir Henry Maturin Farrington, assigned (with his assent) "all that the said capital sum of 10,500*l.*, new 3*l.* 10*s.* Bank annuities, and also all that the said annual sum of 500*l.*, long annuities, to which respectively the said Susannah Kekewich is entitled as aforesaid (subject to such life interest therein of the said Elizabeth Kekewich as aforesaid), and all the funds in which the same may from time to time be invested," &c., unto Mr. Charles, Mr. Samuel I., and Mr. George G. Kekewich, with a full power of attorney, and with a direction that all persons in whom the stock might be vested at the death of Mrs. Elizabeth Kekewich should forthwith on her decease transfer the same to the before-named trustees, to be held by them upon the trusts of the settlement. The trusts were declared to be for Miss Kekewich until the marriage, and afterwards for her for life, for her separate use; and after her decease, if Sir Henry should survive her, then the long annuities were to be held in trust for him for his life; and after the decease of the survivor, then both funds were to be held upon such trusts as she should appoint, for the benefit of Miss Bradney, her niece, and the children of the intended marriage, and of the issue of Miss Bradney, and of the issue of the children of the intended marriage, and in default of appointment, in trust for Miss Bradney and the children of the intended marriage equally as tenants in common. The settlement contained this proviso, "Provided always, and it is hereby expressly declared by and between the said parties to these presents, that in case there shall be no child or children of the said intended marriage, or, there being such, all of them shall happen to die before his, her, or their share and interest under the provisions hereinbefore contained shall have become vested as aforesaid, then immediately after the decease of the said Susannah Kekewich (notwithstanding all or any of the trusts, powers, provisos, and declarations hereinbefore expressed and declared), the said capital sum of 10,500*l.* new 3*l.* 10*s.* per cent. annuities, and the said 500*l.* per annum long annuities (subject, nevertheless, as to the said 500*l.* per annum long annuities to the interest therein of the said

Sir Henry Maturin Farrington for his life as aforesaid), and the several dividends, interest, and annual proceeds thereof respectively shall be upon the trusts and for the ends, intents, and purposes hereinafter expressed and declared, (that is to say,) as to, for, and concerning the said 500*l.* long annuities (subject to the interest for life therein of the said Sir Henry Maturin Farrington as aforesaid), and also as to the capital sum of 5,000*l.* stock, part of the said capital stock of 10,500*l.* new 3*l.* 10*s.* per cent. annuities, and the dividends, interest, and proceeds thereof, the same respectively, immediately upon the decease of the said Susannah Kekewich, shall be upon trust for the said Elizabeth Frances Bradney, for her own benefit, and become vested in her on her attaining the age of twenty-one years, but not to be payable or transferable until after the decease of the said Susannah Kekewich."

The remainder of the funds were settled, in the above-mentioned events, upon such trusts as Miss Kekewich should by will appoint, and in default of appointment for her next-of-kin.

The marriage was solemnized, and Sir H. Farrington soon afterwards died, and there was no child. Mrs. Kekewich had notice of the settlement, but no transfer was made of the funds into the names of the trustees of the settlement, and it did not appear that any application was ever made to Mrs. Kekewich to make such a transfer. In 1838, Lady Farrington married Mr. Manning, and in contemplation of that event, by deed dated in June in that year, she assigned the funds to Mr. George Manning and another person, as trustees, upon trust after her decease, for such of them, Miss Bradney, and the children of the then intended marriage, as she (Lady Farrington) should by will appoint, and in default of appointment for the children of the marriage equally; and if there should be no children, as to 5,000*l.*, part of the reduced annuities, in trust for Miss Bradney, if she should survive Lady Farrington. Of this second marriage there was issue one child; and the second husband died in 1844. Mrs. Kekewich, the original tenant for life, the mother of Lady Farrington, died in 1847. No transfer was ever made of the funds, and

the same, after Mrs. Kekewich's death, remained in the names of that lady and of Lady Farrington.

Miss Bradney married Mr. Bailward, and those persons and the Messrs. Kekewich, the trustees of the settlement of 1834, filed a bill against Mr. George Manning and the other trustee of the settlement of 1838, and against Lady Farrington and her child by the second marriage, praying that Lady Farrington might be ordered to transfer the whole funds (or 5,000*l.*, part thereof, and the long annuities) into the names of the Messrs. Kekewich, the trustees of the settlement of 1834, upon the trusts thereof, and that such trusts might be executed under the direction of the Court, and that Lady Farrington might be restrained from transferring the funds into the names of Mr. George Manning and the other trustee of the settlement of 1838, or of any persons other than the plaintiffs.

The defendants by their answer insisted on the validity of the settlement of 1838, for that Lady Farrington had power to make the same, notwithstanding that of 1834.

The cause was heard before Sir James Wigram, who dismissed the plaintiffs' bill with costs, from which decision they appealed.

Mr. Rolt and *Mr. Bazalgette*, for the appeal.—Either the trust for Miss Bradney is founded on a marriage contract, or it is a complete gift if it be voluntary; and in either view it is good. In support of the trust, as resting on marriage contract, the following cases are in point:—

Marchington v. Vernon, 1 Bos. & P. 101, n.

Johnson v. Legard, 3 Madd. 302; s. c.

6 M. & S. 66; Turn. & Russ. 281.

Clayton v. Earl of Wilton, 6 M. & S. 67.

Ithell v. Beane, 1 Ves. sen. 215.

Heap v. Tonge, 9 Hare, 104.

Gregory v. Williams, 3 Mer. 582.

Goring v. Nash, 3 Atk. 186.

Osgood v. Strobe, 2 P. Wms. 245.

Davenport v. Bishopp, 2 You. & C. C. C. 453; 1 Phill. 701.

Pulvertoft v. Pulvertoft, 18 Ves. 84.

And besides these authorities, the rule relating to a marriage contract, that being a contract for value, is very clearly laid

down by Lord Langdale in the case of *Colyear v. Lady Mulgrave* (1), where he says, "When two persons, for valuable consideration between themselves, covenant to do some act for the benefit of a mere stranger, that stranger has not a right to enforce the covenant against the other two, although each one might as against the other." The party suing in the present case is a party to the contract, and therefore plainly within the rule thus laid down. But should the Court consider that the trust is a voluntary one, still, voluntary though it be, it is a complete gift, for everything was done which was capable of being done, having regard to the subject-matter of the gift. Nothing was left undone of which the subject was susceptible, and to hold that in such circumstances the gift was ineffectual, would be in effect to declare that no such interest is capable of alienation except for a valuable consideration. The gift was complete, and the transmission of interest as full as in—

Collinson v. Patrick, 2 Keen, 123.

Wheatley v. Purr, 1 Ibid. 551.

Rycroft v. Christy, 3 Beav. 238.

Fortescue v. Barnett, 3 Myl. & K. 36.

Ex parte Pye, 18 Ves. 148.

James v. Bydder, 4 Beav. 600.

Ellison v. Ellison, 6 Ves. 663.

Sloane v. Cadogan, Sug. Ven. & Pur. 1119, 11th ed.

Mr. Kenyon Parker, for the trustees.

Mr. Metcalfe, for the respondents.—The answer to the case here is, as it was in the court below, that the plaintiffs are volunteers, and that the gift being incomplete, the Court will in nowise assist volunteers to enforce it. Miss Bradney, a niece only of the intended wife, cannot be considered as coming within the consideration of marriage so as to support a settlement of the property of the intended wife—*Sutton v. Chetwynd* (2), *Cotterell v. Homer* (3), and *Davenport v. Bishopp*. The transaction, besides being voluntary, is imperfect. No declaration of trust is in existence, and the legal estate is outstanding; and all that the plaintiffs can do is, to come for the aid of this Court to enforce the agreement,

(1) 2 Keen, 98.

(2) 3 Mer. 249; s. c. T. & R. 296.

(3) 13 Sim. 506.

which is assistance the Court will not give. The settlement is not, either in form or substance, a declaration of trust; it is merely an assignment; and several cases have decided that an imperfect gift will not be converted into a trust—*Holloway v. Headington* (4), *Dillon v. Coppin* (5), *Antrobus v. Smith* (6), and *Edwards v. Jones* (7). Even in the case relied on by the appellants of *Colyear v. Lady Mulgrave*, the decision was against the voluntary deed; and the cases of *Ward v. Audland* (8) and *Jefferys v. Jefferys* (9) are decisive against the appellants' case.

[LORD JUSTICE KNIGHT BRUCE.—There is the case of *Ellis v. Nimmo* (10), before Sir Edward Sugden, when Lord Chancellor of Ireland. Is the argument this,—that the word "trust" or "confidence" must be used to create a trust?]

No; but some act must be done to shew the creation of the trust, and this is pointed out by Sir James Wigram in *Meek v. Kettlewell* (11); and among the observations of the same learned Judge in deciding the case now before the Court are reasons totally unanswered by the arguments for the appellants. He remarked, that in a case in which there are no means of transferring the property in law, and there is an agreement to transfer, it is admitted that, in the absence of consideration, the Court will not convert the voluntary agreement into a trust, and that therefore, if the person who has the property is called upon to transfer it, this Court will not enforce the demand. He also observed that, supposing the subject in dispute to be property which cannot be transferred at law by the act of the beneficial owner, and instead of there being an agreement to transfer, the transaction takes the form of an absolute assignment, still, if there be a want of consideration, and the deed of itself is inoperative as an assignment, then it is well settled that, in the absence of consideration, this Court does not distinguish the assignment in form from the agreement to assign. On

the other hand, if there be a consideration, it is immaterial whether it be an agreement or an assignment. It is said by the appellants that here the parties have done all they can, and that, therefore, this Court will consider that they have effectually deprived themselves of the property. But that is not so, and the case of *Edwards v. Jones* is a distinct answer to such an argument. There the obligee of a bond, five days before his death, indorsed what was in form an assignment, and handed it over to the party to whom he wished to transfer it, yet the bond debt was held not to pass, the transaction being without consideration and incomplete. Then it is to be observed that, in the proper sense of the expression, it cannot be said that the trustee of the property was a party to the settlement, for although Lady Farrington was a party to the settlement, she was so not as trustee of the property but as a person beneficially interested, and the whole scope of that settlement is, that she assigned her interest in the property when it should fall into possession to trustees to be held by them upon certain trusts. If the mother and the daughter had accepted the trusts, then it might possibly have been reasonably argued that the transaction was complete.

[LORD JUSTICE KNIGHT BRUCE.—Can the respondents' case be supported consistently with *Sloane v. Cadogan* and *Forrescue v. Barnett*?]

These cases must now be considered as in effect no longer binding authorities—*Beatson v. Beatson* (12), *Cobman v. Sarel* (13), and *Sugden's 'Vendors and Purchasers'*, 11th ed. 934, besides the cases of *Meek v. Kettlewell* and *Edwards v. Jones*, before cited.

Mr. Rolé, in reply.—The case of *Edwards v. Jones*, and others which have been relied on by the respondents, are not inconsistent with the appellants' case. All which those cases establish in favour of the respondents is, that where the property professed to be dealt with consists of a merely legal interest, an alienation of it which does not give a complete legal title will not be enforced in equity at the instance of a mere volunteer. Here, how-

(4) 8 Sim. 324.

(5) 4 Myl. & Cr. 647.

(6) 12 Ves. 39.

(7) 1 Myl. & Cr. 226.

(8) 8 Beav. 201.

(9) Cr. & Ph. 138.

(10) Ll. & G. 333.

(11) 1 Hare, 475.

(12) 12 Sim. 294.

(13) 1 Bro. C.C. 12; s. c. 1 Ves. jun. 50.

ever, leaving out of view the marriage contract, and therefore the valuable consideration, the property was equitable, and the assignment of it was a complete alienation.

Dec. 5.—LORD JUSTICE KNIGHT BRUCE.

—The present case has raised, necessarily or unnecessarily, a question which, on several occasions, under different aspects, and in various circumstances, has been brought before this Court, especially since the time of Lord Hardwicke,—the question, namely, whether an act or intended act of bounty, whether a gift, or a promise, or intended gift, was in truth a perfect act, a completed gift, resting neither in promise merely nor merely in unfulfilled intention; or was incomplete, was imperfect, and rested merely in promise or unfulfilled intention. Generally, this question, when arising here, is very material. For as, upon one hand, it is, on legal and equitable principles, we apprehend, clear that a person *sui juris*, acting freely, fairly, and with sufficient knowledge, ought to have power and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversion, and howsoever circumstanced; so, on the other, it is as clear generally, if not universally, that a gratuitously expressed intention, a promise merely voluntary, or, to use a familiar phrase, *nudum pactum*, does not (the matter resting there) bind legally or equitably. I have been speaking of transactions without any sealed writing. But though it is true that, in cases where such an intention, such a promise, is expressed in a deed, it may bind generally at law as a covenant, by reason of the light in which the particular kind of instrument called a deed is regarded at law; yet in equity, where at least the covenantor is living, or where specific performance of such a covenant is sought, it stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed. The rules and the distinction or distinctions between them are, in theory, plain and simple enough, but are sometimes found to be of difficult application practically; nor, considering the position and circumstances in

many instances of property, on the decision of the title to which belongs this jurisdiction, ought one to be surprised if he should find here occasionally a case so near the boundary line separating the two main classes as to render it no light or easy task to say to which side of it the case belongs.

Such instances have occurred not very unfrequently. To state, however, a simple case: suppose stock or money to be legally vested in A. as a trustee for B. for life, and, subject to B.'s life interest, for C. absolutely; surely it must be competent to C. in B.'s lifetime, with or without the consent of A, to make an effectual gift of C.'s interest to D. by way of mere bounty, leaving the legal interest and legal title unchanged and untouched. Surely, it would not be consistent with natural equity or with reason or expediency to hold the contrary, C. being *sui juris* and acting freely, fairly, and with sufficient advice and knowledge. If so, can C. do this better or more effectually than by executing an assignment to D? It may possibly be thought necessary to the complete validity of such a transaction that notice should be given to A. Upon that we do not express an opinion. Suppose the case only varied by the fact that A. and C. are the trustees jointly instead of A. being so alone. Does that make any substantial difference as to C.'s power, the mode of making the gift, or the effect of the act, C. not severing nor affecting the legal joint tenancy? C. would necessarily have notice. Possibly it may be thought material that A. should have notice likewise; but upon that we avoid saying anything beyond referring to *Meux v. Bell* (14), and to *Smith v. Smith*, mentioned in *Meux v. Bell*. It is probably, or certainly, in some instances, the course of this jurisdiction to decline acting at the suit of those whom it terms "volunteers," though within that description a person claiming directly and merely under a gratuitous promise, oral or not under seal, which is *nudum pactum*, may be thought perhaps hardly to come, for such a person has, in effect, had no promise at all. In effect, no contract has been made with him. But whatever rule there may be against "volunteers,"

it does not apply to the case of one who, in the language of this Court, is termed a *cestui que trust* claiming against his trustee. For that which is considered by this jurisdiction a trust may certainly be created gratuitously. So that the absence of consideration for its creation is, in general, absolutely immaterial.

To this doctrine Lord Eldon often referred. He did so especially in *Ellison v. Ellison*, *Pulvertoft v. Pulvertoft* and *Ex parte Pye*; in which two latter cases his language is sufficient to correct any erroneous notion of his views which some part of his judgment in *Ellison v. Ellison* narrowly construed might possibly in some minds create. *Ellison v. Ellison* is among the valuable and instructive cases, various in kind, in manner, and in number, which we owe to the great learning, great carefulness, and great powers of that most distinguished man. With reference to the present litigation it is of the utmost importance. The necessity of sparing time as much as reasonably possible, and the recollection that probably every member of this bar is familiar with the report, alone prevent me from reading it now throughout. Let the report, however, be considered as read, and let it be particularly borne in mind that when Mr. Ellison executed the deed of the 18th of June 1796, he had an equitable interest, and only an equitable interest, in the property wholly personal, but partly moveable and partly immoveable, which was the subject of the deed; that the legal interest became afterwards, and probably at his own request, vested in him by means of the indenture of the 3rd of July 1797, which seems not to have taken notice of the deed of 1796, but to have been just such an instrument as would have been proper if the deed of 1796 had never existed; that the trustee of the property before, and independently of the deed of 1796, was the trustee of the deed of 1796 and the assignor of 1797; that whether this trustee, who had died before this suit, had notice of the deed of 1796 previously to his execution of the deed of 1797, or perhaps even in Mr. Ellison's lifetime, does not appear clearly, or does not appear at all, and that the deed of 1796 was, after Mr. Ellison's death, enforced against his residuary legatees, at

the instance, I agree, of the plaintiffs, of whom one was Mr. Ellison's executrix. The decision, however, seems not to have turned in any degree on that circumstance, but would, it is our clear impression, have been the same had the parties to the suit been reversed, or had the eldest son been the plaintiff alone. Some years afterwards occurred *Pulvertoft v. Pulvertoft* and *Ex parte Pye*. In the former of these, Lord Eldon,—after saying of Lord Thurlow, “I must take his opinion to have been, as I believe it was, that with a mere voluntary settlement this Court has nothing to do,”—used this language, “The distinction is settled that in the case of a contract merely voluntary (I do not speak of valuable or meritorious consideration) this Court will do nothing; but if it does not rest in voluntary agreement, but an actual trust is created, the Court does take jurisdiction.” And in *Ex parte Pye* it is said by the same authority, “The other question involves not only the construction of the French law, and the point whether that has been sufficiently investigated, but farther, whether the power of attorney amounts here to a declaration of trust. It is clear that this Court will not assist a volunteer, yet if the act is completed, though voluntary, the Court will act upon it. It has been decided that, upon an agreement to transfer stock, this Court will not interpose; but if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more, and the Court will act upon it.”

The case of *Cadogan v. Sloane* (commonly called *Sloane v. Cadogan*), the nature and effect of which the profession know from a valuable note in one of Sir Edward Sugden's works, and which we have examined in the Registrar's book, is a decision also of great weight. The plaintiff there was the widow and executrix of Mr. William Bromley Cadogan. The defendants were the surviving trustees of the original settlement of 1747, and the executors of Lord Cadogan, of whom the trustee was one. It does not, we believe, appear that in *Cadogan v. Sloane* any point was, if any could have been, made as to notice or the absence of notice, or as to the absence of the legal title. It is observable, however, that Sir Edward Sugden, in arguing the

case, said, "here Mr. Cadogan did all he could, but that is not enough." Sir Edward Sugden was certainly as unlikely as any man could be to omit any view or suggestion possibly favourable to the side on which he was counsel, although, I think that I have heard him say, it was the first case he ever argued in court, and there were other counsel of great consideration on the same side. Perhaps *Cadogan v. Sloane* could not have been decided, as to the point of gift or trust, otherwise than it was, without contravening *Ellison v. Ellison* or *Antrobus v. Smith*, which was near the time of *Cadogan v. Sloane*; but we think before it. There were very particular circumstances. The property seems to have been Scotch, and although, possibly, the legal title might have been rightfully and effectually changed by Mr. Crawford at his pleasure, he seems not to have so acted, but seems to have retained it. Sir William Grant, who appears to have dismissed the bill on the ground that Mr. Crawford was not, at his death, a trustee for Mr. and Mrs. Antrobus, upon the particular facts and in the particular circumstances of the case, did not, in our opinion, mean to do or say anything of a nature with which that eminent Judge's decision or language in *Cadogan v. Sloane* was at variance. In our view, *Cadogan v. Sloane* is entirely consistent with the decision in *Antrobus v. Smith*; but if it is not, we think *Cadogan v. Sloane* the preferable and more correct decision, subject only to the question, if any, of notice. In an earlier case, *Colman v. Sarel* (of which the *turpis contractus* or *turpis causa* was sufficient to dispose), the alleged donor, George Davy, had, as probably Mr. Crawford in *Antrobus v. Smith* had, the power and right of varying and transferring the legal title, but did not do so; nor did George Davy, we believe, make use of the term "confidence" or "trust" or the word "trustee,"—circumstances to which attention was due, but which perhaps were not of themselves decisive. We do not know, certainly, that if a man, entitled beneficially to the absolute interest in stock standing in his name, should deliberately and advisedly execute a deed declaring himself a trustee of the stock for certain purposes, to take effect imme-

diately, and should communicate and deliver the deed to the *cestuis que trust*, or any one of them, this Court would decline to enforce the trusts against their author, because he executed the deed, though fairly and advisedly, yet voluntarily, that is to say, without consideration. Nor do we agree that an instrument may not be effectual as a declaration of trust, or tantamount to a declaration of trust, although it contains not the word "confidence," the word "trust," or the word "trustee"; and this we should have said even if Lord Eldon had not, in *Ex parte Pye*, expressed himself, and acted as he did, with respect to the French annuity there in question. In the recent case of *Edwards v. Jones*, however, the subject of the alleged gift, a bond debt, was from its nature incapable of being legally assigned, incapable of being transferred at law. Notice, certainly, of the assignment does not appear to have been given to the daughter, though whether that circumstance was material or immaterial the decision seems not to have proceeded upon it, and was against the alleged gift. But *Fortescue v. Barnett*, decided by Sir John Leach, *Wheatley v. Purrr*, by Lord Langdale, and *Blakely v. Brady* (15), by Lord Plunket, have, without question, followed *Cadogan v. Sloane*, and, if it could require support, supported it.

Having, with my learned Brother's concurrence, made these remarks, on his behalf as well as my own, I proceed to the particular circumstances of the case before the Court. [His Lordship, in this detail, observed that Mrs. Elizabeth Kekewick and her daughter held the funds as trustees for their own benefit, and had, therefore, between them as well the whole beneficial as the whole legal interest: that Mrs. Kekewick, contemporaneously with the settlement of 1834, or, at least, in Sir H. Farrington's lifetime, had notice of it: that upon her death the legal title to the Bank annuities became vested in her daughter, and so remained to the present time; and that the dealings of the daughter with the funds by the deed of 1838 could have effect, if at all, only as to the equitable title; and further, that the mother could not have been rightfully or effectually

required to make or join in a transfer of the funds to the trustees of the settlement of 1834, or to affect in any way her legal or equitable title in favour or in consequence of that settlement.] Why, then, should the gift (if that is a proper term) be considered inchoate, unknown, or incomplete, or as resting merely in promise? What more could have been done which was within the power or competency of Sir Henry or Lady Farrington to do or enforce? Was it to depend on the pleasure of the mother whether the daughter should be able to give away her own property or not? Can a trustee, by saying, "I refuse to accept a trusteeship for the new claimant to a participation in the beneficial interest whom you, my *cestui que trust*, have introduced or have endeavoured to introduce,—I will object to the claim and oppose it,—I will not deal with the legal title nor shall you,"—can a trustee, we repeat, by thus saying and thus acting, prevent the *cestui que trust* from making an effectual gift of his interest in the trust property or any part of it? Surely not. It may be said, and perhaps truly, that not only did Mrs. Elizabeth Kekewich never make or join in a transfer, or declare herself a trustee for the purposes of the settlement of 1834, subject or not subject to her life interest already mentioned; or (so subject or not so subject) accept the trusteeship for those purposes, or consent to be a trustee either for the trustees of that settlement in that character or for Mrs. Bailward; but that no request having any such object was ever made, and that it is unknown and inconjecturable what Mrs. Elizabeth Kekewich would have done had any such request or any such application been made to her. This was, I think, immaterial; how the case would have stood if she had not had notice of the settlement in Sir Henry Farrington's lifetime, or if she had not had any beneficial interest in the funds, but had merely been a trustee of them for Lady Farrington, or if before the marriage Lady Farrington had survived her mother, it is altogether unnecessary for us to pronounce any opinion, and we decline doing so.

It has been said that there is not to be found any express declaration, or express direction, or express contract, that the

trustees of the fund, namely, Lady Farrington and her mother, should have or hold the funds as trustees for them, for the purposes of the settlement of 1834 or for the trustees of it, in that character, subject or not subject to Mrs. Elizabeth Kekewich's life interest. Whether this observation is correct in point of verbal accuracy or not, we think it of no weight, being, as we are, of opinion that it is, upon all the language of the settlement of 1834 taken together, for every purpose, of equal efficacy and value with the formal and plain declaration of the most explicit kind, on the part of Sir Henry Farrington and Lady Farrington that she and her mother should, subject to the life interest already mentioned of the latter, stand possessed of the funds in trust for the purpose of that settlement, or for the trustees of it in that character.—[His Lordship said they did not attribute essential importance to the clause directing the trustees in whom the funds should be vested at the death of the mother to transfer them to the trustees of the deed of 1834, though it was not to be disregarded, and was to be considered as especially unfavourable to a portion of the defendants' argument.]—We consider the plaintiffs entitled to a decree, but this is on the assumption that we are not precluded by authority from acting on our opinion of what is right. Are we then so precluded? The plaintiffs, of course, contend that we are not; the defendants, that we are.

The cases of *Ellison v. Ellison*, *Pulvertoft v. Pulvertoft* and *Ex parte Pye* appear to us, not merely to contain no doctrine opposed to the plaintiffs', but to be in their favour. Not only do we not question anything said in either of those cases by Lord Eldon, but we are persuaded that had the present cause come before him, he would have decided it against the defendants. Of *Antrobus v. Smith* we need say no more than has already been said. As to *Wheatley v. Parr*, the report of which has 1835 for 1825, and seemingly an incorrect marginal note, the author of the trust could have transferred the legal title but appears not to have done so. Lord Langdale, nevertheless, established the trust there. That case and those of *Cadogan v. Sloane*, *Fortescue v. Barnett*, *Blake-*

ley v. Brady are, in our opinion, direct and clear authorities for the plaintiffs; but other authorities cited during the argument, and especially *Edwards v. Jones and Meek v. Kettlewell*, are said to be strongly opposed to their title to relief; whether any or all of these authorities, and particularly whether *Colman v. Sarel*, *Colyear v. Lady Mulgrave*, *Ward v. Audland*, *Holloway v. Headington*, *Dillon v. Coppin*, *Jeffreys v. Jeffreys*, *Godsal v. Webb* (16), *James v. Bydder*, *Beatson v. Beatson*, *Bayley v. Boulcott* (17), *Tufnell v. Constable* (18), *Gaskell v. Gaskell* (19), *Farquharson v. Cave* (20), *Edwards v. Jones and Meek v. Kettlewell*, or any one or more of them, ought in our opinion to be considered as contravening or contravened by *Ellison v. Ellison*, *Cadogan v. Sloane*, *Fortescue v. Barnett*, *Wheatley v. Purr* or *Blakely v. Brady*, or as opposed to the plaintiffs' title to relief we think it unnecessary to say; for assuming that contravention, assuming that opposition, we think, nevertheless, that *Ellison v. Ellison*, *Cadogan v. Sloane*, *Fortescue v. Barnett*, *Wheatley v. Purr* and *Blakely v. Brady* support, and are authorities for the plaintiffs' claim, and that we are justified in following the five cases so far at least as is necessary for the purpose of giving effect to it, circumstanced as it is,—and we do so accordingly. In this we are certainly differing from the very able, learned, and careful Judge before whom the suit originally came. He, however, in the particular station which he judiciously filled with so much advantage to the country, may have considered himself placed in a position with respect to former decisions in which we do not consider ourselves to be.

Hitherto, it will have been observed that I have treated the plaintiffs as being what are commonly called in equity volunteers, as persons claiming under a trust created without consideration, and by the mere bounty of Lady Farrington—but is the true view of the case so? The plaintiffs relying little, or not at all, on the re-

lationship of Mrs. Bailward to Lady Farrington, and to her father, insist that the participation of Sir Henry Farrington in the settlement of 1834 precludes any effectual contention that Mrs. Bailward is a mere volunteer. The plaintiffs say that Sir Henry Farrington stipulated and contracted as much for the provision under which Mr. and Mrs. Bailward claim as for any other part of the provisions of the settlement of 1834, although she is not proved to have been related to Sir Henry Farrington, and though probably his only acquaintance with her, if any, and his only interest in her, if any, were through his intended wife; and that even if with the consent of Sir Henry Farrington, or a personal representative of that gentleman, any part of the trusts or purposes of the deed might have been or could be varied or disappointed, there can, without that consent, be no such variation, no such disappointment (21). We think this contention on the plaintiffs' part not by any means unworthy of attention. How do we know that Sir Henry Farrington did not take a strong interest in the welfare of Mrs. Bailward? How do we know that he did not believe in the existence of a moral obligation on the part of Miss Kekewich, in the circumstances of the case, to make a provision for her niece? How do we know that he would have concurred in any settlement not making a provision for Mrs. Bailward? How do we know that if he had refused to concur in a settlement the marriage would have taken place? How could it be known that he would not survive his wife? How is it clear that he was indifferent to her state of freedom as to property after his death if she should survive him, or to her marrying a second time, or the consequence of that step? Were it, in our opinion, necessary to decide this point, we should probably first deem it prudent to consult various authorities from *Goring v. Nash*, or earlier, down to *Davenport v. Bishopp*, but we do not consider it necessary. We dispose of the cause on the other view of it, that into which we have more fully entered; we

(16) 2 Keen, 99.

(17) 4 Russ. 345.

(18) 7 Ad. & E. 799.

(19) 2 You. & J. 511.

(20) 2 Coll. C.C. 356.

(21) In a previous part of the judgment his Lordship had observed that it did not appear whether there ever was a personal representative of Sir Henry Farrington.

decide it upon *Ellison v. Ellison*, upon *Cadogan v. Sloane*, and upon principle chiefly, but secondarily, also upon *Fortescue v. Barnett*, *Wheatley v. Purr* and *Blakely v. Brady*, in the plaintiffs' favour.

KINDERSLEY, V.C. }
March 11. } ANDERSON v. NOBLE.

Injunction—Proceedings at Law.

The plaintiff had obtained the common injunction to stay execution in an action on the same day that the action was tried, but before the verdict was given against him :—Held, upon motion by the defendant before answer, that the plaintiff must pay the amount for which judgment had been signed into court within a specified time, or the injunction must be dissolved.

This was a motion, on behalf of the defendant, that the plaintiff might be at liberty within three weeks to pay into the Bank of England to the credit of this cause the sum of 3,086*l.* 10*s.*, being the amount for which judgment had been signed in an action against the plaintiff, and that in default of such payment within the time aforesaid, the injunction issued in this cause might be dissolved. The bill stated that the plaintiff, James Anderson, prior to the year 1841, and for some time afterwards, carried on business as a merchant at Sydney, and in the course of his business had employed the defendant, Robert Noble, who was a merchant at Halifax, as his agent; that the said Robert Noble had claimed a large sum of money to be due to him in respect of such commission, which the plaintiff declined to pay, on the ground that a larger sum had been charged for commission than was fairly due to the defendant; that the defendant had thereupon brought an action against the plaintiff for 2,240*l.*, the sum alleged to be due to him as such agent; that in consequence of the refusal of the defendant to produce his books, papers, &c. the plaintiff was unable to prove, what was the truth, that there was a much smaller sum due to the defendant than was alleged. The bill therefore prayed that an account might be taken, under the direction of the Court, of all the

dealings and transactions between the plaintiff and the defendant; and that the defendant might be restrained from further prosecuting the said action at law against the plaintiff.

From the affidavit of J. E. Bee, the clerk to the defendant's solicitors, it appeared that the action against the plaintiff was commenced on the 6th of October 1849; that the trial of the said action had been delayed from time to time by the plaintiff, upon various applications for commissions to examine witnesses at San Francisco, most of which had been refused by the Judges before whom the applications were made, on the ground that they were intended only for the purpose of delay; that the cause at last came on for trial on the 19th of January 1852, the day on which this bill was filed, when a verdict was given for the defendant, Robert Noble (the plaintiff in the action), for 2,881*l.*; that the costs of the said action had been taxed at the sum of 205*l.* 10*s.* making, with the sum of 2,881*l.*, a total of 3,086*l.* 10*s.* debt and costs, for which judgment had been signed and execution issued previously to the granting of the injunction in this cause. The affidavit further stated the deponent's belief that the plaintiff's object in instituting this suit and obtaining the injunction was solely to delay the defendant in the recovery of his debt and costs in the action, and that the answer of the defendant, including a statement of all the accounts required by the bill, could not be put in for three or four months, having regard to the course of post between this country and Halifax, where the defendant resided, and the deponent believed that the said debt and costs would be endangered by the continuance of the injunction.

Mr. Cairns, in support of the motion, contended that the defendant was entitled to have the money paid into court or to have the injunction dissolved. The plaintiff had done all he could to delay the trial of the action, and then, on the very day when a verdict was obtained by the defendant (the plaintiff at law), he filed this bill in order to delay payment until the defendant should put in his answer, and being abroad he could not do so for a

considerable time. The following cases were cited—

Acton v. Market, 2 Bro. C.C. 14.

Wesket v. Carnevali, Ibid. 182, note.

Coglan v. Requeneau, Ibid.

Potts v. Butter, Ibid.

Mr. Roxburgh, contra, submitted that as the injunction had been obtained before the verdict at law, it could only be dissolved in the usual way, after the answer had been put in. The cases cited had reference only to where the injunction was obtained after verdict, and did not apply to this case. There had, moreover, been ample time since the bill was filed for the defendant to put in his answer, and to have come to the Court upon the answer to dissolve the injunction, and the defendant might have sent over his invoices and books. There had not even been an affidavit made by the defendant in Halifax to deny the charges in the bill. If that had been done there might have been some ground for the motion, but the only affidavit was made by the solicitor's clerk, who could know nothing of the merits of the case.

KINDERSLEY, V.C.—I really have no doubt about the case whatever. In the ordinary course, if a person brings an action at law against another, the defendant has a right to file a bill for an account in this court, and certainly this Court has jurisdiction in matters of account where the action is brought to recover that which is the result of an account between the parties, and it is much more convenient to adopt the machinery of a court of equity in taking the account. The party says—“I ask the Court to give me an injunction to restrain the proceedings in the action; that is to say, to restrain execution in the action (for that is all the common injunction restrains), until an account has been taken.” Moreover, he can apply to stay trial until the defendant has put in his answer, in order that when the trial does take place, the execution will still be restrained. The defendant at law will have the benefit of the answer put in; that is, the discovery which he will get by the putting in of that answer. That is the

common course, and then the defendant in equity, wishing to dissolve that common injunction, must put in his answer; and when the answer is a full answer, he must obtain a common order *nisi*, in the first instance, to dissolve the common injunction, and after a certain fixed time, unless cause be shewn, he will get that order absolute.

Long ago it was felt, that where the plaintiff in an action at law resided abroad, the defendant at law availed himself of that in order to delay the recovery of what he felt to be a just debt, coming to the Court with a bill after verdict (for I will take that course first), after he has taken all the advantage of the defence which he could make at the trial; and then observe, you have no right to move to dissolve this injunction unless you have put in your answer; and as you are abroad, he may say, “I know you cannot put in your answer for some considerable time.” The Courts early saw the mischief arising from that, and in those cases which have been referred to, all of which appear to me to be cases in which *prima facie*, at least, it was after verdict that the bill was filed, the Courts said just this in substance—“When you are filing your bill against a plaintiff at law who is resident abroad, and you are asking to substitute service of the subpoena by serving it on the attorney in the action at law, you must have an affidavit of merits; you shall not have a right to substitute service; you are to go through the form of serving him, if you can.” Moreover, the Court felt that that was not enough, but that where the defendant at law (the plaintiff in equity) has got the common injunction, the defendant being abroad can apply to this Court to have the money brought in or let the injunction be dissolved; and the mischief intended to be cured by that practice, introduced above a century ago, was an obvious mischief, which, no doubt, became very frequent, and which would still exist as a gross abuse of the justice of the country—a gross abuse of the law of this Court—were the Court not to exercise such a jurisdiction. And that that is the practice still there can be no doubt, although the cases on the subject are only of

ancient date. But if there are no modern cases in which the Court has exercised its jurisdiction, are there any modern cases in which the Court has refused? And what is the use of a reporter multiplying cases upon that which is the well-known A B C practice of the Court? In those cases decided by Lord Thurlow and the other Judges, I have no doubt that the practice is such, and that it will still be enforced without the slightest hesitation. If such be not the established practice, it is high time that such a practice were introduced, for the want of it would enable the grossest abuse of justice to be perpetrated under the forms and appearance of justice.

Now, then, let us look at the facts in the particular case in question. The bill was filed not after verdict, at least there is nothing to shew conclusively that it was after verdict; but the bill was filed on the same day that the trial took place. And now let us see under what circumstances. The action was brought as far back as the 6th of October. The summons was then delivered in the action, and the declaration was delivered on the 3rd of November; so that, from the time of the 3rd of November 1849, down to the time when the action was tried, on the 19th of January 1852, during all that time, the plaintiff in equity (the defendant at law) well knew what defence he could make; he perfectly well knew what the case was that he was to meet when he came to the action, and he did undertake the defence of the action. Pleas were put in, issues joined in the month of February 1850; and then what took place from the time when the issue was joined in the month of February 1850, down to the time of the trial in January 1852? First of all, the defendant at law obtained a commission to examine witnesses at San Francisco, and that, of course, he was entitled to do. That was obtained on the 13th of April 1850, and then we find that a copy of the interrogatories was delivered a month afterwards, on the 13th of May; and nearly two months after that again, that is, nearly three months after the order for the commission was obtained, further interrogatories were delivered on the 9th of July 1850.

In the mean time, the plaintiff at law, on whom the onus of proving every item in the account lay, obtained the commission to examine witnesses at Halifax; that is, on the 31st of February 1850. The interrogatories were handed over, I think, on the same day, but, at all events, very shortly afterwards, and on that day, an application is made to the defendant to know whether he means to cross-examine the witnesses. On the 4th of June, he writes to say that he declines generally to cross-examine the witnesses. That commission was executed and delivered in October 1850. Now, what was done with the commission to San Francisco, in California, does not appear; or whether the defendant who obtained it abandoned it, I do not know; but on the 10th of January 1851, that is to say, nine months after obtaining the first commission to San Francisco, he applied for and obtained a second commission to San Francisco, as I understand, to examine another witness there, and the interrogatories were handed over on the 30th of January; and from the 30th of January down to the month of November there is what I may call a total blank as to what was being done with respect to that commission, or whether it was ever attempted to be prosecuted at all. At length, on the 21st of November 1851, that is, a period of rather more than two years after the declaration was delivered in the action, notice of trial was given. A few days after that notice of trial was given, on the 25th of November, the defendant at law took out a summons—for what? Why, at the end of two years, he took out a summons for leave to inspect Noble's documents; that is, books of account, invoices, and so on, at Halifax, and praying that all proceedings might be stayed in the mean time. The Judges, no doubt, felt and saw that all this was for the purpose of delay, and that if he wanted it he should have done it at least two years before, and they refused the application, and, as I think, most justly refused it. But not satisfied with that, on the 28th of November, the defendant at law took out another summons for leave to examine Mr. Noble upon interrogatories, and that was heard on the 6th of December, and the Judge

there, no doubt, felt that it was for delay, and that if what was asked for had been wanted, it ought to have been applied for before, as there had been ample opportunity, and he refused that application with costs, also. But again, not satisfied with that, the defendant at law took out another summons—to do what? To put off the trial until the return of his commission to San Francisco, the first having been issued on the 13th of April 1850 and the second on the 10th of January 1851. Instead of endeavouring to support that summons when it was tendered, on the 1st of December, it was abandoned; so that the defendant at law did either not want to have his commission (for, at all events, he might have got it returned), or he did not wish now to put off the trial on the ground that his commission was not returned from San Francisco. Upon the 9th of December the cause was called on, and it would then have been heard, but from the absence of counsel it was postponed. Then the defendant at law takes an advantage again of that postponement; and he takes out a new summons for a commission to examine Mr. Noble on interrogatories at Halifax. That came on to be heard on the 3rd of December 1851, and it was dismissed, with costs. Upon the 9th of January 1852 notice of trial was a second time given. Then, on that same day, the defendant at law (certainly leaving no stone unturned to prevent the thing from being brought to a conclusion) applied to the full court of law, upon a notice of motion, to examine Mr. Noble on interrogatories. The Court, on the 12th, when it was heard, refused the application again, as I understand, and expressed its opinion, in which I entirely concur, that all these applications were simply for the purpose of delay. On the 19th the cause came on to be tried, and a verdict was obtained, the plaintiff having proved his case; having proved it by the evidence of witnesses whom the defendant had refused to cross-examine; and a verdict was given for the plaintiff. On that same 19th he applies for leave, on an affidavit made according to the requisitions and the practice of this Court—an application made to this Court, and granted of course

on such an affidavit as contained the requisite statement of facts. So rapid were the defendant's motions there, that on that same day on which the trial took place he filed his bill, he got his affidavit filed, and an office copy of the affidavit, (at least, I presume he did so, otherwise it would have been totally irregular), he got an order of this Court, and he got service on the attorney of the plaintiff at law on a subpoena to appear and answer. Then, it is said, if he had got it done on the 20th, that practice which has been referred to would have prevailed, but because he got it done on the very day the verdict was given, it was not after verdict, and therefore the practice is wholly inapplicable. There is no doubt that if a party be sued at law, if he comes and asks this Court on bill filed, and gets an injunction to stay proceedings, that will not be dissolved until the coming in of the answer, if properly a matter of account; but if a party can shew sufficient equity, then, upon an application to dissolve, the Court will do justice. But is a party to say—"I will delay, I will wait; I will put off trial for two years and a half by every possible contrivance, and then I will take every advantage that I can at law, and then, on the very day on which the trial has to come on, I will have my bill ready, and I will file that bill and get an order to substitute service, and in accordance with that order substitute service; and I will then say, the practice does not apply, although twenty-four hours would have made all the difference"? Now if that practice, I say, did not exist at all it is high time to establish it; but finding it existing, and finding that it is just as applicable to the case before me as to any one of those cases which have been cited, and that it is just as necessary, and feeling that it would be an absolute stain on the justice of the country if the application were not granted, I should have no hesitation in granting it.

But there is more than that. The plaintiff in equity being required by the practice of the Court to file an affidavit as to the merits of his case—the bill properly stating, and necessarily stating, for the purpose of sustaining it at all, that the

accounts, if properly taken, would shew a very different result from that which the verdict at law would shew, as to that which the plaintiff was claiming at law; and stating that on the taking of the account, either nothing would be due, or a very small sum, or at all events much less than the amount claimed by the plaintiff,—the bill, I say, properly stating that, and the plaintiff himself having verified the merits of his case on his bill by affidavit, carefully abstains from saying one word, even on belief, that the whole of the money claimed by the plaintiff, and now established by the verdict, is not due. Not attempting to state that one farthing of that is more than is due; and not only that, but all that he says about any inaccuracy, any impropriety, in the accounts delivered is, that some time either in or previous to 1848, when he had the accounts, and when he was abroad, he says, "I then became aware that there were inaccuracies in the accounts—that a commission on something or other had been charged improperly"; but neither on the bill nor on the affidavit does he attempt to state what the particulars are which lead to the belief that there is that overcharge, or to give me the slightest reason for supposing that there is one single farthing less than that found by the verdict due upon the account. Well, if ever there was a case in which an attempt was made, first in delaying the proceedings at law and then filing this bill and getting the substituted service, to use the process of the Court in order to delay a just demand, it appears to me to be this case.

I have not the smallest hesitation in applying that wholesome practice to the case now before me; and not merely because it would be an abuse to do otherwise, but because it is the order which ought to be made. Let the plaintiff in equity be at liberty within three weeks from this day, to pay into court to the credit of this cause the sum of 3,086*l.* 10*s.*, and in default thereof, let the injunction awarded in this cause for stay of the defendant's proceedings at law be dissolved.

KINDERSLEY, V.C. } FORSYTH v. ELLICE.
March 12.

Witness, Commission to examine.

The Court having directed a commission to issue for the examination of witnesses upon the certificate of the Master, and that commission having miscarried, by reason of the defendant being deprived of an opportunity of cross-examining the plaintiff's witnesses, a new commission was directed by the Court to issue without any further certificate of the Master.

This was a motion, on behalf of the plaintiffs, that they might be at liberty to sue out a renewed or new commission, for the cross-examination of the witness or witnesses examined on the part of the said plaintiffs, under the commission already sued out by them, in pursuance of an order made in these causes bearing date the 27th of May 1851, and that the said renewed or new commission might be directed to the same Commissioners as were named in the said former commission; and that the defendant Edward Ellice might be at liberty to exhibit interrogatories for the cross-examination of the said witness or witnesses, and to examine any witnesses whom he might desire to examine; or otherwise that the depositions taken under the said original commission might be forthwith published, and the said defendant, Edward Ellice, be estopped from taking any objection to the said depositions on the ground of the said Commissioners having refused or omitted to receive interrogatories on the part of the said defendant for the cross-examination of the said witness or witnesses.

It appeared from an affidavit in support of the motion, by the solicitor for the plaintiffs, that by the decree made on the hearing of these causes dated the 11th of July 1845, it was referred to the Master to inquire and state to the Court whether any debts or debt, or sum of money, for or to which the firm of Sir Alexander M'Kenzie & Co. was liable, had at any and what time since the 21st of March 1821 been paid or become vested in the defendant Edward Ellice. That in pursuance of such decree a

state of facts and claim was carried into the office of the Master in respect of a debt due from the firm of Sir Alexander M'Kenzie & Co. to Messrs. M'Gillivray & Co., and claimed by the said defendant to be vested in him; and that a counter state of facts, on the part of the plaintiffs in the said cause, with respect to the said debt, was also carried into the office. That by a certificate of the Master, dated the 29th of March 1851, he certified that it appeared to him to be necessary that a commission should issue directed to Commissioners in Canada, to take the depositions of witnesses on the part of the plaintiffs. That by an order made on the 27th of May 1851, upon the petition of the plaintiffs, it was ordered that the petitioners should be at liberty to sue out a commission for the examination of witnesses in Canada, and that a commission was issued accordingly, directed to Commissioners, on the part of the plaintiffs and the defendant, which was forwarded to Montreal, in Canada, in the month of September last. That such commission had been returned, with the depositions under the seal of the Commissioners. That a warrant was taken out to shew cause why publication should not pass, and that the solicitor for the defendant Edward Ellice objected to such publication, on the ground of some irregularity having occurred in the execution of the commission, whereby he had been deprived of the opportunity of cross-examining the plaintiffs' witnesses. That in consequence of such irregularity the plaintiffs' solicitor applied to the defendant's solicitor to consent to an order for the plaintiffs to be at liberty to sue out a renewed or new commission to take the cross-examination which, under the circumstances, had not been taken under the original commission, but the defendant's solicitor declined to consent to any further commission being issued.

Mr. Glasse and *Mr. Dickinson*, in support of the motion, contended that this order ought to be made by the Court and not by the Master, and that it was necessary, in consequence of the irregularity in the first commission, that a renewed or new commission should issue; and cited

Handley v. Billinge, 1 Sim. 511.

Campbell v. Scougal, 19 Ves. 552.

Marquis Cholmondeley v. Lord Clinton, 2 Mer. 81.

Dobson v. Land, 7 Hare, 296; s. c. 18 Law J. Rep. (N.S.) Chanc. 240.

Mr. Bacon and *Mr. Brett* opposed the motion, on the ground that it was for the Master to direct a new commission to issue, if he thought it desirable, and not the Court, and that it had never been the practice of the Court to issue a second commission without the Master's certificate.

KINDERSLEY, V.C.—The question here is not, as in some of the cases cited, whether a commission should issue, but whether, a commission having issued on the authority of the Master's certificate, a cross-examination can be issued upon motion to the Court without a reference to the Master. The Master only asserts that there ought to be a commission; but it is the Court that orders the commission to issue, and the Court having ordered the commission, and a miscarriage having taken place, the question arises whether the Court is now to deal with it.

On this motion there has been a transposition of the two alternatives; in fact, the cart is placed before the horse. The application should have been to publish the depositions, or if the Court, by reason of a miscarriage having taken place, should think that the depositions should not be published, then to direct in the alternative that a new commission should issue. In the case of *Handley v. Billinge* there was an actual certificate by the Clerks in Court, as to the publication of the evidence of witnesses examined under a commission; it was in these words:—

"We humbly certify that in the case of the examination of witnesses after a decree, such witnesses having been examined either by commission or before the Examiner, the publication of the depositions is passed by order of the Court, unless the publication be passed by the respective Clerks in Court signing a consent to pass publication in the Six Clerks rule book; but in the examination of the witness by the Master personally, a circumstance rarely

occurring, the publication is by warrant granted by the Master."

If that were the simple case here, without any miscarriage of the commission, and without any dispute about its having been duly returned, then this Court, not the Master, would be the tribunal to apply to; and I think that upon the proper principle it is not the Master's commission, he only certifies that it is necessary to have a commission, and the Court says "Let the witnesses be examined," so that in fact this Court is the proper tribunal to say when and how the commission is to go. That is plain on a simple case where there is no question about miscarriage. I think this would have been a simple application to pass publication, but the parties went before the Master on a warrant, to ask him to pass publication. The question raised was, whether it ought to pass or not; but nothing was determined by the Master; and then the parties come here, the plaintiffs' solicitor finding out that he has been wrong in going to the Master, and that he ought to have come here in the first instance. I think that the alternative should have been put in a different way, but I do not think that that fault vitiates the notice of motion. The plaintiffs do not wish for a new commission, but it is acknowledged by the plaintiffs that there has been a miscarriage, and they ask the Court to let the defendant have a new commission to cross-examine their witnesses; but if that order is not made, and if the defendant does not choose to have a new commission, then that publication may pass under the commission, which has been to some extent executed. It is said, as to the first alternative, "How can you come and ask for a commission when there is no certificate of the Master?" No doubt this Court will not issue out a commission except on the certificate of the Master, but when the Court has directed a commission to issue on the certificate of the Master, and when the defendant says publication ought not to pass because of miscarriage, in consequence of his not having been able to cross-examine the witnesses, then it is not for the Master to determine whether the cross-examination requires a commission, but it is for this Court to determine

whether, by reason of the miscarriage, there ought to be a renewal of the commission to set right what may have occurred upon that miscarriage. I think the defendant is at liberty to choose whether he will have a new commission, or whether publication shall pass. Declare, the Court being of opinion that the defendant should elect which to take; and the defendant electing to take a new commission to the same Commissioners, direct the plaintiffs to issue a new commission, the plaintiffs not to examine new witnesses, but to be at liberty to cross-examine witnesses examined by the defendant. Costs to be costs in the cause.

PARKER, V.C. }
April 19. } HYDER v. COLEMAN.

Costs—Unopposed Petition—Irrelevant Matter.

An unopposed petition contained statements which were immaterial to the prayer. The Court inserted in the order a direction to the taxing Master, in taxing the costs, to have regard to such statements.

A petition was presented in this cause praying for an order that the Master might sell a certain property by private contract.

The petition was unopposed.

Mr. Steere, for the petition.

PARKER, V.C. said that, on reading over the petition, he perceived that it contained several statements which were quite immaterial to the prayer of the petition. He could not pass this over; and he should, therefore, insert in the order a direction to the taxing Master, in taxing the costs, to have reference to the statements contained in the petition, and to allow costs for such of them only as the petition required.

L.C. } *In re* THE ST. GEORGE STEAM
1851. } PACKET COMPANY, *Ex parte*
Dec. 1, 8. } CROPPER.

*Company—Committee for Winding up—
Costs of obtaining an Act of Parliament.*

A committee was appointed under the provisions of the deed of settlement for winding up the affairs of a joint-stock company. The existing law being inadequate for the purpose, the committee incurred large expenses in procuring the insertion into a bill then before parliament of certain clauses applicable to the affairs of the company:—Held, affirming the decision below, that these expenses were not a charge against the company, not being authorized by the deed of settlement or by the individual shareholders.

On the 14th of September 1843, the St. George Steam Packet Company, under the powers contained in the 72nd clause of the partnership deed, was dissolved; and Abraham Wood, E. Pike and J. Pain, being three of the directors, and Edward Cropper, G. B. Crewdson and J. Potter, three of the shareholders, were appointed a committee for effectuating the dissolution and winding up the affairs of the company; and this committee appointed Mr. Rigge and his partners to act as their solicitors. At the date of the dissolution, the company were indebted to various persons in the sum of 162,000*l.*, and had assets estimated at 91,000*l.*, leaving an estimated deficiency of about 71,000*l.* The company consisted of three hundred and fifty shareholders. The committee prepared and circulated among the shareholders a statement of accounts, shewing that it would require a contribution of 120*l.* per share to discharge the liabilities of the company, and required the immediate payment of that amount. The whole amount authorized to be raised by the deed of settlement having been fully paid up by the shareholders, the committee had no power by action or otherwise to enforce payment of the contributions required by them, and the greater part remained unpaid. The committee then induced several creditors, upon being indemnified against costs, to issue writs of *scire facias*, on judgments obtained against the company, against the shareholders who had not paid. But these

proceedings, not being productive, were ultimately abandoned. In 1844, the government introduced a bill into parliament for winding up joint-stock companies unable to meet their pecuniary engagements (7 & 8 Vict. c. 111.); but such bill in the form in which it was introduced only applied to companies then carrying on business, and not to such as had been dissolved, and the remedies proposed were altogether inapplicable to a company in the position of the St. George Steam Packet Company, as the bill contained no provisions for enforcing payment from the shareholders in cases where the assets should prove insufficient for satisfying the debts and losses of the company. Mr. Rigge, by the direction of the committee, went up to London at various times during the session, for the purpose of procuring such alterations in the bill as would make it applicable to this company, and enable them to wind up its affairs. After various interviews with the Board of Trade, who had charge of the bill, and through the influence of different members of parliament, whom Mr. Rigge and his agent, Mr. Field, had interested in the matter, various clauses were introduced into the bill, extending its provisions to companies which had been dissolved, providing for enforcing the rateable payment by shareholders towards the losses of the company where the assets should prove insufficient for the discharge of their liabilities, and for rendering shareholders resident in Ireland and Scotland subject to the provisions of the bill. Mr. Rigge, on his return from London, reported to the members of the committee the various steps he had taken for carrying out the purposes aforesaid; and such steps were fully approved of by the committee; and he was then instructed by them to use his best exertions to procure the making of the orders in Chancery requisite for carrying out the provisions of the act. In the year 1845, Mr. Rigge several times visited London, and had interviews with Lord Langdale and the Board of Trade with respect to such orders. In the same year, the government introduced a bill for extending the provisions of the former act to Ireland; and Mr. Rigge, after considerable difficulty, obtained the insertion of a clause enabling the company

to be wound up in England. During the sessions of 1846 and 1847, Mr. Rigge several times visited London to attend to the progress of the bill, and reported to the committee the steps he had taken therein, which were adopted and approved.

The 72nd clause of the deed of settlement under which the company was dissolved was as follows:—

"That an absolute and entire dissolution of the company and determination of this partnership may lawfully take place on the terms hereinafter expressed, and on no other terms; that is to say, by and with the consent and approbation of two-thirds at least in number and in value of the votes of the shareholders present in person, and voting at each of two successive meetings of the proprietors, and each meeting to be for that purpose exclusively, respectively convened by the directors, by one calendar month's notice at least, (to be signed by the clerk for the time being), by advertisement in a Liverpool and Dublin newspaper; and that proper measures for effectuating such dissolution shall be taken by a committee, to be composed of three of the directors for the time being of the company, and by an equal number of persons to be elected by the majority of votes of the shareholders present and voting at the latter of such meetings; and that after such dissolution the affairs and concerns of the company shall, with all convenient speed, be wound up, and the debts and liabilities of and claims on the company shall be satisfied, discharged, or otherwise sufficiently provided for; and all the vessels, boats, engines and other property and effects, securities or assets, guaranties, and other funds, and interest and benefit of existing engagements, shall be converted; and for that purpose all outstanding debts owing to, and the benefit of engagements belonging to the company, may be sold for money, and the balance, if any, of the assets and property of the company shall be divided among the persons who shall be the respective shareholders at the period of dissolution, and their respective executors and administrators, rateably and in proportion to the amount of their respective shares at that time. Any of the shareholders, not being a director, may become purchasers of any

of the assets of the company which shall be sold; and the majority of voters, according to the rules of voting hereinbefore contained, present and voting at any such special meeting to be convened for the purpose, may declare the accounts of the company finally closed and the assets of the company fully administered, or with such exceptions as they may think fit to declare: and the directors, trustees, and all other parties to be relieved and discharged, with or without such exceptions, from all suits, claims, and demands under and by virtue or in consequence of these presents, and they shall be released and discharged according to such resolution, and in the forms and under the modifications thereof."

An order was obtained under the Joint-Stock Companies Winding-up Act 1848, for winding up the affairs of the company. The bill of costs of Mr. Rigge, for journeys and professional advice in the matters before mentioned, amounted to upwards of 2,000*l.*, and for that amount the present applicants claimed to be creditors of the company. The Master rejected the claim, and upon appeal, K. Bruce, V.C. affirmed the Master's decision; and the present motion was by way of appeal from the decision of the Vice Chancellor.

Mr. Roll and *Mr. Selwyn*, for the appeal.
Mr. Bacon and *Mr. J. V. Prior*, contra.

The LORD CHANCELLOR (TRURO).—This case appears to me to be unaccompanied with any serious difficulties. Certain individuals became partners under a deed, which regulated their liabilities *inter se*, their extrinsic liabilities remaining to be regulated by the general law. As between themselves, it was competent to them to come to such arrangements as they might think fit; but it was not in the power of any portion of the body to vary the liabilities of the individuals. In this case it appears that the company were in a condition that rendered it desirable to wind up their affairs; and I am told that those who interfered in the endeavour to wind up the concern, did so, not by resorting to the provisions of the deed, but by inducing creditors to bring actions or issue writs of *scire facias* against individuals, with a view of charging those

individuals with the debts of individual creditors. Whether that was a proper course of proceeding is not a question before the Court. It was found in the result that these proceedings were not calculated to produce the desired result, and they then agreed to dissolve the company according to the provisions of the deed.

When the partners engaged with each other under that deed, they might or they might not have known what were their legal obligations under that deed; but it is clear that they meant to be bound by the existing law, and not blindly to enter into a contract that their liabilities should be regulated by some future and unknown law. Nor does it appear that at the meeting for the dissolution of the company there was any suggestion of an intention to apply for a new law to regulate the rights and remedies in a manner different from that under the existing contract; but the committee was appointed with reference only to a view of proceeding consistently with the provisions of the deed. These provisions might or might not be competent for the purpose; but each of the proprietors had a right to a voice in consenting whether the funds of the company should be applied to the obtaining of a new law, which was to increase their liabilities and give new remedies. Those who concurred in appointing the committee had no ground for supposing that the committee would procure a new law for winding up the company. They contemplated that the present law was sufficient; but if inadequate, they never contemplated that a new law was to be obtained at their expense; or that, at their expense an application should be made to improve the general law, where the object of the new law would be to increase the liabilities and give facilities against certain members of the company. That would certainly not improve their condition as individuals. Individuals who authorize a committee to wind up their affairs, might well express their surprise if they should be attempted to be charged with the obtaining of such a new law. The committee was clearly appointed with reference to the state of the law, the circumstances, and the liabilities as they existed at the date of their appointment. Now, though

the general body of the subscribers must have supposed that the existing law was to be applied, it appears that some had a latent intention of endeavouring to obtain a new law to improve the condition of some who were primarily liable to the creditors; and the bill in question opens with the consideration of getting some clauses introduced into a bill brought into parliament by the government which should embrace the circumstances of this particular company, and, of course, other companies under the like circumstances. But the committee started with the intention of obtaining a new law; and, as far as I have gone through the items, the whole bill appears to be directed to that object.

It is said that the solicitors have a right to be paid;—that the Court has nothing to do with. If the solicitors gave the committee due caution as to what they were about, and that it was not within the scope of the authority given to the committee, they are entitled to be paid; but if the committee trusted to them to keep them within the limits of their authority, and if, by oversight or mistake, the solicitors led them into error by overstepping their authority, and put them to great expense, that is a matter between them and the committee; but it has no connexion with the general liabilities of the company. The solicitors start with seeing if a new law could be obtained: the bill proceeds with that view; they have divers communications with the various departments of government and various counsel, to see what clauses are necessary to be inserted in the bill with reference to this company. Dealing, therefore, with that part of the bill, my opinion is, that the decision of the Court below and of the Master was correct, and that it was not within the authority of the committee to set about procuring a general or a particular act of parliament.

It was said that they were authorized to take "the proper means for winding up the company." That means, of course, within the deed of partnership, and if those means are found impracticable, then they should have applied to those at whose expense they meant to act for further powers; and the liability would be confined to those persons who adopted their suggestion. The committee were bound to resort to

such means as the deed authorized, and no other; and they had no implied authority to incur expense not within the terms of the deed. It was said that there is authority under the 76th clause of the deed to apply for an act of parliament; but that evidently has no reference to the winding up of the company, but is directed to a different object, namely, the carrying out the objects of the company and procuring certain privileges, such as a charter; and when you find an express clause, the 72nd, directed to the winding up of the company, which is altogether silent as to the authority to procure an act of parliament, and afterwards find in the 76th clause the language I have referred to, the distinction between the two clauses is perfectly clear. Considering, therefore, this committee only authorized at the expense of the company to prosecute such remedies as were incident to the partnership founded upon the deed, it was said that there were other applications to procure certain orders. All these appear to me to be orders and rules which it was desired to obtain for the purpose of incorporating them with that act of parliament; and there were no applications independent of that act of parliament. Again, the discretion of applying for an act of parliament was by the deed committed to the directors; but this committee was formed partly of directors and partly of other persons, and to this body no such discretion was delegated. The act, then, is out of the question; and with respect to that portion of the bill for obtaining orders, that does not appear to have entered into the minds of the parties until they had ceased contemplating the winding up of the company under the existing law; and it turned out to be an abortive attempt. Whether or not they rendered a public service in improving the act of parliament which afterwards passed, the Court has nothing to do with. It can furnish no ground for these particular charges against the company. They had no authority to incur any part of the bill with the payment of which they now seek to charge the company; and, therefore, the order of the Vice Chancellor must be affirmed, and the motion dismissed, with costs.

KINDERSLEY, V.C. } LLOYD v. LLOYD.
March 4, 18. }

Marriage, Restriction upon—Charitable Bequest—Repair of a Tomb.

A testator directed his executors to sell the whole of his real and personal estate, and invest the proceeds in some government annuity for the benefit of his wife and M. L., to be equally divided between them, and at the death of either of them her share was to pass to the survivor, and in case either his widow or M. L. should marry or live in a state of adultery, then her share to pass to the other, but if they both should marry, then their shares to go to his nephew. The testator also directed his wife and M. L. out of their annuity to keep in good repair the tomb in which he was buried:—Held, that the restriction upon marriage was good as related to the widow, but was not good with respect to M. L., who was a single woman.

Held, also, that the direction to the testator's widow and M. L. to repair the tomb, which was confined to the lives of the annuitants, was not void on the ground of perpetuity.

George Lloyd, by his will, dated the 18th of October 1842, in the first place appointed Mr. Robert Browning, jun. and Mary Martha Lockley executor and executrix of his will. He then requested that at his decease his body might be placed in a good sound oak inner coffin, one inch and a half thick, and the outer one of good sound oak, one inch and a half thick, cemented together and varnished, and no cloth was to be made use of on the outside of the coffin, and at the expiration of fourteen days to be interred in the vault in St. Mary's Churchyard at Chatham. And he desired that every unnecessary expense attending his funeral might be avoided, and that no person or persons whomsoever might be deposited in the said vault, save Mary Martha Lockley, if she continued a single woman, and living a chaste life. He then gave and bequeathed to Mary Martha Lockley his household furniture, glass, china, silver plate, jewellery, linen, &c. for her own use and benefit, and directed his executor or executrix to pay his funeral expenses, and collect all monies, securities for money, and all other property of

whatsoever description of which he might die possessed; and his said executor or executrix was to sell or cause to be sold, to the best advantage, the whole of his personal and real estate, and invest the proceeds of such sale in some government annuity, for the benefit of his wife, Lucy Lloyd and Mary Martha Lockley; and when the amount of the said government annuity should be ascertained, then the said sum of money so raised by the way of annuity on the joint lives of his wife Lucy Lloyd and Mary Martha Lockley, was to be equally divided, share and share alike, between Lucy Lloyd and Mary Martha Lockley; and at the death of either of the above-named Lucy Lloyd and Mary Martha Lockley, her share, at her death, was to pass to the survivor of the two above-named Lucy Lloyd and Mary Martha Lockley, on the day of her decease; and in case either Lucy Lloyd or Mary Martha Lockley should marry or live in a state of adultery, then her share should pass to the other, the same as if death had taken place; and should Lucy Lloyd and Mary Martha Lockley both marry, then their shares and interest should pass to his nephew, Samuel Hayes, of Woolwich, in case Lucy Lloyd or Mary Martha Lockley should fail in fulfilling the conditions of his will. And further the testator desired that his wife Lucy Lloyd and Mary Martha Lockley should, out of the annuity they received, keep in good sound repair the tomb and vault at Chatham Churchyard that belonged to him, and cause to be painted the said tomb and vault every four years, or if required, more frequently; and in default or failure, they should lose or forfeit the claim to the annuity, and any person thereafter that should receive the annuity should be bound to perform the same conditions. The testator then directed his executrix or executor to ascertain the amount of money received by his wife Lucy Lloyd from the Chatham Dockyard Society (which might be by the secretary's yearly report), and when that amount should be ascertained by his executrix or executor, the said Mary Martha Lockley would be entitled to the half of the sum so received by his wife Lucy Lloyd from the said society; and should his wife Lucy Lloyd refuse to pay the half of the sum so

received by her from the society, then his executrix and executor were to stop so much of the share of the government annuity that his wife Lucy Lloyd should receive, as would make good her half of the dockyard pension money to Mary Martha Lockley, so that there might be an equal division of money between Lucy Lloyd and Mary Martha Lockley.

The testator afterwards made a codicil, dated the 12th of October 1844, which was to the following effect:—That having entered into an agreement with Mr. J. W. Pyle to let him his house at Barnes, on a lease for fourteen or twenty-one years, at a yearly rental of 48*l.* per annum, to be paid quarterly, he now made this offer, that at the expiration of the first fourteen years of the said lease of twenty-one years, should he, the said Mr. Pyle, wish to continue the lease, he might do so upon paying to his executrix or executor (in case he should then have departed this life) the sum of 48*l.* yearly during the lifetime of his wife Lucy Lloyd and Mary Martha Lockley. And further, the said Mr. Pyle was to pay, after the death of his wife Lucy Lloyd and Mary Martha Lockley, within six months, the sum of 200*l.*, clear of all costs, charges, and expenses, and to invest the said 200*l.* in the new 3*l.* 5*s.* per cent. annuities of the Bank of England, in the joint names of the minister and churchwardens of St. Mary's Church, Chatham, in the county of Kent, as trustees for the time being. If the above stipulations were fulfilled in every point by the said Mr. Pyle, as respected the payment of the 48*l.* and the investment of the 200*l.* in the Bank of England, then he gave and bequeathed the said house at Barnes to the said Mr. Pyle for ever.

The testator afterwards made a second codicil to his will, dated the 14th of October 1844, by which he directed that his house at Barnes, then in the occupation of Mr. Pyle, should not be sold, but let at a yearly rental, or on lease, to the best advantage, for the benefit of his wife Lucy Lloyd and Mary Martha Lockley, and the proceeds of the rent applied as set forth in his will, subject to all the conditions contained in his will, the same as if the house had been sold, share and

share alike; and after the death of his wife Lucy Lloyd and Mary Martha Lockley, or in case Mr. Pyle, of Barnes, should refuse to accept the offer made to him by the previous codicil, or in default of Lucy Lloyd and Mary Martha Lockley fulfilling the conditions contained in his will, he gave and bequeathed upon trust, the said house at Barnes to the minister and churchwardens of St. Mary's Church, Chatham, for the said minister and churchwardens to apply the produce of the rent of the said house as follows:—First, to take for themselves 5*l.* every year for their expenses, of the rent or proceeds out of the said house at Barnes, and further to keep in good sound repair the vault and tomb, and cause the said tomb to be painted every third year, that belonged to him, in Chatham Churchyard; then the residue and remainder of the said rent to be applied for the benefit of his nephew, Samuel Hayes, of Woolwich; and after the death of the above Samuel Hayes, then the residue and remainder of the said rent to be applied for the benefit of the Church Missionary Society attached to St. Mary's Church, Chatham. And he further desired that if the said Mr. Pyle should accept the offer of the house at Barnes, then the interest of the 200*l.*, invested by him in the Bank of England, in the new 3*l.* 5*s.* per cent., in the joint names of the minister and churchwardens of St. Mary's Church, Chatham, should be applied as follows:—First, the said minister and churchwardens to take for themselves each 1*l.* 1*s.* every year; then the residue and remainder of the interest of the 200*l.* to be applied in keeping in good sound repair the vault and tomb, and to cause the said tomb to be painted every third year, that belonged to him in Chatham Churchyard; and if any surplus remained, after the expenditure of the cash on the tomb and vault, then it should be given to the Church Missionary Society attached to St. Mary's Church, Chatham.

The testator died in the year 1848, leaving his wife Lucy Lloyd and Mary Martha Lockley surviving him; Samuel Hayes, the nephew of the testator, was also living at his death.

This bill was filed for the administration of the estate of the testator, and upon a

reference to the Master it appeared that Mr. Pyle had declined the offer made him by the testator.

When the cause came before the Court, in February 1850, the Vice Chancellor decided that the bequests in favour of the minister and churchwardens and the Missionary Society were void. The questions now argued were, whether the restrictions upon the marriage of the widow of the testator and of Mary Martha Lockley were void, and whether the direction to repair the testator's tomb was void or not.

Mr. Torriano, for the widow and Mary Martha Lockley, submitted that the testator having given an annuity to his widow and Mary Martha Lockley, on condition that if they married the annuity should go over to other parties, the restriction was void, and the life estate was unconditional. In *Sheffield v. Lord Orrery* (1) it was held that restraint on the marriage of a testator's widow was not invalid, and had this testator confined the condition to the widow it would stand; so also in *Rishton v. Cobb* (2). But here the testator had associated with his widow in the condition Mary Martha Lockley, a single woman. In *Morley v. Rennoldson* (3) the testator annexed to the bequest to his daughter a condition that it should go over in the event of her marrying; but there, though the daughter was afflicted with nervous debility, the restraining clause was held to be void. In *Grace v. Webb* (4) the testator gave an annuity of 40*l.* to a single woman, which he directed to be reduced to 20*l.* in case she married. Lord Cottenham, in 2 *Phillips*, 701, reversed the decision of Sir L. Shadwell, upon the ground that the gift was a contract to pay 40*l.* until marriage, and 20*l.* afterwards, but he did not disturb the principle on which the case had been decided by the Vice Chancellor of England. The condition, therefore, was void as to Mary Martha Lockley, and as she was joined by the testator with the widow, it was void as to both.

(1) 3 Atk. 282.

(2) 9 Sim. 615; s. c. 5 Myl. & Cr. 145; 9 Law J. Rep. (N.S.) Chanc. 110.

(3) 2 Hare, 670; s. c. 12 Law J. Rep. (N.S.) Chanc. 372.

(4) 15 Sim. 384; s. c. 18 Law J. Rep. (N.S.) Chanc. 13.

Mr. Haldane appeared for *Mr. Pyle* in the same interest.

Mr. Malins and *Mr. Collins*, for the heir-at-law, said it was clear that, as regarded the widow, the restriction against marriage was good: the rule had been relaxed to this extent; but as to single women, there was much difference of opinion expressed by Judges, and the distinction was exceedingly minute. However in this case it was submitted that the condition as to the marriage of *Mary Martha Lockley* was good. The following cases were cited—

Chapman v. Brown, 6 Ves. 404.

Cherry v. Mott, 1 Myl. & Cr. 123;

s. c. 5 Law J. Rep. (N.S.) Chanc. 65.

Monypenny v. Dering, 15 Jur. 1050.

Rishton v. Cobb, 5 Myl. & Cr. 145;

s. c. 9 Law J. Rep. (N.S.) Chanc. 110.

Mr. Begbie, for *Samuel Hayes*, the nephew of the testator, contended that the restriction upon the marriage was perfectly good, as it was a limitation, and not a condition, and a limitation until marriage had always been held to be good. Vice Chancellor Wigram expressed his opinion that *Morley v. Rennoldson* would not govern other cases, as it depended upon its own circumstances. Subject to any interest which the Court might consider the two ladies had, the nephew took an absolute interest in all the copyhold property. The following cases were also cited—

Hill v. the Bishop of London, 1 Atk. 618.

Mitford v. Reynolds, 1 Ph. 185, 706;

s. c. 17 Law J. Rep. (N.S.) Chanc. 238.

Mr. Torriano, in reply.

March 18. — *KINDERSLEY*, V.C. — The question in this case arises upon the construction of the will of *George Lloyd*. The will is not very intelligible. The testator appears to have been a person who was not entirely destitute of education, but was not able to express his intentions in very clear or intelligible language; still it is not difficult to come to a conclusion as to his general intentions. He apparently had no children, but he left a widow and a person named *Mary Martha Lockley* surviving him, who

seemed a friend, or a person for whom he desired to make a provision, though no relation. He had also a nephew, *Samuel Hayes*; and the principal objects of his bounty seem to have been his widow and *Mary Martha Lockley*, and in some degree he seems to have desired to do something for his nephew. In the first part of the will there is a clear intention that the executors should convert all the real and personal estate into money, and invest that money in a government annuity for the lives of his widow and *Mary Martha Lockley*, and the life of the survivor. So far there is no difficulty whatever; he gives an annuity for their joint lives and the life of the survivor; then he goes on as to the restriction upon marriage.

Now, with respect to that which, as a condition subsequent, attaches to the previous gift, I think, according to the authorities, it is not void as regards the wife. The law recognizes in the husband that species of interest in the widowhood of his wife, which makes it lawful for him to restrain a second marriage, that is to say, that the provision which he has made shall cease upon a second marriage. I have no doubt, also, that with respect to either his wife or a stranger, a testator may give an annuity, to continue so long as she remains single and unmarried; but as to a person not a wife, if he first gives her a life or other estate, and then appends a condition to defeat that estate if she marries, that would not be good. If I am right in this view of the law, the effect of that clause is, that if the wife should marry, her share would go over to *Mary Martha Lockley*; but if *Mary Martha Lockley* should marry she would lose nothing.

But then comes another condition or provision, "And should *Lucy Lloyd* and *Mary Martha Lockley* both marry, then their shares and interest shall pass to my nephew, in case *Lucy Lloyd* and *Mary Martha Lockley* fail in fulfilling the conditions of this my will." Now, that is a sentence part of which is intelligible, but as a whole it is not very easy to say what the testator meant. So far as he meant to give the property over in the event of their marrying again, it is clearly void with respect to *Mary Martha Lockley*, as I said before. But the testator imposes another condition as to his tomb;

and the difficulty is to know whether he meant to say, if Lucy Lloyd and Mary Martha Lockley both marry or fail in fulfilling the condition, or if he meant to say, in the conjunctive, if they both marry and fail, &c. My impression is, that he meant, at all events, that if they both married it was to go over; and I think that void.

But he adds another condition as to the tomb. Now, I am satisfied that a condition for keeping a tomb in repair is not a charitable use, and is not illegal. It may be illegal to invest property in perpetuity in trust for that purpose, so as to create a perpetuity; but a direction that the wife and Mary Martha Lockley are, during their lives, to enjoy the annuity, and are to keep the tomb in repair, is quite lawful; it is a valid condition imposed upon the enjoyment. I consider, therefore, that Lucy Lloyd and Mary Martha Lockley are obliged, out of the annuity, to keep the tomb in repair.

Then, there is a direction about which there is no question, that his executors shall ascertain the amount of money which the wife is entitled to from a certain society, which the Master must inquire about. But nothing turns upon that.

So far, then, the testator directed the sale of all his real estate, for the purpose of purchasing an annuity for the two lives; and by a codicil he refers to this. Amongst the testator's estates was a copyhold at Barnes, which is let to Mr. Pyle. Mr. Pyle is lessee for fourteen years, at 48*l.*, and he says, "if you choose to accept this offer, you may do so upon the terms of paying 48*l.* during the life of my wife and Mary Martha Lockley," and then 200*l.* more, which is to be invested in the funds, but he does not direct any trust, and it appears Mr. Pyle has declined the offer. Then comes the second codicil, and by that, after referring to the fact that by his will he had directed a sale, he says it shall not be sold, but let, and so on. This language is very inartificial, and if you take it as it stands, it clearly does not express the meaning which ought to be extracted from the whole of the codicil. What the testator must have intended was, if Mr. Pyle does not accept the offer, then let the house continue to be let, and the rent to be paid to Lucy Lloyd and Mary Martha Lockley during their lives, and the life of the survivor; and he afterwards

devises it to the minister and churchwardens, if Lucy Lloyd and Mary Martha Lockley fail to fulfil the conditions of the will, and I see no reason why the limitation over, in the event of their not fulfilling that condition, is not good: that is, assuming that the devise over is valid. But the devise to the minister and churchwardens is declared to be upon this trust; first, to take 5*l.* which would not be of itself illegal if the duty they were to perform was a duty which was valid; but the next trust is, to keep in sound repair the vault and tomb, and this being a devise of the fee, or rather of the inheritance of the copyhold, to the minister and churchwardens, upon trust to cause a tomb to be painted every year, that is, in fact, a perpetuity; and I suppose it is for that reason that the Court at the hearing declared this devise to be void, and dismissed the trustees from the suit; my opinion is, that whether right or wrong I am not here to alter it. But I must say I think it quite right, and the effect of it appears to be that everything which is contained in or grafted on the trust to the minister and churchwardens is void, and the trust is void. It is unnecessary, therefore, to consider the effect of the subsequent trusts; that is to say, to consider what is to be done with the rent after keeping the tomb in repair. It is to be applied to the benefit of the Missionary Society, which is, of course, void under the Mortmain Acts. Then, he says, "the interest of the 200*l.* invested in the joint names of the minister and churchwardens is to be applied as follows," &c. It is not necessary to comment on these ulterior limitations; they are clearly void, and have even been declared to be so by the Court.

The effect then of the whole is, that this property, after paying the costs of the suit, will have to be invested in the purchase of a government annuity for the life of Lucy Lloyd and Mary Martha Lockley, with a direction to pay the interest to these two persons in equal shares, during their joint lives, they undertaking to perform the conditions contained in the will with regard to the repair of the tomb and the painting of it, with liberty for any party to apply upon the death of either, or upon any other event.

L.C.
1851. }
March 26, 27; } WATKINS v. WILLIAMS.
Nov. 25. } HAVERD v. DAVIS.

Will—Construction—Condition, Precedent or Subsequent.

An estate was settled to such uses as W. D., a feme covert, should by deed or will appoint. W. D. devised the estate to R. D., her husband, with power to sell and dispose of the same, and to raise any sum or sums of money thereon by mortgage or otherwise as he should think proper, but with this proviso, "Provided, and these presents are upon this express condition, that such part of all and every sum and sums of money as aforesaid raised by the said R. D., either by sale or mortgage, as shall be expended at my (his) decease shall be charged upon the houses belonging to the said R. D., situate at, &c., to be disposed of immediately after the decease of the said R. D.; that is to say, that that sum shall be paid to my four nieces, share and share alike." And in case the estate should not be mortgaged to its full value, the testatrix devised the reversion to her said four nieces; and in case the estate should not be sold or mortgaged by R. D., she devised the same to her four nieces, and their heirs, as tenants in common. R. D. mortgaged the estate, and died without having made any charge of the mortgage money or any part thereof upon his houses:—Held, that the condition was not a condition precedent, and that the mortgages made by R. D. were valid.

Tenants in common, plaintiffs in a suit for redemption, are not entitled to a decree for partition in the same suit against the will of the mortgagee.

This was an appeal from a decree of foreclosure made by the Vice Chancellor Knight Bruce. The facts of the case are fully set out in the judgment.

Mr. Swanston and Mr. T. Terrell appeared for the appellants, the owners of the equity of redemption; and

Mr. Bacon and Mr. W. M. James, for the representatives of the mortgagee, in support of the decree.

Nov. 25. — The LORD CHANCELLOR (TRURO).—The facts of the case are very
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complicated, but I will state such as are relevant and material to the judgment I am about to pronounce. By indentures of the 12th and 13th of May 1817, George Price Watkins, under whom the respondents claim, took a transfer of a mortgage for 1,200*l.* on an estate called Lower Tylecrown. Some years prior to this, Lewis Williams, being the owner of the equity of redemption of Lower Tylecrown, and also owner in fee of Upper Tylecrown, devised these estates to his daughters Abigail and Winifred, as tenants in common in fee, and died in the year 1802. Abigail Williams intermarried with Walter Lewis, and Winifred Williams intermarried with Rees Davis. In or about the year 1824, Abigail Lewis died intestate, leaving her husband, Walter Lewis, and three children, Edward Williams Lewis her son and heir-at-law—Mary, afterwards the wife of Thomas Haverd—and Margaret, afterwards the wife of John Lewis. Edward W. Lewis, the only son and heir of Abigail Lewis, died, leaving his sisters Mary Haverd and Margaret Lewis him surviving, in whom the moiety which belonged to Abigail Lewis became vested as his co-heiresses-at-law. In September 1833 Walter Lewis, Thomas Haverd and John Lewis made an equitable mortgage of the moiety which belonged to Abigail Lewis to G. P. Watkins, for securing 600*l.* one-half of which appears to have been paid. By indentures of the 16th and 17th of November 1838, John Lewis and Margaret his wife made a mortgage to G. P. Watkins of one undivided fourth part or share of Upper and Lower Tylecrown for 1,150*l.*

By indenture of the 21st of May 1813, Rees Davis covenanted with Samuel Church that he, Rees Davis, and Winifred his wife, would levy a fine of her moiety of Upper and Lower Tylecrown to such uses as Winifred Davis should by deed or will appoint, and a fine was levied accordingly. Winifred Davis devised to Rees Davis, her husband, her share of Upper and Lower Tylecrown, with power to sell and dispose of the same, or to raise any sum or sums of money thereon by mortgage or otherwise as he should think proper. And she then added a proviso, in these terms—"Provided always, and these presents are upon this express con-

dition, that such part of all and every sum and sums of money so as aforesaid raised by the said R. Davis, either by sale or mortgage, as shall be unexpended at my decease shall be charged upon the houses belonging to the said R. Davis, situate at &c., to be disposed of as hereinafter expressed, immediately after the decease of the said R. Davis, that is to say, that that sum shall be paid to my four nieces, viz., Charlotte Coltheart, Mary Lewis, Margaret Lewis, and Helen Williams, share and share alike." And in case the estate should be mortgaged for less than its real then value, the testatrix devised the reversion of the same to her said four nieces, share and share alike, and in case the estate should not be sold or mortgaged by the said R. Davis, then she devised the same to her said nieces, their heirs and assigns, as free from incumbrance as they should be at her decease, share and share alike as tenants in common.

Rees Davis made certain mortgages to George P. Watkins, and in 1839 died without having made any such charge on the two houses as required by the proviso in the will of Winifred Davis. On his death, the moiety in which he had a life interest became vested in possession (subject to the mortgages) in the defendants Charlotte Williams, Mary Haverd, Margaret Lewis, and Ellen Holderness, as tenants in common in fee, and in their husbands Henry Williams, Thomas Haverd, John Lewis, and John Holderness in their right.

George Price Watkins devised the premises vested in him as mortgagee under the various mortgages to the respondents, and the several mortgage debts still remain due to the estate of George Price Watkins, except the part of the 600*l.* which has been paid off. In this state of things the appellants, in February 1844, filed a bill for redemption and partition, and in March in the same year the respondents filed a bill of foreclosure. These causes came on to be heard before the Vice Chancellor Knight Bruce, when his Honour pronounced a decree of foreclosure, the particulars of which it is not necessary to state any further than this, that it was thereby declared that the mortgages created by Rees Davis were valid, and it also treated the equitable mortgage for 600*l.* as a valid

charge; and it did not direct that a commission should issue for making a partition as prayed by the redemption bill. Against that decree the parties interested in the equity of redemption presented a petition of appeal, whereby they objected to the decree: first, on the ground that the mortgages created by Rees Davis are not valid; secondly, on the ground that the equitable mortgage for 600*l.* is not a valid charge; and, thirdly, on the ground that the decree ought to have contained a direction for a partition. The other objections which were taken by the appellants on the hearing of the appeal, and which do not appear on the face of the petition of appeal, I cannot entertain without infringing a rule of practice (stated in 2 *Daniell's Ch. Pr.* by Headlam, 1354) which is necessary to protect respondents from being taken by surprise.

Now, with respect to the objection to the validity of the mortgages made by Rees Davis, the foundation of that objection is, that the power in the will of Winifred Davis under which he created them, was dependent on the condition of Rees Davis making such a charge as is required by the proviso in the will; and inasmuch as he did not perform that condition, the mortgages created by the execution of the power were void. I am of opinion that this objection to the validity of these mortgages cannot be maintained. I do not think the condition embodied in the proviso is a condition precedent. Conceding that the words "unexpended at my decease" were written by mistake for "unexpended at his decease," and supposing, also, that the import of the proviso is sufficiently clear, and that the meaning was that Rees Davis should create a charge, either by deed or will, on his two houses, for such a proportion of the money to be raised by him as might happen to be unexpended at the time of his decease, the form of the proviso is most certainly not that of a condition precedent upon which an estate is to arise, but of a condition subsequent, in that general sense of the term in which it is sometimes used in contradistinction to a condition precedent, to denote a clause which causes the cesser of an estate given in a preceding sentence, whether such condition subsequent is a condition properly so called, which causes

the reverter of the property, or a conditional limitation, which gives the property over to a third person. Indeed, the word "provided" and the words "on condition," when they constitute the introductory words of a distinct sentence, whereby a condition is annexed to an interest given in the preceding sentence, are the technical words which properly introduce a condition subsequent, as opposed to a condition precedent. But, independently of the form of the proviso, the condition cannot be a condition precedent, because it would be absurd that Rees Davis, before raising the money, should have been obliged to execute a charge by deed on his own estate to secure to the nieces so much as should be unexpended by him, and thereby put himself to considerable expense, and preclude himself from the free alienation of his estate, and from the power of raising money on it, when he could at any moment render such a charge wholly nugatory by spending the whole of the money. And as to a charge by will, that, of course, cannot be deemed to have been intended, as it might be revoked the next day. The proviso is of the nature of a condition subsequent, in the general sense of the term which I have mentioned. It is an irregular way of accomplishing the purposes of a conditional limitation, properly so called. A conditional limitation takes effect in defeazance of the interest given in a preceding sentence, and this proviso is intended virtually to take effect in partial defeazance of the absolute interest in the entirety of the money to be raised; for it would seem to amount to the same as if the testatrix had said, "But in case Rees Davis shall not expend all the money which shall so be raised by him, so much as shall be unexpended at the time of his decease shall go to my nieces, and Rees Davis shall execute a charge on his two houses to secure that amount to them." But whether this is the precise character and import of the proviso or not, which it is unnecessary for me to decide, there can be no doubt that it was intended virtually to be a limitation over in some way or other of so much of the money as should be unexpended.

Now, it is a rule that where a money fund is given to a person absolutely, a

condition cannot be annexed to the gift that so much as he shall not dispose of shall go over to another person. Apart from any supposed incongruity—a notion which savours of metaphysical refinement rather than of anything substantial—one reason which may be assigned in support of the expediency of this rule is, that in many cases it might be very difficult, and even impossible, to ascertain whether any part of the fund remained undisposed of or not, since, if the person to whom the absolute interest is given left any personalty, it might be wholly uncertain whether it were a part of the precise fund which was the subject of the condition or not. Another reason may be, that it would be contrary to the well-being of the party absolutely entitled to lead him profusely to spend all that was given him, which in many cases might be all that he had in the world; for although, indeed, he might provide against leaving himself destitute by buying an annuity, yet, even if he did this, it might be at the expense of those for whom he might be under a moral obligation to make some provision.

In *Ross v. Ross* (1) Sir Thomas Plumer observed—"One consequence of permitting such limitations over would be, that if the party entitled to the absolute interest had not spent the money, and were to die indebted to any amount, his creditors would be excluded from it." The validity of this reason may be doubtful, as it may, perhaps, be said that a man might properly be deemed to have spent the amount of debt which he has contracted, and which he has laid himself under an obligation to pay. In *Bourn v. Gibbs* (2) a testator gave his personal estate to his wife for her own absolute disposal, provided, nevertheless, that if his wife should make no disposition thereof in her lifetime, or by her will, then he directed that such part as should remain undisposed of should go to, and he accordingly bequeathed the same to, his nephews. It was held that the sum of stock, which was part of the testator's property given to his wife, remaining in his name at her death, passed

(1) 1 J. & W. 154.

(2) 1 Russ. & M. 614 s. c. 8 Law J. Rep. Chanc. 151.

by her will, although it contained no allusion to her husband's will; Sir John Leach being of opinion that the widow took an absolute interest in the whole of the testator's residuary estate. So in *Ross v. Ross*, a testator gave to his son a sum of money with a limitation over in case he should not receive or dispose of it by will or otherwise in his lifetime. He died intestate, without having received the money, although it was carried to his separate account in a suit. Sir T. Plumer said, "This differs from a power and a remainder over in default of its exercise. * * * If you give absolute property to a person, you cannot subject it for his life to a proviso, that, if he does not spend it, his interest shall cease." So in *Cuthbert v. Purrier* (3), an absolute interest was given to A. at twenty-one, with a bequest over in the event of his dying under that age, "or afterwards without lawful heirs, being intestate." Sir T. Plumer said, "As the testator had two objects, which are inconsistent,—to invest his son with the absolute property, and then to provide for the event of his not exercising his rights over it,—I think the Court is bound to transfer it to him." So in *Green v. Harvey* (4) Wigram, V.C. said, "The general rule of law is, that an absolute interest is not to be taken away by a gift over, unless that gift over may itself take effect. Now, it has been repeatedly decided, that where a legacy is given absolutely, and a gift over is superadded, in the event of the legatee dying without having disposed of his legacy, the gift over is void and the legacy is absolute." So in *Byng v. Lord Strafford* (5) Lord Langdale said, "If an absolute interest be given upon an express condition which may be lawful in itself, but is incompatible with the free enjoyment of the property, the Court does not modify the absolute interest for the purpose of giving effect to the condition, but declares the condition void for the purpose of supporting the absolute interest." The case of *Doe d. Stevenson v.*

Glover (6), in which I was counsel, is not opposed to these cases; as that was not a case of money limited over, but one in which there was a devise over of real estate. There a testator devised his real estate to his son, his heirs and assigns for ever; but in case he should die without leaving any issue then living, or being no such issue, and he should not have disposed and parted with his interest in the real estate, then the testator devised the same to his illegitimate daughter, her heirs and assigns. The Judges were unanimous in the opinion that the devise over was a good executory devise; and that as the son had not parted with the estate in his lifetime, although he had disposed of it by will, it went over to the daughter.

As to the case of *Doe d. Willis v. Martin* (7), which was cited at the bar by the counsel for the appellants, a most substantial distinction exists between that case and the present. That was a case of a power enabling settlors to revoke the uses of a settlement, and the trustees to sell the estate and convey to a purchaser, so as the purchase-money should be paid to the trustees and not to the settlors, to be laid out and invested by the trustees in the purchase of other property to be settled to the same uses. It was held that the power of revocation was conditional, and as neither of the conditions were performed, viz. the payment of the money to the trustees, and the re-investment of it in the purchase of other lands to be settled to the same uses, the revocation was a nullity. In this case, as Lord Kenyon intimated, the exercise of the power and the performance of the condition were beyond all doubt to be considered as parts of one transaction. They were essentially and inseparably connected. The performance of the condition, instead of being a derogation from the ownership of the parties to be affected by the exercise of the power not permitted by the law, was an act which those parties had a most unquestionable right to expect to be done.

But, independently of the rule to which I have adverted, the mortgages created by

(3) Jacob, 415.

(4) 1 Hare, 431; s. c. 11 Law J. Rep. (N.S.) Chanc. 290.

(5) 5 Beav. 567; s. c. 12 Law J. Rep. (N.S.) Chanc. 169.

(6) 1 Man. G. & S. 448; s. c. 14 Law J. Rep. (N.S.) C.P. 169.

(7) 4 Term Rep. 39.

Rees Davis cannot be affected by the proviso. Supposing, for the reasons I have assigned, it was not a condition precedent, then, as the testatrix has specified no time for the creation of the charge, it would be sufficient for Rees Davis to create it at any time before he died. But, it cannot be contended that he was bound to create it at all if he had spent all the money. And yet the appellants, upon whom it was incumbent to shew that the condition was not performed, have not proved that Rees Davis left any part of the money unexpended, and, consequently, have not proved that the condition was broken. For these reasons, I am clearly of opinion that their objection to the validity of the mortgage created by Rees Davis altogether fails.

With respect to the second ground of appeal, it appears to me that the decree must be right in treating the equitable mortgage as a valid charge; for the appellants, by their answer, have admitted that the 600*l.* was lent, and that John Lewis and Thomas Haverd gave George Price Watkins a written undertaking that they would execute a mortgage of their respective interests, and that if necessary all proper parties should concur in levying a fine of the premises. The answer seems to me to admit facts which constitute a valid equitable mortgage of the life estates of the husbands of the two daughters of Abigail, and of the four nieces of Winifred; and I see no evidence to impeach or reduce that mortgage, except so far as the payment of one-half of the 600*l.*

With respect to the third ground of appeal, viz. the omission of a direction as to a partition: a partition appears to me not to be properly incident to a foreclosure or redemption suit, in such a way that the owners of the redemption can be allowed to insist on it against the will of the mortgagees who has no interest in the question. In the present case, with the consent of the mortgagees, the parties interested in the equity of redemption may have a partition; but I cannot regard the omission of a direction for a partition as constituting a ground for an appeal.

The appeal must be dismissed, with costs.

PARKER, V.C. }
June 25 ; } TAYLOR v. PROBISHER.
Feb. 9. }

Will—Construction—Remoteness—Word “vested.”

*A testator directed trustees to pay the interest of a sum of 1,000*l.* to A. for life, and, after her death, to divide the principal between the child and children of A, and if there should be only one child, then the whole to such child, to be a vested interest or vested interests on their respectively attaining the age of thirty years, and directed that, if any child should die under thirty years, without lawful issue, the share of him or her so dying should go to the survivors or survivor, and become vested at the same time as their original shares. B, one of the children of A, died in the lifetime of A. under thirty years of age:—Held, that the gift to B. as one of the children of A. was a valid bequest, and that the gift over on the death of B. without issue was void for remoteness, and therefore that the representatives of B. were entitled to a share of the fund.*

Mrs. Blanchard, having a power of appointment over a sum of 1,000*l.* made her will, dated the 23rd of March 1833, and thereby directed her trustees J. Gray, W. Husband and J. Barber, to invest the same as therein mentioned, and to pay the income to her daughter, Ann Gray, for life. The will then proceeded as follows.—“And from and after her decease to pay, apply, and dispose of the said principal sum of 1,000*l.* and all interest due thereon unto, between, or amongst all and every the child and children of my said daughter, in equal shares, or, if there shall be but one such child, then the whole to such only child, to be a vested interest or vested interests on their respectively attaining the age of thirty, and, if any child or children of my said daughter shall die under the age of thirty years, without lawful issue, the share or shares, of him, her or them so dying, as well original as accruing by survivorship, shall go to the survivors or survivor in equal shares, if more than one, and become vested at such ages or times as his, her, or their original share or shares; and upon this further

trust, that they my said trustees do and shall, after the decease of my said daughter, and, until the share or respective shares of such child or children as aforesaid shall become vested and payable, by and out of the interest, dividends, and annual proceeds of the said sum of 1,000*l.*, pay and apply to and for the maintenance and education of the same child or children respectively such yearly sum or sums of money as to them my said trustees shall seem meet, not exceeding the interest of the expectant share of such child or children respectively in the said principal sum of 1,000*l.* And I hereby direct and declare that, in case all the children of my said daughter shall die under the age of thirty years and without lawful issue, the said J. Gray, W. Husband and James Barber, their executors, administrators and assigns, shall stand possessed of the same principal sum of 1,000*l.* upon trust to pay or transfer the same unto my said son, Thomas Frobisher, his executors, administrators and assigns."

The testatrix died in 1835, leaving two children, Ann Taylor and Thomas Frobisher, who were named in the will.

Ann Taylor died in 1841. Ann Taylor had two children, T. J. Taylor and B. F. Taylor. B. F. Taylor died in the year 1839, in his twenty-eighth year.

This was a special case under Sir George Turner's Act; the question being whether B. F. Taylor took any interest under the will.

Mr. Russell and *Mr. Young*, for T. J. Taylor.

Mr. Bazalgette, for the representatives of B. F. Taylor.

Mr. Malins and *Mr. C. C. Barber*, for the other defendants.

The following cases were cited:—

Glanvill v. Glanvill, 2 Mer. 38.

Bull v. Pritchard, 1 Russ. 213; s. c. 5 Hare, 567; 16 Law J. Rep. (n.s.) Chanc. 185.

Bland v. Williams, 3 Myl. & K. 411; s. c. 3 Law J. Rep. (n.s.) Chanc. 218.

Saunders v. Vautier, Cr. & Ph. 240; s. c. 10 Law J. Rep. (n.s.) Chanc. 354.

Russel v. Buchanan, 7 Sim. 628; s. c. 5 Law J. Rep. (n.s.) Chanc. 122; 2 Cr. & M. 561; 3 Law J. Rep. (n.s.) Exch. 194.

Greet v. Greet, 5 Beav. 123.

Davies v. Fisher, 5 Beav. 201; s. c. 11 Law J. Rep. (n.s.) Chanc. 338.

Berkeley v. Swinburne, 16 Sim. 275; s. c. 17 Law J. Rep. (n.s.) Chanc. 416.

Harrison v. Grimwood, 12 Beav. 192; s. c. 18 Law J. Rep. (n.s.) Chanc. 485.

Note (c) in 4 *Davidson's Forms of Conveyances*, p. 437.

PARKER, V.C.—The question in this case depends on the meaning which, upon consideration of this will, is to be attached to the word "vested," as used by the testatrix. It is scarcely necessary to say that, in construing this will, the Court lays out of sight the circumstance that, if one construction be adopted, the disposition in favour of the children of Ann Taylor would be void for remoteness, while, if the other be taken, it would be in a great measure supported. The Court, in such cases, in the first instance ascertains what are the provisions of the instrument, whether they are opposed to the ordinary rules of construction, and to what extent they are in accordance with the rules of law. In this will the testatrix uses the word "vested" not in its ordinary sense, but in the sense of not being subject to be divested, so as to be defeasible. It is only in this way that her intention could have been carried into effect in the form which was in her contemplation. The word "vested," though it has a technical or strictly legal meaning, especially when applied to various interests in real estate, is in effect used in different senses. In *Barnes v. Allen* (1), Lord Thurlow says—"Contingent or executory interests may be as completely vested as if they were in possession;" obviously there using the word "vested" in the sense of "transmissible." In *Berkeley v. Swinburne* the Lords Commissioners, where the testator directed the shares to be vested interests in the sons at twenty-one, and in daughters

(1) 1 Bro. C.C. 182.

at twenty-one or marriage, construed the word to mean indefeasible, and held that the shares vested before the ages of twenty-one or marriage on the death of the tenant for life, subject to be divested on their deaths under that age, and, in the case of daughters, without having been married. In *Glanvill v. Glanvill* Sir W. Grant construed the word "vested" in its ordinary sense, observing, however, that there was no evidence from any part of the will that the testator did not affix to the word its precise legal meaning.

In the present case, the testatrix, after the death of Ann Taylor, directs the trustees "to pay, apply, and dispose of the said principal sum of 1,000*l.*, and all interest due thereon, unto, between, and amongst all and every the child and children in equal shares, or, if there shall be but one such child the whole to such only child, to be a vested interest or vested interests on their respectively attaining the age of thirty years, and, if any child or children of Ann Taylor should die under the age of thirty years, without lawful issue, the share or shares of the child so dying to go to the survivors or survivor." In this disposition, as well as in what follows it, the testatrix contemplates that each child, before attaining the age of thirty years, was in some sense, at least, to be entitled to a share of the fund, which she designates as "the share of such child respectively." If any child die under thirty years without issue, then the share of such child is to go to the others; if any child die under the age of thirty years leaving issue, the share of such child is not to go to the others, but the original gift remains unaffected. The conclusion appears to be irresistible that the testatrix intended the child so dying with issue to retain his share as an interest transmissible to his representatives. It is impossible to suppose it meant an intention that, while the share of a child dying and leaving no issue was to go to the others, a share of a child dying leaving issue was to go to the others, but to go to those who were to take in default of appointment. So, when the testatrix, in the ultimate disposition of the fund, gives it to Thomas Frobisher, in the event of all the children of Ann Taylor dying under the age of thirty years and without issue,

she must have meant that to be the only event in which, under the previous dispositions, the fund was to be undisposed of; but, in the event of an only child dying and leaving issue, the fund was not to go over to Thomas Frobisher, because such deceased child took an absolute interest in the fund. The object of the testatrix was to make a complete disposition of the fund, and, in such a case, the Court always endeavours to construe the will so as to prevent a failure of the interest of any party named therein. I consider that here the meaning was, that all the children of Ann Taylor were to take vested interests in the fund, subject to be divested by their deaths under thirty without issue, and that, when they attained thirty, they were to take respectively indefeasible interests in their shares. This construction, which makes all the will consistent, is in accordance with what was said by Sir John Leach, in his judgment in the case of *Bland v. Williams*. He there says—"Whether, in a gift of this nature, the time of vesting is postponed, or only the time of payment, depends altogether upon the whole context of the will. If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age. In this case, the gift over is not simply upon the death under twenty-four, but upon the death under twenty-four without leaving issue. If upon a death under twenty-four at whatever age issue was left, then the gift over is not to take place. It is, in effect, therefore, a vested interest with an executory devise over in case of death under twenty-four without leaving issue. All the cases upon the subject except the one before Lord Gifford, *Bull v. Pritchard*, are reconcileable with this distinction." If the case before Lord Gifford be referred to, it will be found to form no exception to the rule as stated by Sir John Leach. In that case, the gift was not to any children except such as should attain the age of twenty-three years. Such a gift in favour of children is of the same nature as that in *Glanvill v. Glanvill* before referred to; and, in the latter case, Sir William Grant's decision would probably have been different if the gift over had been in the event of the death of children under age without leaving issue. The case of *Russel v.*

Buchanan has been referred to. There is nothing in the will in that case to shew that the word "vested" is to be taken in any other than its ordinary sense; the clause being similar to that adverted to in *Glanvill v. Glanvill* and *Bland v. Williams*, for the destruction of the contingent remainders in that case by an event subsequent to the testator's death could not affect the construction of the will. In the present case, the direction as to maintenance does not throw much light upon the intention of the testatrix either way, neither does the discretionary power to the trustees. The testatrix appears to have considered the fund as entirely disposed of by the previous dispositions.

For the reasons I have stated, my opinion on the case is, that the bequest or appointment in the will of Mrs. Blanchard of 1,000*l.* after the decease of Ann Taylor, unto and amongst all and every her child and children is a valid bequest, and that the gift over of the shares of any child or children who shall die under the age of thirty without issue, is void for remoteness. The consequence is that T. J. Taylor and the representatives of B. F. Taylor are the persons who are entitled under the clause in question. The costs must come out of the fund.

PARKER, V.C. } *Ex parte* THE BISHOP OF
Feb. 20. } HEREFORD.

Copyhold Enfranchisement Act—Costs of Petition for Investment.

A Bishop, lord of a manor, enfranchised certain copyhold lands held of the manor under the Copyhold Enfranchisement Act, and the consideration money was paid into court. A petition was presented by the Bishop for the investment of the money:—Held, that the Copyhold Commissioners had a right to appear at the hearing of the petition, and that their costs of the petition and those of the Bishop were payable out of the consideration money.

The Bishop of Hereford, as lord of a manor, with the consent of the Copyhold Commissioners, enfranchised certain copyhold hereditaments held of the manor, and

the money received in respect thereof was paid into court under the Copyhold Enfranchisement Act.

A petition was presented by the Bishop for the payment of the costs of, and incident to, the petition out of the fund in court, and for the investment of the remainder, as directed by the act, and for the payment of the dividends. The Copyhold Commissioners were served with the petition and appeared. The petition came on to be heard, and an order was made according to the prayer of the petition.

The Registrar having declined to draw up the order, on the ground that Sir J. L. Knight Bruce had decided that the Commissioners ought not to have been served with the petition, and that the costs were not payable out of the fund, the matter was now again brought before the Court.

By the 4 & 5 Vict. c. 35. s. 56, it was enacted that a lord of a manor, whatever might be his estate or interest therein, with the consent of the Commissioners under the act, might enfranchise lands holden of the manor for any sum, &c.

The 58th and 69th sections of the act relate to the expenses of the enfranchisement.

By the 73rd section, it is enacted "that all monies paid for enfranchisement from the lord's right, where such lord shall be only entitled for a limited estate, shall, if the same exceed 200*l.*, be paid into the Bank of England in the name and with the privity of the Accountant General of the Court of Exchequer, to be placed to his account there, *ex parte* the Copyhold Commissioners, pursuant &c., and shall, when paid in, therein remain until the same shall, by order of that Court, made upon the petition of the party who would have been entitled to the rents and profits of the manor had no such enfranchisement been made, be applied in the discharge of incumbrances affecting the manor, or in the purchase of lands to be settled to the like uses; and, in the mean time, the same money may, by order of the said Court, upon application thereto, be invested by the said Accountant General in his name in the purchase of 3*l.* per cent. consolidated bank annuities, or 3*l.* per cent. reduced annuities, the dividends in the mean time to be paid to the person who would have

been entitled to the rents and profits of the manor if no enfranchisement had been made."

Mr. Willcock, for the petition.

Mr. Prendergast, for the Copyhold Commissioners.

PARKER, V.C. said that he had communicated with Lord Justice Knight Bruce, and that he should decide that service of the petition on the Commissioners was necessary, and that they had a right to appear on the hearing. As to costs, the question was one of more difficulty, and, but for a decision of the Vice Chancellor Knight Bruce, (*Ex parte the Archbishop of Canterbury* (1)), who granted the costs of the petitioner out of the fund, he should have doubted his jurisdiction to make any order as to the costs of the petitioner or the Commissioners. He should, however, follow that precedent; and, as the Commissioners had a right to appear at the hearing of the petition, he thought that the proper order on the present occasion would be, that the petitioner should pay the costs of the Commissioners, and add them to his own, and take such costs out of the fund.

PARKER, V.C. }
March 10. } STRUTT v. BRAITHWAITE.

Power of Appointment—Exclusive Powers—Attaining Twenty-one—Estate in Fee—Surviving a Parent.

By a settlement made on the marriage of A. and B. real estate was conveyed to trustees and their heirs upon trust for A for life, with remainder for B. for life, and, after the death of the survivor, in trust to apply the rents in the maintenance of all and every the children of A. and B, until such children should attain twenty-one, and, when such children should attain twenty-one, to convey the premises to such children in such manner as A. and B. jointly, or the survivor should appoint, and, in default of appointment, to convey the premises to such children equally as tenants in common; and, if there should be but one such child who should attain

twenty-one, to convey the premises to such child, his or her heirs and assigns:—Held, that the power of appointment was not an exclusive one, and, that in default of appointment, all the children took the property as tenants in common in fee, without reference to their attaining twenty-one or surviving their parents.

By indentures of settlement, dated the 12th and 13th of April 1784, made on the marriage of John Strutt and Sarah Susannah his wife, certain real estates, the property of Mrs. Strutt, were conveyed to H. Mayo, J. Oxland, and N. Taylor, and their heirs, upon trust that they, and the survivor of them, and the heirs of the survivor, should be seised thereof upon trust for Mr. Strutt for life, with remainder to Mrs. Strutt for life. The settlement then proceeded as follows:—"And from and immediately after the decease of the survivor of them, the said J. Strutt and S. S. Strutt, upon trust to pay and apply the rents, issues, and profits of the same premises towards the maintenance and education of *all and every the child or children* of the said J. Strutt on the body of the said S. S. Strutt lawfully to be begotten, until such child or children shall attain his, her, or their age or ages of twenty-one years; and, *when and as such child or children* respectively (if more than one) shall attain the said age of twenty-one years, then upon trust to release and convey the same premises *unto such child or children*, in such manner, shares, and proportions, for such uses and estates, as they, the said J. Strutt and S. S. Strutt, shall jointly in their lives' time, or which the survivor of them alone by any deed, &c. shall appoint; and, for want of, and in default of any such deed, will, disposition, direction, or appointment, then upon trust to release and convey all the same premises, with the appurtenances, *unto and amongst such children equally*, share and share alike, to hold as tenants in common, and not as joint tenants; and if there shall be but one such child who shall live to attain the age of twenty-one years, then upon trust to release and convey all the same premises, with the appurtenances, *unto such only child*, and his or her heirs for ever. Provided that, in case it shall happen that there shall be no such

(1) 1 Coll. 154.

lawful issue of the said then intended marriage, or, being any, all such issue shall happen to die, without having any lawful issue, in the lifetime of both the said J. Strutt and S. S. Strutt, or after her decease, and in the lifetime of the said John Strutt, then and in either of such cases the said trustees, and the survivors and survivor of them, and the heirs of such survivor, shall stand seised of and convey the same premises to such uses as the said S. S. Strutt shall by any deed or will, &c. appoint, to take effect from and immediately after the decease of the survivor of them, the said J. Strutt and S. Susannah his intended wife, or their issue under the age of twenty-one years, and without issue as aforesaid; and, in default of, and subject to, any such last-mentioned direction or appointment, upon trust to convey the premises to the right heirs of the said S. S. Strutt."

In 1830 Mrs. Strutt died.

There were eight children of the marriage. Three of these children died before 1835, one of whom was an infant.

At the date of the settlement next stated five of the children were living: Mrs. Braithwaite, Joseph Henry, Sarah, Maria, and Matilda.

By an indenture, dated the 12th of January 1835, John Strutt, in exercise of the power given by the settlement of the 13th of April 1784, appointed that the hereditaments and premises comprised in the said settlement should, subject to his life estate, go, remain, and be to the use of the said Joseph Henry, Sarah, Maria, and Matilda Strutt equally as tenants in common, and their respective heirs and assigns, and directed that the trustees of the settlement should, immediately after his death, convey and assure the said hereditaments and premises accordingly.

Joseph Henry died in 1848 having attained twenty-one, and Mr. Strutt died in 1850.

The suit was instituted for the purpose of obtaining the decision of the Court as to the effect of the above-mentioned deeds with reference to the shares of the children.

Mr. Bacon and *Mr. Mott*, for the plaintiffs.

Mr. C. Hall, *Mr. E. F. Smith*, and *Mr. Sergeant*, for the defendants.

The following cases were cited—

Boraston's case, 3 Rep. 19.

Vanderzee v. Aclom, 4 Ves. 771.

Kenworthy v. Bate, 6 Ibid. 793.

Doe d. Wheedon v. Lea, 3 Term Rep. 41.

Skey v. Barnes, 3 Mer. 335.

Cohen v. Waley, 15 Sim. 318.

Gordon v. Hope, 18 Law J. Rep. (N.S.) Chanc. 228.

PARKER, V.C.—This is a very obscure settlement, and no one in construing it can feel sure what was the construction which the parties contemplated at the time. Mr. Strutt appoints to some only of the objects of the power, and this raises the question whether the power did or did not authorize an exclusive appointment. This turns entirely, as it appears to me, on the grammatical force to be attributed to the word "such" in the clause giving the power to appoint "unto such child or children, in such manner, shares and proportions, and for such uses and estates, as they, the said John Strutt and Sarah Susannah, should jointly in their lives' time, or the survivor of them should appoint." If "such" meant such as they should choose to appoint, there can be no doubt that the power authorized an exclusive appointment. If "such" is to be taken in the sense of "the said," the power did not authorize an exclusive appointment.

In the first place I find a trust to pay and apply the rents, issues, and profits towards the maintenance and education of all and every the child (this is the only place in which the word "the" is used) or children of the said John Strutt on the body of the said Sarah Susannah lawfully begotten, until such child or children (this must mean all—not excluding any) "shall attain his, her, or their age or ages of twenty-one years; and when and as such child or children respectively, if more than one, should attain the said age of twenty-one years, then upon trust to release and convey the same premises unto such child or children" (which must mean the said child or children following the previous description). The next place where I find it introduced seems to me to remove all doubt whatever: "And in default of any such

deed, will, disposition, direction, or appointment, then upon trust to release and convey all the same premises, with the appurtenances, unto and amongst such children equally share and share alike" (the word "such" must there have the same grammatical force as it had where the parents were empowered to appoint); "and if there shall be but one such child who shall live to attain the age of twenty-one years, then upon trust to release and convey all the same premises, with the appurtenances, unto such only child and his or her heirs for ever." I think that the power did not warrant an exclusive appointment; and, therefore, the appointment by Mr. Strutt was bad, and there must be a declaration to that effect.

The next question is, who are the parties to take in default of appointment? Three constructions were contended for. It was first said, that those children only were to take who survived the surviving parent. I think that there is no ground for this construction. This was a marriage settlement, and the Court always endeavours to construe marriage settlements so as not to make the interest of the children depend on their surviving their parents. In the case referred to by Mr. Hall (*Gordon v. Hope*), there was a trust to pay to and amongst all and every the children and issue of the marriage, to be paid to sons at twenty-one, and to daughters at twenty-one or marriage, on the death of the parents: and it was held, that the fund vested in the children as they came of age, though they died in the lifetime of the parents. There can be no doubt, then, that in this case the children attaining twenty-one took vested interests, though they died in the lifetime of their parents.

The next question is, whether the children who died under twenty-one took any interest; and as to this, I must say that I do not see my way, on legal principles of construction, to exclude any child who died under twenty-one from taking a share in the property. It is on these words of gift, in default of appointment, that the argument arose: "Upon trust to release and convey all the same premises, with the appurtenances, unto and amongst such children equally, share and share alike, to hold as tenants in common, and not as

joint tenants; and if there shall be but one such child who shall live to attain the age of twenty-one years," &c. This, it was contended, was a gift to all of them at twenty-one, for that by the word "such" was meant such as should attain twenty-one. It is not, however, safe, on an instrument so framed as this, to depart a single step from the literal meaning of the words. If to attain twenty-one was to be the condition of vesting, what became of the share of a daughter marrying under twenty-one, and dying before that age? There was not to be a gift over in case of one dying leaving lawful issue during the parents' existence. A daughter, therefore, dying under twenty-one leaving a child, would prevent that gift over taking effect, though she took no share,—which would be incongruous. I think that none of the children were to be excluded.

The next question is, what estates did they take in default of appointment? I think that there is no doubt they took estates in fee. The conveyance to the trustees was in fee. "Upon trust," (after saying they were to convey to such children as the parents should appoint) "to convey in default of appointment to the children as tenants in common; and, if only one, then all to such one, his heirs and assigns." In a marriage settlement which is for the benefit of the children a direction to convey must mean to convey to children in fee.

L.C. }
March 13. } WYKE v. ROGERS.

Principal and Surety—Collateral Security—Reservation of Rights against Surety—Parol Evidence.

J. W. joined in a bond as surety, and the creditor subsequently took a promissory note from the principal debtor, payable at two months, for the balance due upon the bond. The principal debtor becoming insolvent, and the note being unpaid, the creditor sued J. W. on the bond, who thereupon filed his bill for an injunction. It was proved that at the time of taking the note there was a general understanding between the principal debtor and the creditor that the remedies upon the

bond should not be thereby affected :—Held, that this general understanding amounted to a stipulation between the parties preventing the legal consequences that would have otherwise flowed from the transaction, and that the surety was not released.

An agreement that a dealing between the creditor and principal debtor shall not operate as a discharge of the surety may be proved by parol evidence.

This was an appeal from an order made by Knight Bruce, V.C., on further directions.

In 1843, the plaintiff joined one Evans in a joint and several bond to the defendant Rogers in the penal sum of 800*l.*, conditioned for the payment of 400*l.* and interest, which sum was paid by the defendant to Evans, with the consent of the plaintiff. In January 1844 the plaintiff paid to the defendant 120*l.* on account of the principal secured by the bond. In January 1845 the defendant applied to Evans for the payment of the balance due upon the bond, and Evans thereupon gave to the defendant a promissory note as follows :—

“ Abergavenny, Jan. 20, 1845.—280*l.* Two months after date, I promise to pay Mrs. Alice Rogers, or her order, the sum of 280*l.*, value received. S. Evans.”

An action was afterwards brought by the defendant against Evans upon the note, and judgment recovered, but no execution was issued, Evans being insolvent. The defendant then commenced an action against the plaintiff and Evans, for the balance of 280*l.* due upon the bond and arrears of interest. The plaintiff filed his bill against A. Rogers and Evans, alleging that at the time of giving the note there was an agreement between the defendant and Evans, without the knowledge or consent of the plaintiff, that the bond should not be put in force until the note should arrive at maturity, and charging that under the circumstances the plaintiff's liability upon the bond as surety was discharged, and it prayed that the action might be restrained. The answer of the defendant stated that at the time of the giving of the promissory note it was distinctly understood and agreed that it was not to be considered as payment of the balance due upon the bond,

and denied any undertaking by the defendant for postponing the remedies upon the bond.

At the hearing, the Vice Chancellor Knight Bruce directed an inquiry whether, at the time the promissory note was given, there was any and what agreement entered into between Rogers and Evans with respect to the bond in the pleadings mentioned, and under what circumstances the promissory note was given, with liberty to state special circumstances. The Master found that the promissory note was not given in discharge of the bond, and that there was a general understanding between Rogers and Evans that the remedy on the bond was not to be taken away ; but he found that there was no written, nor, beyond the general understanding before mentioned, any distinct parol agreement, respecting the bond, between Rogers and Evans.

The cause coming on for further directions, the plaintiff not appearing, the Vice Chancellor, after hearing the report and the evidence, dissolved the injunction, and ordered that the defendant should be at liberty to proceed with the action, and that the plaintiff should pay the costs of the suit, and all further proceedings should be stayed.

The plaintiff then appealed.

[The LORD CHANCELLOR.—Is the plaintiff rightly before the Court upon appeal, when, by his own neglect, the judgment of the Court below has not been exercised upon the question? The proper course was to apply to the Vice Chancellor to have the case reheard.]

Upon the consent of the defendant's counsel, the Court allowed the appeal to proceed.

Mr. Cooper, Mr. Bilton, and Mr. J. Brown, for the appellant.—During the two months the promissory note had to run, no proceedings could have been taken upon the bond against the principal debtor ; and, consequently, the surety was discharged. The reservation of the remedies against the surety ought to appear on the instrument giving time ; and parol evidence of the understanding of the parties to the deed that the remedies against the sureties should be reserved, cannot be admitted.

Byles on Bills, 186, 5th ed.

Ex parte Glendinning, Buck, 517.

Lewis v. Jones, 4 B. & C. 506; s. c.
3 Law J. Rep. K.B. 270.

Mr. Wigram, Mr. Bovill, and Mr. Pearson, contra.—The promissory note was not a discharge either at law or in equity, for it did not suspend the remedies upon the bond; it was merely a collateral security—*Pring v. Clarkson* (1). It is upon the plaintiff to prove that the remedies on the bond were suspended, and the Master's report negatives that fact.

Mr. Cooper replied.

The LORD CHANCELLOR.—In this case the plaintiff had joined with Evans in a bond for 400*l.* to the defendant as surety. 120*l.*, part of that sum, had been paid, and the remaining 280*l.* was still unpaid. In that state of things a promissory note for the 280*l.* was given by Evans to the creditor, payable at two months. The effect of that at law was in no manner to impeach the bond, which remained as effective at law as it was before. A question, however, might arise upon the circumstances, whether that promissory note did necessarily, in the absence of agreement, operate as a discharge of the surety; that is, whether it was simply a collateral security, or whether from its being payable at two months it must not be understood as giving two months' time to the principal debtor so as to prevent the remedy upon the bond during that period. All the cases prove that if at the time the security is taken, which might operate as a discharge of the surety, the remedies against the surety are reserved, there is no discharge of the surety. An action was brought upon the bond, and judgment recovered; and then the surety resorts to this Court to stay proceedings. The party coming for equitable relief against a legal obligation must shew a case that would operate to release the surety in equity from his obligation. Is anything shewn here which necessarily operates to give time to the principal debtor so as to release the surety? But I do not mean to give an opinion upon that point; because it is perfectly clear in law that if a security is taken, which, by postponing

the time of payment, would operate to release the surety, the creditor may prove by parol evidence that an agreement was come to between the parties that the transaction should not have that operation. I assume that you could not give parol evidence to impeach the promissory note; but here the evidence is properly introduced to prevent that collateral operation which it is insisted the note had, namely, to prevent any proceedings being taken upon the bond in the mean time, and so to release the surety. Beyond doubt the evidence was admissible, and if the plaintiff thought it was not, instead of allowing the matter to go to the Master, the plaintiff should have insisted that no such evidence was admissible. However, the evidence before the Master was directly against the claim of the plaintiff. The defendant also, in her answer, swears that there was an understanding that the giving of the note was not to have the effect contended for by the plaintiff. Now, with respect to the parol evidence, a case was cited to shew that this understanding ought to have appeared on the face of the promissory note. The case cited proves no such thing. In that case (*Lewis v. Jones*) there was a regular instrument, by which the compromise was effected; and the Court held that you could not introduce parol evidence to vary the effect of that instrument. Nothing can be clearer than that. Then it was insisted that the promissory note was given in discharge of the bond. It would require a strong case to prove that, because it would be converting a specialty debt into a simple contract debt, without any consideration. The Master has found that there was no distinct parol agreement, but a general understanding between Rogers and Evans that the remedies on the bond should not be affected. There was no contract in terms, but a general understanding, which in point of law amounts to a stipulation that the taking of the promissory note should not be a bar. I am of opinion that there was no such dealing in this case with the principal debtor as would discharge the surety; and the appeal, therefore, must be dismissed, with costs.

(1) 1 B. & C. 14; s. c. 1 Law J. Rep. K.B. 24.

KINDERSLEY, V.C. }
 March 16. } HEATH v. CHAPMAN.

Witness—Foreign Commission—Expenses.

A testator gave the residue of his property to be held in deposit for the purpose of inquiring whether there were any relations of his blood living, and if so the said residue was to be divided equally among them. Upon a reference to the Master to make inquiries in conformity with the above residuary bequest, the Master reported that a commission ought to be sent to Venice to examine witnesses as to who were the next-of-kin. The Court, upon the application of the executors, made an order for a foreign commission, and also directed what sum should be allowed out of the testator's property for the expenses of the commission.

This suit was instituted for the administration of the estate of Domenico Dragonetti, a professor of music, who was a native of Venice, but had died domiciled in England, and by his will, after making various specific bequests and legacies, gave the residue of his property in the following terms:—"And as respects the residue of all the money and securities for money belonging to me at my bankers, in whatever bank or place the same may be, I desire that after all obligations, gifts, and engagements shall have been satisfied, the above-mentioned residue be held in deposit for the purpose of inquiring whether there be any relation of my blood living, and if such be found it is my will that all the said residue be given to my next-of-kin; and if there should be living several of my relations in equal degree of consanguinity, I desire that the said residue above alluded to be divided in equal shares for them and among them." In case no persons could be found to answer the above description, the testator gave the residue of his property for the benefit of various churches in Italy. Upon a decree made in the cause in December 1850, it was referred to the Master to inquire and state who, according to the laws of this country, would have been entitled at the testator's decease to his personal estate, and who were his next-of-kin or their legal personal representatives.

The Master, by his report, dated the 28th of January 1852, stated that one Giro-

lamo Zener, resident at Venice, had made a claim, alleging himself to be the representative of the next-of-kin living at the time of the decease of the testator, and had carried in a state of facts in support of his claim, and by which, very material facts relating to the family of the testator appeared.

The report of the Master, after setting forth the effect of the evidence before him, and the names of the witnesses, all of whom resided at Venice, stated that it appearing that no further evidence could be obtained, shewing who were the next-of-kin of the testator unless the evidence above referred to should be obtained, and it appearing that the decree could not be further prosecuted without such further evidence, the Master certified that it was necessary that a commission should issue to take evidence in Venice and its neighbourhood in reference to the inquiries.

A motion was now made that in pursuance of the certificate of the Master, a commission might issue to take evidence in Venice and its neighbourhood in reference to the inquiries directed by the decree, and that all the costs, charges, and expenses incident thereto might be borne by the estate of the said D. Dragonetti, and that if necessary it might be referred to the Master to ascertain what would be a proper sum to be allowed for the commission, and that such sum might be raised out of the money forming part of the estate of the testator.

Mr. Stuart and Mr. Elderton appeared for the plaintiffs, and submitted that this commission ought to be granted, since it was impossible otherwise for the trustees to carry out the trusts of the will. It was also urged that the expenses of the commission should be paid out of the testator's estate, and money for the purpose should be advanced, since the claimant was a person in humble life, and was quite unable to provide the expense himself.

Mr. James appeared for the Attorney General, and submitted that it was unnecessary to go to the expense of a commission, as it would be quite sufficient to obtain evidence by communicating with persons in Italy. There had already been a considerable outlay in searching for the testator's relations, and this would mate-

rially diminish the property which, in case of there being no next-of-kin found, would go to a charity.

KINDERSLEY, V.C.—This was an application for a commission to examine witnesses at Venice in a cause for the administration of the estate of a person who was by birth an Italian and a native of Venice, Domenico Dragonetti. He was a musical professor in this country, and had amassed a certain amount of personal property, which he has given first to his next-of-kin, and in his will there is this clause—(His Honour here read the residuary clause in the testator's will).—So the testator intimates very distinctly that he is uncertain whether he has even any, or how many, of his blood living; at all events entirely uncertain whether, if there be any, they will be capable of being ascertained, and quite uncertain as to what relatives they may be; and he clearly directs that the residue of his property shall be held in deposit for the purpose of inquiring whether there be such relatives of his blood. Now, it appears that the decree having made a reference to the Master to inquire what relations he had, the inquiry was in this form: He was to inquire and state to the Court, who, according to the laws in force in the country in which he should find the testator Domenico Dragonetti to have been domiciled, for regulating the succession of estates and effects of persons dying intestate, would have been entitled to his personal estate,—who was or were next-of-kin to the said testator at the time of his death, according to the laws in force in this country for the distribution of intestates' assets, and he was to inquire whether such person or persons were dead, and who were their representatives. So that the purpose of the inquiry was to ascertain what the testator himself had pointed out that it was necessary to ascertain, and he was unable to give any information by his will upon the subject.

It seems that the Master, in the course of last year, certified that a commission was necessary for the purpose of prosecuting this inquiry, and Lord Cranworth made an order for a commission; and upon appeal to the Lord Chancellor he reversed that decision and discharged the order, considering that it was not regu-

lar to grant the order in the then state of circumstances. It did not very distinctly appear what the Lord Chancellor's grounds were, but I think I can see quite ground enough for his having thought that in that state of things there could not be a commission. At that time there was nothing before the Master but a decree containing the reference for inquiry. Now, under a decree directing an inquiry as to certain matters of fact, the Master cannot merely upon that receive evidence upon anything. He must have before him some state of facts, or charge, or claim, brought in by somebody, in support of which, or in opposition to which, he may receive evidence. There must be something before the Master containing an allegation of something, for the Master to receive evidence at all; and that not only as to evidence under a commission directed to persons in a foreign country, but even evidence with reference to persons in this country he cannot receive, until there is some allegation before him upon which he can proceed. There seems to have been no such allegation, no such state of facts, charge, or claim before the Master; but it seems to have been considered that he was directed to inquire whether there was to be a commission, not for the purpose of taking evidence, but for the purpose of inquiry. Now, that alone, I think, would be a ground why it would not be regular in that state of things to grant a commission as the matter then stood in July last. Another ground seems to have been, that there was no particularity as to there being any witnesses who might be able to give any evidence under the commission. I believe another ground existed, though it did not appear very distinctly; that the commission was of a roving kind, that is to say, it was not addressed to any particular locality, but, I believe, addressed to Italy generally, which the Lord Chancellor very properly considered was too roving. There was quite sufficient ground in that state of things for the Lord Chancellor to have thought there ought not to be a commission.

The state of things now, when this application is made, is very different from what it was at that time. It appears, that since the proceedings in July last, a Venetian, a person at least residing in or near

Venice, of the name of Girolamo Zener, has brought before the Master a state of facts and charge, claiming that he is the next-of-kin, or, at least, one of the next-of-kin or blood relations of the testator, and in support of that state of facts produced before the Master various documents sent over from Venice to this country, which, although they do not establish perhaps in the shape of distinct evidence whether this Girolamo Zener is positively the next-of-kin, or one of the next-of-kin, nor establish who are the next-of-kin distinctly and conclusively, certainly do go to shew that there are a number of persons whose names are distinctly set forth, resident in or near Venice, who are capable of giving at least some evidence and information upon the subject of the testator's family, and evidence which may go either to substantiate or defeat the claim of Girolamo Zener who is claiming to be next-of-kin; and not only so, but will also probably tend, whatever may be the result of that particular claim, to do what the testator desired to have done, to have the inquiry made as to who are his blood relations, whether there be any such, and who they are. There is, therefore, now, in the existing state of things, no positive irregularity in granting the commission. The Master certifies, very much indeed in detail, the grounds upon which he considers a commission should go; and it appears clear that the commission would be quite right if it were applied for by Girolamo Zener, the claimant, for the purpose of his claim. The plaintiffs are the representatives of the testator, and they have no interest either in defeating or supporting the claim of Girolamo Zener, or anybody else; but they have a positive duty imposed upon them to do all they can to ascertain whether there are any blood relations or any next-of-kin, and who they are. That duty is imposed upon them by the testator's will, and this Court would be very reluctant to adopt a course, the effect of which must be that this testator's property must remain in this court I do not know till when. I do not know what steps are to be taken except in some way as here proposed. For the purpose of this Court really and truly adjudicating upon the rights of the persons who are entitled to the property, it is necessary to find out who

they are. I have said there would be no irregularity in now granting a commission, if it were upon the application of Girolamo Zener, the claimant himself; nor would there be any irregularity in granting the commission upon the application of the plaintiffs themselves. Supposing the plaintiffs to be in a situation in which they had either an interest or a duty to oppose the claim, they might have a commission for the purpose of examining witnesses to oppose this man's claim: but their position is such that their duty is only to oppose in the sense of taking care that the evidence is distinctly and fully brought out to shew whether the man is or is not next-of-kin, or who may be next-of-kin. There being no irregularity in granting a commission, what presses upon my mind is this:—that it appears to me that the granting of a commission, irrespective of its being a mode of determining whether this man, who now claims, is or is not the next-of-kin;—irrespective of that, it appears to me to be a mode and machinery by which the Court can best, in all probability, work out what the testator directed to have done, that is, to have inquiries instituted, not merely a roving inquiry getting somebody to pick up all the gossip he can get in Venice and its neighbourhood, but by information derived from persons subjected to the test of examination under the solemnity of an oath. It appears to me I ought to grant a commission, first, because it is not irregular to do so, and it may be very serviceable with a view to the specific claim now pending before the Master, and also as a very convenient and a very desirable mode of working out what the testator desired should be worked out, and what this Court would be very desirous to work out, and which it is the duty of this Court for this purpose to work out. For these reasons, I think it right to grant this commission.

It is true, as was urged by the counsel for the Attorney General, it may be that the result of this commission may be to defeat the claimant Girolamo Zener. It may defeat his claim, and if it were merely to result in that, the observation of counsel would be very just—"Why should the testator's estate be wasted by an individual claim which may turn out to be no claim

at all. But being satisfied as I am that the tendency at least, if not the certain result, of the commission will be to get inquiries effectively prosecuted upon the subject of the testator's relations, for that reason it appears to me that it will not be a waste of the testator's estate, even though the particular claim should fail, whatever should be the result of the claim.

Then comes the question, what ought to be done with reference to that part of the application which asks that a certain sum out of the testator's estate, now in court, should be delivered out for the purpose of working this commission? What is asked is a reference to the Master to ascertain what would be a proper sum; but it has occurred to me that, without the expense of going back to the Master, I could be satisfied by reasonable evidence of some persons competent to judge of the matter, of what would be required upon an economical scale fairly to work the commission without extravagance. For that purpose I should like to know how it is intended to work the commission. Its effectiveness would depend very much upon the mode in which, and the persons by whom, it is worked.

Upon a subsequent application to the Court an affidavit was produced, shewing in what manner it was proposed to work the commission, and what sum would be required for the purpose.

KINDERSLEY, V.C. made an order in conformity with the affidavit, and directed the money to be raised and paid out of the testator's estate.

KINDERSLEY, V.C. }	HAWKINS v.
May 27 ;	GATHERCOLE.
July 2.	

Advowson — Charge — Contempt — Receiver.

A judgment having been entered up against a beneficed clergyman for a debt, the Court held that it was a charge upon the benefice, and that the creditor was entitled to have a receiver of the profits of the benefice appointed. Another creditor of the clergyman obtained judgment upon his debt, and

issued a writ of sequestration directed to the receiver already appointed:—Held, upon motion to commit the second creditor for contempt, that upon his undertaking to deal with the tithes as the Court should direct, and pay the costs of the motion, no order should be made.

This case came before Lord Cranworth in November 1850, and is reported 20 *Law J. Rep.* (N.S.) Chanc. 59; s. c. 1 Sim. N.S. 63.

The defendant, being a clergyman, and the owner of the advowson of the vicarage and parish church of Chatteris Nuns, mortgaged his advowson to the plaintiff, Mr. Hawkins, for 25,000*l.*, and as a further security for the principal and interest, gave a warrant of attorney for the same amount, upon which judgment was entered up. Shortly afterwards the defendant presented himself to the living. The interest upon the debt having become greatly in arrear, the plaintiff issued a writ of sequestration for the arrears of interest, and filed his bill for a receiver. The Court decided that under the 13th section of the statute 1 & 2 Vict. c. 110. the judgment was a valid charge upon the living; and that the plaintiff having a legal right as against the profits of the living was entitled to make it available in equity, by having a receiver appointed. In pursuance of this decision, Mr. Burder was appointed receiver of the tithes and profits of the living of Chatteris Nuns. In April last, another judgment was recovered in the Court of Queen's Bench against the defendant, by J. S. Carrick, for the sum of 3,000*l.* and costs, and a writ of *testatum fieri facias* was issued, directed to the Sheriff of Cambridgeshire, indorsed to levy 1,254*l.* The sheriff returned that the defendant, Mr. Gathercole, had no goods in the bailiwick, but was vicar of the parish and parish church of Chatteris Nuns, having no lay fees. A writ of *sequestrari facias* was then directed to issue out of the Court of Queen's Bench, at the suit of Carrick against Mr. Gathercole, directed to the Bishop of Ely, commanding him to enter the vicarage of Chatteris Nuns, and take and sequester the same until he should have levied the said sum of 3,000*l.* and costs. A writ was accordingly issued,

directing Mr. Burder, who was appointed the receiver in the original suit, to levy and receive the rents, tithes, oblations, fruits, issues and profits of the vicarage of Chatteris Nuns, and all the ecclesiastical goods belonging to the vicarage, or to the said M. A. Gathercole as vicar thereof, and out of the said profits and emoluments (if need be) to cause the cure of the said church to be duly served, and all other duties, charges, repairs, &c. to be done, and to pay the surplus in such manner as the said Bishop should direct.

A supplemental bill was then filed for the purpose of making Mr. Carrick a party to the original suit, and a notice of motion was now given to commit Carrick for contempt, in causing the sequestration to be issued.

Mr. Stuart and Mr. Sydney Smith, in support of the motion, referred to the previous report of this case.—The proceedings already taken by Mr. Hawkins were well known to Mr. Carrick, who nevertheless commenced proceedings in the common law court, and obtained a judgment against the defendant. A writ was issued, to which there was a return of *nulla bona*, and that there were no lay fees. The effect of the order of Lord Cranworth was to bring all the profits of the living into court, in order that they might be held for the benefit of all those creditors who were properly entitled. The effect of the sequestration issued by Mr. Carrick would be to give him a priority over the other creditors—*Russell v. the East Anglian Railways Company* (1).

Mr. Malins and Mr. Shebbeare, for Mr. Carrick.—The proceedings at law and the publication of the writ were adopted in order to give Mr. Carrick a *locus standi*, so as to have his rights adjudicated upon, and so that Mr. Hawkins should not have the whole money, 24,500*l.*, to himself. The writ had not been executed so as to interfere with the receiver. Mr. Carrick only wanted to stand on an equal footing with the other creditors, and he considered that the course he had pursued was the best method of doing so. He was also desirous that the propriety of Lord Cranworth's

decision should be ascertained. Mr. Carrick could not be bound by an order made in a suit to which he was not a party. He was desirous of disputing the validity of the receiver's appointment by appeal from Lord Cranworth's decision.

Mr. S. Smith, in reply.

Judgment reserved.

July 2.—KINDERSLEY, V.C.—This case came before me in this way:—a motion was made by Mr. Hawkins, the plaintiff, to commit one of the defendants, named Carrick, for contempt of court in having interfered with the possession of the receiver appointed by this Court. It appears that the plaintiff Hawkins, being a creditor of the first defendant, who is a clergyman, filed a bill against him, and got a receiver appointed. It is unnecessary to enter into the particular circumstances under which Hawkins proceeded; it is sufficient to say that Lord Cranworth determined that Hawkins was entitled to have a receiver appointed of the profits of the living of which Mr. Gathercole was the incumbent. Mr. Burder was appointed the receiver, and is still such. Mr. Carrick, another creditor of Mr. Gathercole, having recovered judgment against him for his debt, and sued out execution upon such judgment, and the sheriff having returned *nulla bona*, the defendant being a clergyman, the usual sequestration was issued by the Court of Queen's Bench, which is addressed to the Bishop, as a substitute for the sheriff, sometimes called the ecclesiastical sheriff, directing him to sequester the living of Mr. Gathercole, which was in his diocese of Ely. The sequestration was addressed to the Bishop of Ely in the usual course, and he was thereby authorized to sequester the living. The same gentleman was appointed sequestrator who is also the receiver, and the Bishop issues his sequestration; and in pursuance of the ordinary course, the sequestration is published by affixing it on the doors of the church in the living of which the defendant is incumbent. The effect of that sequestration is, that the Bishop, by the terms of it, authorizes, as far as by law he may, the sequestration of all and every the rents, tithes, profits, and other ecclesiastical goods, &c.

(1) 20 Law J. Rep. (N.S.) Chanc. 257.

belonging to the vicarage of Chatteris Nuns. The effect of this sequestration was, that the sequestrator is directed by an authority which he is bound to obey, and which he dare not disobey, to collect the profits, &c. and apply the same for the benefit of the creditors, after the other ends have been answered, and the directions contained in the order complied with. The question now is, whether the act done by Mr. Carrick in procuring the sequestration to issue amounts to an interference with the possession of the receiver.

Mr. Carrick has done nothing more than in the ordinary course of legal process he is entitled to do by virtue of the judgment; but it is equally clear that when this Court has appointed a receiver, it will not allow the possession of that receiver to be disturbed by any one, however good his right may be; but the party conceiving that he has a right paramount to that of the receiver must, before he can presume to take any step, apply to this Court for leave to assert his right against the receiver. This is not an arbitrary rule, not a rule of tyranny, but one that is absolutely necessary, because it would be impossible for the Court otherwise to administer justice; for this Court will always take care to have justice done, and give any one who has a paramount right to the receiver, the means of asserting that right. The question is not whether Mr. Carrick in the abstract had a right to issue the sequestration,—most unquestionably he had,—but whether he has done anything without the leave of this Court which has disturbed the possession of the receiver. It was argued that it was true all this has been done, the sequestration issued, &c., but no disturbance has yet taken place; “wait and see whether the sequestrator does interfere with the possession of the receiver—whether he does collect and receive the rents and profits of the living so as to prevent the receiver from getting them in.” If that argument was a good one, the same rule would authorize an ejectment to be brought against the receiver; for it might be said “until execution is actually taken out, there is no disturbance of the receiver.” Now, it was clear that the Court would not allow a first step to be taken without its authority. It appears to me that the act

which has been done does amount to a disturbance of the possession of the receiver. See how the matter stands. Any tithe-payer or any person liable to pay any of the dues of the living is in this predicament,—there might be a demand made by both parties, the sequestrator and the receiver. It is quite clear that the moment the sequestrator appointed by the Bishop does anything in the performance of his duty, he disturbs the possession of the receiver, and that is a step which it appears to me the Court will not permit. Mr. Carrick ought, before he issued the sequestration (being entitled to obtain the judgment), to have come to this Court stating the facts, and asking leave to do it. I think the Court would have allowed him to do what he has done, but upon terms. For this reason, it was necessary to give Mr. Carrick the position as between him and his debtor which he holds between himself and the other creditors. If the application had been made stating the fact of *nulla bona* being returned by the sheriff, the Court would then have allowed him to issue the writ upon the terms of undertaking to use the writ entirely in submission to the direction of this Court, and that the sequestrator should not receive the profits, &c. without the leave of the Court. It was represented, on the part of Mr. Carrick, that it was necessary to do what he did; and it was justly said that Mr. Carrick, by the very act of appointing the same person sequestrator as was previously appointed receiver, has indicated that he had no desire to interfere with the possession of the receiver, and had no wish to take the rents and issues of the living, but only that the receiver, being the same person as the sequestrator, should receive them.

I have not the smallest doubt that Mr. Carrick will now give the same undertaking as, had he applied to the Court before he had caused sequestration to issue, the Court would have required him to give before he would have been permitted to do so; but as he has done this without the leave of the Court, and thereby justified Mr. Hawkins, the plaintiff, in making this application to protect the receiver, Mr. Carrick must pay the costs of this application; and upon doing that

and submitting to deal with the writ of sequestration in such manner as the Court shall from time to time direct, and undertaking that the sequestrator shall not receive any portion of the rents of the living, I make no further order on this motion.

PARKER, V.C. }
July 3. } *In re STABLES.*

Infant—Allowance to Parents out of Infant's Income.

The Court will not give a direct benefit out of an infant's income to his father.

A scheme by which an infant (whose father was living) was to be articted to a solicitor, and to live with an uncle residing in the same place, was approved of by the Court; and the uncle was appointed to act in the nature of a guardian to the infant, and to have an allowance out of his income. An application that an allowance might be made to the father, who lived at a distance, and was in very narrow circumstances, was refused.

This was a petition presented by an infant.

This petition stated that the infant, then seventeen years of age, was absolutely entitled to property which produced about 220*l.* a-year, that it was proposed that he should be at once articted to a solicitor named in the petition, who was willing to take him, and that he should, during his minority, reside with an uncle who lived in the same place as the solicitor.

The petition then contained these statements:—The father of the infant was living. He was a clergyman of the Church of England, but had no preferment, and was not entitled to any property whatever, and his only means of subsistence were the emoluments derived from teaching a village school, which amounted to no more than 20*l.* a-year. The father's residence was at a distance from the town where it was proposed the infant should be articted.

The petition then stated that it was proposed that the infant's uncle should be appointed to act in the nature of a guardian to him, and that an allowance of 90*l.* a-year should be paid to him for the in-

fant's benefit, and that the father was willing that the above arrangement should be carried out, and that he did not wish to interfere with the infant in any way. The petition then stated that, under the circumstances of the case, it was proposed that an allowance of 20*l.* a-year should be paid to the father out of the infant's income not required for his maintenance. The petition prayed that the above scheme might be carried out, and that the uncle might be appointed to act in the nature of a guardian to the infant, and that the above-mentioned allowance should be paid to him for the infant's benefit, and that 20*l.* a-year might be paid to the father.

Mr. B. L. Chapman, for the petition, asked that the above-mentioned allowance of 20*l.* a-year should be paid to the father out of the income of the infant on the authority of the cases of *Heysham v. Heysham* (1) and *Allen v. Coster* (2). In *Heysham v. Heysham* the father of a female infant was dead, and her mother was living. The Court had passed over the mother and appointed another person to be the guardian of the infant. An order was made that 130*l.* should be paid to the guardian for the maintenance of the infant, and that 120*l.*, part of the infant's income, should be paid directly to the mother. In *Allen v. Coster* the principle of making an allowance to a parent directly, where the guardianship of the infant was in other hands, was recognized by Lord Langdale; though, as it was there contended that there was a gift to the father of the income, the point was not expressly decided.

PARKER, V.C. said, that in the case of *Heysham v. Heysham* a benefit was given to the mother. A father was bound to maintain his children, and he thought that he could not make an order giving him a direct benefit out of the income of the infant's property. In *Allen v. Coster* there was a sort of compromise. He must decline to make any order as to that part of the prayer of the petition which asked for an allowance to the father.

(1) 1 Cox, 179.

(2) 1 Beav. 202; *s.c.* 9 Law J. Rep. (N.S.) Chanc. 131.

PARKER, V.C. }
 1851. } *Ex parte* THE MAYOR,
 Dec. 20. } ALDERMEN AND CITIZENS
 1852. } OF LINCOLN.
 July 3. }

Charity—Scheme—Protection of the Interests of a large Body of Persons in a Matter before the Court.

A railway company took, for the purposes of their act, a piece of land belonging to the corporation of L., but over which the freemen of L. had certain rights. By one of the railway acts of the company it was enacted that, out of the purchase-money, the costs of the corporation should be paid, and that such a sum should be appropriated for the corporation as the Court of Chancery should, on the application of the corporation, direct, and that the residue should be applied for the permanent benefit of the freemen as the Court of Chancery should, on the same application, direct, and that notice of such application should be fixed on the door of the town hall. On an application by petition by the corporation of L. for a scheme,—Held, that the freemen of L. ought to be represented at the hearing.

In 1847 the Great Northern Railway Company took possession, for the purposes of their act, of certain lands in Lincoln, belonging to the corporation of Lincoln, but over which the freemen of Lincoln had certain rights of pasturage.

By the 14 & 15 Vict. c. cxiv., one of the Great Northern Railway Acts, it was enacted that it should be lawful for the mayor, aldermen and citizens of the city of Lincoln to convey the above-mentioned land to the company, free from the rights of pasturage thereon, and that, out of the purchase-money, certain costs and expenses of the corporation relating to the sale should be paid, and that such sum should be appropriated to the said mayor, aldermen and citizens as the Court of Chancery, by any order to be made in the matter of the act, and *ex parte* the mayor, aldermen and citizens of Lincoln, upon the application of the said mayor, aldermen and citizens, should order and direct, and that the residue should be applied for the permanent benefit of the freemen of Lincoln as the Court should by any order to be

made in the same matter, and *ex parte* the corporation, upon such application as aforesaid, order and direct. To this the proviso following was added—"Provided, nevertheless, that seven days' notice of every such application as aforesaid, so to be made by the said mayor, aldermen and citizens, shall be given by affixing the same on the outer door of the town hall of the said city."

A petition was presented by the corporation of Lincoln, praying for a reference to the Master as to the application of the purchase-money and a scheme for the benefit of the freemen.

A notice had been placed on the door of the town hall in Lincoln, as required by the act, but none of the freemen had been served, and no one appeared on the petition on their behalf.

Mr. Baggallay, for the petition.

PARKER, V.C. said, that he thought that any interest that was to be protected ought to be protected properly. It did not appear that the freemen had appointed any committee to contract with the company for the sale. He thought that he could not make an order of reference to the Master as the matter then stood. The number of freemen being large, he considered that this was a case in which the Court should treat any *bond fide* selection as representing the whole. Without hearing the freemen upon the question, he did not see what directions could be given to the Master, nor how the proportion of the fund to go to the corporation could be determined. He desired that so many of the freemen should be served as would give a certainty that the body was fairly represented, and directed that the petition should stand over.

The freemen of Lincoln afterwards had a meeting to take the above matters into consideration, at which they appointed a committee to look after their interests. By the direction of the committee, counsel appeared for the freemen, and a sum was appropriated for their benefit, and a scheme was approved of by the Master. On the coming on of a petition for the confirmation of the Master's report,

Mr. Hallett, for the freemen, asked for

their costs, and referred to the 80th section of the Lands Clauses Consolidation Act.

PARKER, V.C. said, that the case as to the freemen's costs did not come within the Lands Clauses Consolidation Act, but must be decided on the act directing the application of the purchase-money. In that act there was a particular mention of the costs of the corporation, and in the absence of any notice as to the costs of the freemen, he thought that he could not give them.

After some further discussion,—

His HONOUR said, that, upon evidence being produced of a resolution passed at a public meeting of the freemen that the costs should be paid out of the income of the fund appropriated for their benefit, he would make an order accordingly.

KINDERSLEY, }
V.C. } LONGSTAFF v. RENNISON.
May 24, 31. }

*Promissory Note—Debt or Legacy—
Mortmain—Power to call in Common Law
Judge.*

A testatrix directed her executors to pay the debt which she owed to two persons named, and for the security of the payment of which she had given her promissory note. The promissory note was voluntary:—Held, that whether this was a good debt or whether it was a legacy was a question for a court of law, and that it was not a case in which the Court could call in the assistance of a common law Judge under the statute 14 & 15 Vict. c. 83. s. 8.

The testatrix gave the residue of her estate to her trustees to be applied towards establishing a school:—Held, that this gift was void under the Statute of Mortmain.

This case came on upon exceptions to the Master's report, the object of the parties being to have certain questions arising upon the will of Margaret Clay decided by the Court. The testatrix, Margaret Clay, by her will, dated the 8th of March 1844, directed the debt of 350*l.* and interest which she owed to the Rev. John Carrick

and the Rev. George Sample, and for the security of the payment of which she had given them her promissory note payable to them or their order on demand, and all other her just debts and funeral and testamentary expenses to be paid by her executors; and the testatrix, after giving her real and personal estate to her trustees, J. Rennison and M. Roplewell, upon certain trusts therein mentioned, continued in the following words:—"And as to all the rest, residue and remainder of my said trust estate, monies, chattels and premises, after payment of the before-mentioned legacies, debts, funeral and testamentary expenses, and the expenses of proving and carrying into execution the trusts of this my will, and all the expenses incident thereto respectively, I will, bequeath, and direct my said trustees and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, to pay and apply the same towards establishing a school in connexion with the Baptist Chapel at North Shields for the time being, and to pay the same over to the treasurer for the time being of such school, now or hereafter to be built, whose receipt shall be a good and sufficient discharge for the same to my said trustees."

The suit was instituted for the administration of the will; and upon a reference to the Master, he found that the promissory note alluded to by the testatrix was dated the same day as her will; and that she had handed the note over to her trustee Rennison to be given to Messrs. Carrick and Sample. She had also told Mr. Rennison that she wished the proceeds of the note to be applied for the use of the Baptist Chapel at Tynemouth, but she desired that Messrs. Carrick and Sample might not be informed of her wishes until after her death. The promissory note was given to Mr. Carrick about four months after the date of the will; but Mr. Rennison did not communicate the wishes of the testatrix respecting its application until after her death. The Master, under these circumstances, found that the note was made voluntarily; that there was no debt owing by the testatrix to Messrs. Carrick and Sample, but that the amount thereof was intended as a legacy to them; that at the date of the testatrix's will there was no school in connexion with

the Baptist Chapel at North Shields, nor was there any such school now existing, nor had any land been purchased as a site for building a school.

Mr. Kenyon Parker and *Mr. Hislop Clarke*, for the plaintiff, who was the heir-at-law and one of the next-of-kin of the testatrix, said,—the first question was, whether the direction to pay the 350*l.* was in satisfaction of a debt, or whether, if there was no debt, it was good as a legacy to that amount; and the other question was, whether the gift for establishing a school was not void under the Statute of Mortmain, on the ground that it was impossible to establish a school without purchasing land upon which the school should be built. The testatrix distinctly treated this as a debt; but if it were a legacy it was given upon a secret trust, and that trust was void—

Briggs v. Penny, *ante*, p. 265.

Mather v. Scott, 2 Keen, 172; s. c. 6 Law J. Rep. (N.S.) Chanc. 300.

Trye v. the Corporation of Gloucester, 14 Beav. 173; s. c. *ante*, p. 81.

Blandford v. Thackerell, 2 Ves. jun. 238.

Mr. Lee, for the executor, submitted that a legacy for establishing a school was not void under the Statute of Mortmain. There was no reason why a school should not be established in a house rented for the occasion, or in the chapel itself, a plan which was commonly adopted by all classes of dissenters.

The Attorney General v. Williams, 2 Cox, 387; 4 Bro. C.C. 526.

The Attorney General v. Stepney, 10 Ves. 22.

Mr. Smythe appeared for Messrs. Carrick and Sample, and contended that this was a debt, and ought to be paid before the legatees of the testatrix. It was a debt, though there was no valuable consideration appearing upon the transaction.

Mr. James appeared for the Attorney General.

Mr. K. Parker, in reply.

KINDERSLEY, V.C.—If the effect of the Master's report is, that this is found to be

a legacy properly payable to these gentlemen, or the survivor of them, there can be no question about the matter; but, if it is to be treated as undecided, then the question arises whether it is a debt. Now, upon that point, in strict propriety, I ought to send the case to a court of common law, and I do not see how I can escape it, the question being whether, upon the death of the testatrix, the sum of 350*l.* was due from her to Messrs. Carrick and Sample. If there was no debt at her death it could not become one afterwards, nor could the will make it so; therefore, the question is, whether at the death of the testatrix any debt was owing by her, and it is, I think, doubtful how a court of law would deal with this question. It is not as if there were a number of decided cases from which I could draw a clear conclusion as to what a court of law would decide, but it seems to me an open question, and such a question as a Judge in equity cannot take upon himself to decide.

As to the other point, with respect to the residue, there is no doubt that as regards any part of it which consists of realty, or savours of the realty, so far the devise is void; and then comes the question as to the pure personalty, whether that is well given to the charitable purpose mentioned. The question is, whether it is void on the ground that in the execution of that trust there would be a necessity for the purchase of real estate for the site of the school. In *The Attorney General v. Williams* there was no gift of the *corpus* of the fund to establish a school, but a direction to pay out of the dividends a sum of money to the master, and to apply the surplus in a different way, so that in the due execution of that trust there could be no application of the dividends in the purchase of land. But in the case before me the *corpus* of the fund is given upon trust to pay and apply the same towards establishing a school. Now, it is true that a school might be established without buying land; but the question is, would it not be a due execution of this trust to apply this fund in buying land and building a school-house? It clearly would be. I do not say it is a necessary inference; but, there being no existing school, it would be a due performance of the trust to buy land and build a

school. Taking it altogether, it appears to me a case in which, though it might be possible, if there were an existing school to apply this fund towards the establishment of the school, yet, there being no school, the direction to apply the money in this manner is void. I think this is a case within the purview of the Mortmain Statutes, and I ought to hold the gift of the residue, as applicable to pure personalty, to be void.

An application was then made by Mr. Smythe, in which all the parties concurred, that the Vice Chancellor would call in the assistance of a common law Judge to decide this case, in order that the expense of sending it to law might be avoided—the amount of property in dispute being very small. It was submitted that the Court had power to take this course under the 8th section of the statute 14 & 15 Vict. c. 83, the act appointing the Lords Justices, which enacted, that “it shall be lawful for the said Court of Appeal and the Master of the Rolls, and the Vice Chancellors, and for each of the said jurisdictions, to sit, with the assistance of any Judge of either of Her Majesty’s Courts of Common Law at Westminster, upon the request of the Lord Chancellor, if any such common law Judge shall find it convenient to attend upon such request.”

KINDERSLEY, V.C. said, — that there might be cases involving points with respect to which the assistance of a common law Judge would be very valuable, but he did not think that this clause applied to a case where the whole decision depended upon a point of law. Before the act referred to, the Lord Chancellor had power to ask any of the Judges to assist him, but that never was held to supersede the practice of sending cases to common law where there was a dry point of law to be decided. Assuming, however, that there was such a power, he did not think this was a case for the exercise of it. It was clear that, when the opinion of a Court of common law upon a case like this was required, it was of great importance to have the case argued before four Judges and by common law counsel. Under these circumstances, he should decline to call in the assistance of a Judge;

but, as it was probable the state of the assets would be such as to render the argument useless, and, as he felt clear that this was not a legacy, if it was a debt, but as it might be that the same parties would be entitled in either case, he would consider the point; for if he came to the opinion that it was a legacy, the question as to whether it was a debt would perhaps be immaterial.

Judgment reserved.

May 31.—KINDERSLEY, V.C. — In this case I was anxious to see whether I could save the parties the expense and delay of going to law. The testatrix, Mrs. Clay, on the same day that she made her will, executed a promissory note for 350*l.*, by which she promised to pay to two persons 350*l.*, together with interest, for value received, and that was without consideration, voluntary; and she did not on that day deliver the bill to the payees, but to her solicitor. Then Mr. Rennison proves that he was directed by the testatrix to get the note from the solicitor and hand it over to the payees, and she communicated to Mr. Rennison what her intention was about the property, and the object of the trust was to be communicated to the trustees. So Mr. Rennison did deliver over the promissory note to Carrick and Sample. Then, on the same day on which she executed the note she made her will, and referred to the note in this way—“I order and direct particularly the debt of 350*l.* and interest which I owe to the Rev. J. Carrick and the Rev. G. Sample, and for the security of the payment of which I have given them my promissory note, payable to them on demand, and all other my just debts and funeral and testamentary expenses to be paid by my executors hereinafter mentioned.” So she treats this as being a debt, and she directs the debt and all other debts to be paid by her executors. Now, the Master has reported that in his opinion this is good as a legacy, at the same time submitting the matter to the opinion of the Court. It appeared questionable whether on the authorities, and whether on a trial at law the Court would decide it was a legal debt. I have formed no opinion of that; but, at all events, it was questionable: so my determination was to send

the case to law to have the question tried, whether it was a debt; but considering that if it was not valid as a debt, it would be as a legacy, and as it is immaterial whether it be a legacy or debt, and as the only way in which it could make any difference would be upon the subject of legacy duty, and as the legatees are willing to take it as a legacy and to pay the duty, and as they are also willing to take it without having priority over any other legacies, I may, I think, under these circumstances, affirm the Master's report and decide that it is a legacy. It will then be subject to legacy duty and will not be prior to other legacies, and I ought to declare that the amount is due as a legacy on the trusts declared by the testatrix, that is, subject to the secret trusts. The effect of doing it in this way will be, to leave the parties unfettered, in case they wish to take the opinion of another Court. Under this declaration, so much as consists of real estate will go to the heir, but so much as consists of personal estate will go to the trustees.

KINDERSLEY, V.C. }
 March 27; } WEBB v. WOOLLS.
 April 26. }

Will—Precatory Words—Absolute Bequest—Trust and Confidence.

A testator, by his will, bequeathed all his property of whatsoever description to his wife, her executors, administrators and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her, that she would dispose of the same to and for the joint benefit of herself and his children:—Held, that the widow of the testator was entitled to have the entire residuary property transferred and paid to her for her own use and benefit.

This was a claim filed by the plaintiff, Jane Webb, who was the executrix appointed under the will of her husband, Richard Webb, against Edward Woolls, who was the executor appointed by the will jointly with the plaintiff, and against the children of the testator, for the purpose of having an account taken of the estate and effects of the testator which had been received by the defendant, E. Woolls.

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The claim now came on upon further directions, and a question was raised as to the construction of the will of R. Webb, dated the 4th of June 1836, which was in the following words:—"This is the last will and testament of me, Richard Webb, miller. All my property of whatsoever description, whether in possession, reversion, remainder, or expectancy, or which I may be possessed of at the time of my death, I give and bequeath the same and every part thereof unto my dear wife Jane, her executors, administrators and assigns to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her, that she will dispose of the same for the joint benefit of herself and my children. And I hereby appoint my said wife and my friend Edward Woolls executrix and executor of this my will and testament, hereby revoking all previous testamentary papers at any time heretofore made by me."

The question was, whether the widow of the testator was entitled absolutely to the property bequeathed by the above will, or whether a trust was created for the benefit of her children.

Mr. Shapter appeared for the plaintiff.

Mr. Beavan, for the defendant, Edward Woolls; and

Mr. Murray, for the other defendants.

Cases cited:—

Crockett v. Crockett, 1 Hare, 451; 5 Hare, 326; 2 Ph. 553; s. c. 11 Law J. Rep. (N.S.) Chanc. 279; 16 Law J. Rep. (N.S.) Chanc. 214.

Woods v. Woods, 1 Myl. & Cr. 401; s. c. 17 Law J. Rep. (N.S.) Chanc. 426.

Raikes v. Ward, 1 Hare, 445; s. c. 11 Law J. Rep. (N.S.) Chanc. 276.

Cooper v. Thornton, 3 Bro. C.C. 96, 186.

Robinson v. Tickell, 8 Ves. 142.

Wood v. Wood, 3 Hare, 65.

KINDERSLEY, V.C.—This is one of a class of cases which are extremely difficult to arrive at a conclusion upon. It is one of those cases in which a gift being made to the parent, by the words of the will, a question is raised as to whether

a trust is created for the benefit of the children or family of that legatee. In the present case the words of the will are short, and certainly very distinct; and I have not been able to find any case, or rather, any decided case, which appears to me entirely to govern the present. The words of the will are these, "This is the last will and testament of me, Richard Webb. All my property of whatsoever description, whether in possession, reversion, remainder, or expectancy, or which I may be possessed of at the time of my death, I give and bequeath the same and every part thereof unto my dear wife Jane, her executors, administrators and assigns to and for her and their own use and benefit." Now, if it stopped there, of course there would be no question, because it is not only a gift to the wife, her executors, administrators and assigns, but it goes on to declare that the party or parties who are to benefit by that gift are the wife, her executors, administrators, and assigns. It is a gift to her of the legal interest, and an express gift to her of the whole beneficial interest. If she is alive when the property is realized it would go to her; if she had died before the property was realized, it would go to her executors and administrators for their own use and benefit, of course, as part of her estate; and if she had made an assignment of it, then to her assigns for the use and benefit of those assigns. And nothing can be more express and distinct than the testator's intention, that the whole beneficial interest should belong, in fact, to the wife, or to those claiming under her, either as her executors or administrators, or as her assigns. And, then, I may observe that if that be so, if in the words which follow there is anything that imports that there is to be a benefit for some parties other than the wife, her executors, administrators and assigns, such words would necessarily be in direct contradiction to the language which I have just read. Now the words which follow are these, "Upon the fullest trust and confidence reposed in her, that she will dispose of the same for the joint benefit of herself and my children; and I hereby appoint my said wife and my friend Edward Woolls, of Uxbridge, executrix and executor of this my last will

and testament, hereby revoking all previous testamentary papers heretofore made by me." That is the whole of the will. Now, the question is, whether that last clause,—“upon the fullest trust and confidence reposed in her, that she shall dispose of the same for the joint benefit of herself and my children,”—creates a trust for the benefit of the widow and her children, contradicting an express direction in a prior part of the will, that the gift is to the wife for her own use and benefit.

Now, one rule of construction, which is quite elementary, appears to me to be applicable to this case, which is this,—that if there be two clauses or sentences, or branches of a sentence, in a will capable of two different constructions, according to one of which constructions the two sentences or branches of a sentence would contradict each other, but according to the other construction, the two clauses or sentences, or branches of a sentence, would be in accordance with each other, carrying no contradiction with them, you should adopt that construction which would make the two clauses agree, instead of putting a construction upon them which would make them contradict each other. Now, here we have not only two sentences, but two parts of the same sentence. If I am to put upon the latter branch of the sentence a construction the effect of which would be to create a trust, that is, a trust which might be enforced in this court for the benefit of the children as well as the wife,—if, I say, I put that construction, I make these two branches of the same sentence directly contradict each other. Now, is there any construction which I can put on that last branch which will prevent that contradiction? I think there is. I think I may fairly put this construction on the latter clause,—that the latter clause was intended, not for the purpose of creating a trust for the benefit of the wife and children, which the children could enforce against the wife, but simply for the purpose of declaring that in giving all his property to his wife for her own use and benefit, making her the absolute mistress of the property, and of the mode of disposing of it, all he meant to do by the latter clause was to express that he reposes in his wife full confidence

that she will dispose of it for the joint benefit of herself and her children, without intending to impose upon her the obligation to do so.

Now, in looking through all the cases (and I think I have examined them all), those that were cited, and those that were subsequently handed up,—and there is a note of several others in those,—I have not been able to find any case which is in all respects the same as this. The nearest case to it I think, or one of the nearest cases to it, is that of *Crockett v. Crockett* in 1 *Hare*, and again in another stage of the cause in 5 *Hare*, and then upon appeal, in 2 *Ph*. Now, in that case the language of the will was this, “My desire is, that all and every part of my property shall be at the disposal of my most true and lawful wife Caroline Crockett:” of course, if it stopped there, there would be no doubt, since giving the property to be at her disposal would be to give it to herself absolutely. Then it goes on to say, “for herself and her children, in the event of any unforeseen accident happening to myself, which God forbid, and I recommend the arrangement of all my affairs to my friend J. Gore.” Now, the wide difference between that case and the present is this, that there is not in *Crockett v. Crockett* as in this case, first of all a gift to the wife, her executors, administrators and assigns, to and for her and their own use and benefit; there is simply a direction that the property shall be at the disposal of the wife for herself and children. In that case the Vice Chancellor Wigram held that the wife and children took as joint tenants, and one of the children, who had attained twenty-one, having applied for his share on that footing, Vice Chancellor Wigram gave him an equal share with the wife and the other children. When it came by way of appeal before Lord Cottenham, Lord Cottenham reversed that decision. He reversed the declaration which Vice Chancellor Wigram had made,—that the wife and the children took as joint tenants, and reversed the direction to pay an equal share to the child who had come of age, but he declined to decide what the rights of the parties were. He said that no doubt the wife had a personal interest in the fund, and that as between herself and her children she was,

as he said, either a trustee with a large discretion as to the application of the fund, or she had a power in favour of her children, subject to a life interest in herself. And having stated that one or other of those two was the right construction His Lordship there left it, and I cannot help thinking, left it there on account of the enormous difficulty in saying which of those two was the right construction. His Lordship gave reasons why he thought it not necessary to decide it, but the fund was in consequence left in court, and the dividends had been previously ordered to be paid to the wife by Vice Chancellor Wigram. Lord Cottenham continued that, and therefore there remained in court the fund, the wife receiving the dividends without any direction how to apply them: there was no declaration of any interest or trust for the benefit of the children; but it was left in this uncertain way, either it was a trust with a large discretion in the trustee, or if it was not that, then it was a life estate in the wife with a power of appointment to the children, such either as were then living, or such as might be living at her death. Very little instruction is to be gained from that case; but even if it had been fully decided, it does not appear to me to touch the present case for the reason I have mentioned, that in the present case the testator sets out by declaring and directing—and by declaring and directing in the very same sentence (for the whole will is but one sentence)—that the gift to his wife in the first instance is a gift to and for the use and benefit of herself and her executors, administrators and assigns. Now, there is no such clause in the will in *Crockett v. Crockett*: it is only a direction that the property should be at the disposal of the wife for herself and her children.

There is another case of *Wood v. Wood* which has a little bearing upon this, but not sufficient bearing to make it necessary to refer to the case more specifically. But another case decided by Vice Chancellor Wigram is somewhat like the present, or rather I should say somewhat like *Crockett v. Crockett*,—the case of *Raikes v. Ward*. The language in the will in that case was this: “I give to my dear wife Marianne all my personal estate, to the intent that she may dispose of the same for the benefit

of herself and our children, in such manner as she may deem most advantageous." Now, the difference between that case and the present is this, that although there is a gift in the first instance to the wife, so far from there being any declaration that that gift is for the use and benefit of the wife, as there is in the present case, it is a gift to her expressly to the intent that she may dispose of the same "for the benefit of herself and our children in such manner as she may deem most advantageous." Now, in that case the Vice Chancellor Wigram gave his opinion that there was a trust, but that the Court would not deprive the widow of the honest exercise of the discretion which the testator had vested in her. It will be observed that in that will there are express directions that the wife is to have a discretion as to what she considers the best mode of disposing of the property for herself and children; and therefore, though there was no decree, because the matter was necessarily referred to the Master to take the accounts, the Vice Chancellor expressed his opinion—I think a very just and sound opinion—that there was a trust there, and that there was by the express terms of the will a discretion to be exercised by the wife, which, if honestly exercised, the Court could not interfere with.

These two cases of *Crockett v. Crockett* and *Raikes v. Ward* appear to me the two cases which most nearly approach the present. At the same time, neither the one nor the other appears to me to govern the case now before me; I think that I must declare that the wife is entitled to have the whole residuary personal estate transferred and paid to her for her own use and benefit, and decree accordingly. By that means it appears to me that I am making a declaration which expresses her right almost in the very terms of the will; at the same time I shall be directing that the property be handed over to her, to be dealt with by her as she thinks fit, as any other property which is to be for her own use and benefit.

And I may observe, that there are two cases which, though not governing the present, might possibly help to shew that I should be right in so deciding. I refer to the cases of *Cooper v. Thornton* and

Robinson v. Tickell. In *Cooper v. Thornton*, the testator, by his will, gave "to Thomas Cooper 100*l.* to be equally divided between himself and his family;" and after the death of Thomas Cooper, and of the executor who had paid the 100*l.* to Thomas Cooper, the children filed a bill against the surviving executor, who was the widow of the testator, and also, I think, the residuary legatee of the testator, calling on her to pay them the 100*l.* Lord Alvanley decided that the 100*l.* was rightly paid to Thomas Cooper, upon the footing that the testator meant it to be handed over to the parent, leaving the parent to apply it for the benefit of himself and his family. And upon appeal to Lord Thurlow, Lord Thurlow affirmed that decision. The case before Lord Alvanley and the case on appeal are reported in the same volume of Brown. That was a decision that in a case where a sum of money was given to A. to be equally divided between himself and his family, the money was rightly paid over to A. Now, *Robinson v. Tickell* was decided by Sir William Grant upon the authority of that case of *Cooper v. Thornton*. The gift there was this, it was a bequest of 2,000*l.* stock to Mrs. Hooke for her life (but that bequest has nothing to do with the question), and when she died with remainder to her daughter, "and my niece Mary Ann Robinson, for her and her children's use which she either now has or may have, for ever." So that there was, in fact, a gift of 2,000*l.* stock to Mary Ann Robinson for her and her children's use, that is, any children she has now, or may have hereafter. Upon the authority of *Cooper v. Thornton*, Sir William Grant decided that the 2,000*l.* stock should be handed over to Mrs. Robinson, leaving her to execute such trust as was created, for the benefit of her children. Now, in subsequent cases, it has been observed on these two cases of *Cooper v. Thornton* and *Robinson v. Tickell*, that there was no decision that would amount to a trust; but that, assuming there was a trust for the children or the family in the case of *Cooper v. Thornton*, assuming, I say, there was a trust, the money was rightly paid over to the parent, leaving the parent to deal with it, and leaving the parent amenable to such right, if any, as the children might

have as between the parent and the children.

Now, I mention those two cases, not because they govern the present, but because I think that, even upon the authority of those two cases, if I were of opinion that there was a trust here created on this property for the benefit of the children of this testator, I might still in conformity with those two cases direct the property to be handed over to the parent. I recollect in referring to these cases that they have the authority or sanction of such names as Lord Alvanley, Lord Thurlow, and Sir William Grant. I must honestly confess that if it had not been for those authorities, if it had been a case where a trust was created, I cannot see the propriety of handing over trust property to the trustee, leaving the trustee, although the parent of the children, to deal with the property and make away with it, so that the children might never be able to recover it in case the parent died, having spent it. I should have thought, I confess, that the children would have been entitled to have the property secured at all events, if there was a trust at all. And in *Woods v. Woods*, before Lord Cottenham, which was precisely the same case, Lord Cottenham held that the children might file a bill to secure the property. Now, in *Woods v. Woods*, the case was a very peculiar one. The testator had authorized his executors, who were his wife and his brother, to sell all his estates and chattels, and he gave them authority not to sell if they thought it most advantageous and most desirable to keep them. The purpose of the sale was chiefly to pay his creditors, and then he says that he desires that every creditor should have his money if the property is sold. It is to be observed, he gave an absolute discretion to the trustees either to sell or not to sell; but if sold "all overflush," that is, the surplus, "to my wife towards her support and her family, if any there be, after paying my brother for his trouble, and all other debts whatsoever." There was, in fact, a direction that if a sale took place, after paying the creditors and all other liabilities, the overplus was to go to his wife towards her support and her family. Now, one would think that according to the cases of *Cooper v. Thorn-*

ton and *Robinson v. Tickell*, which I have referred to, that might have been a very proper case to have said, "this overflush may be properly paid to the mother, leaving her to deal with it as the Court in those other cases left the parent to deal with it." And accordingly, upon a bill being filed by the children, a demurrer was put in to the bill, and no doubt upon the authority of those cases. Now, when it came before Lord Cottenham, Lord Cottenham overruled the demurrer. He said there was some interest in the children, and such an interest, at all events, as entitled them to file a bill to have the accounts taken.

Well, if I, in this case, were of opinion that a trust was created, I confess I do not very well see my way to part with the fund. But being of opinion that the testator, although he expressed a confidence which he reposed in his wife, inasmuch as he has stated that he gives the property to her for her own use and benefit, and in the very same sentence states as if he were stating his reason for so doing, because he reposed such trust and confidence in her, that she would do what was right,—for these reasons, and following those cases which I have cited as governing the present, I consider that there is no trust here created, but that, at all events, without declaring that there is no trust, I should declare that the wife is entitled to have the whole property. The surplus has been ascertained, I believe, and the declaration will, therefore, be that she is entitled to have the surplus of the personal estate paid and transferred to her for her own use and benefit and decree accordingly.

The cases to which the Vice Chancellor was referred were the following:—

- Hamley v. Gilbert*, Jac. 354.
- Hammond v. Neame*, 1 Swanst. 35.
- Foley v. Parry*, 2 Myl. & K. 138.
- Broad v. Bevan*, 1 Russ. 511, n.
- Collier v. Collier*, 3 Ves. 33.
- Andrews v. Partington*, 2 Cox, 223.
- Curtis v. Rippon*, 5 Madd. 434.
- Conolly v. Farrell*, 8 Beav. 347; s. c. 14 Law J. Rep. (N.S.) Chanc. 189.
- Costabadie v. Costabadie*, 6 Hare, 410; s. c. 16 Law J. Rep. (N.S.) Chanc. 259.
- Leach v. Leach*, 13 Sim. 304.

Cafe v. Bent, 3 Hare, 245; s. c. 13 Law J. Rep. (N.S.) Chanc. 169.

Bowden v. Laing, 14 Sim. 113.

Wetherell v. Wilson, 1 Keen, 80; s. c. 5 Law J. Rep. (N.S.) Chanc. 235.

KINDERSLEY, }
V.C. } JONES v. MORRALL.
April 21; }
May 5. }

Executors, Liability of—Wilful Default—Interest on Balances—Costs.

In an administration suit by one executor against his co-executors, the pleadings raised a question of wilful default; but upon the hearing, a decree was made for the common accounts of what had been received, without any special direction or inquiry as to what might have been received but for the wilful default of the defendants. Upon the cause coming on for further directions, it was held that the plaintiff was then precluded from raising the question as to wilful default, but that if the question were still open, the plaintiff could not call upon his co-executors to account for what he jointly with them might have received.

The plaintiff claimed interest upon balances remaining in the hands of the defendants:—Held, that the Court was not precluded from entertaining this question by the decree, which might have afforded materials for forming an opinion; but the circumstances of this case were not such as to entitle the plaintiff to interest, there having been no improper retention of balances to any substantial amount.

This suit was instituted to administer the estate of a lady named Frances Morrall, who died in the year 1823. The testatrix made a will in execution of a power during the life of her husband, and appointed certain property, about which no question arose. Upon the death of her husband, the testatrix made a codicil to her will, by which she disposed of certain leasehold estates, and she then directed that the household goods, farm-houses, cattle, farming implements and other effects (except money and plate) being in and about the manor-house of Plas Yellen,

should remain there for the use of her son William Morrall during his life; and after his decease, the same should be equally divided amongst all her children that should be then living. The testatrix gave the residue of her personal estate to be divided equally between all her children, and appointed her sons, C. Morrall and R. Morrall, and the plaintiff, Thomas Jones, who had married one of her daughters, executors of her will.

The testatrix died in December 1823, leaving eight children, and the will and codicil were proved by the three executors. In May 1829, the plaintiff Jones became a bankrupt, and obtained his certificate in the following September. In December 1834, the share of the plaintiff's wife in the residuary estate of the testatrix was assigned by him and his assignees to Edwards, who, on the 7th of April 1835, executed a deed declaring that he was a trustee for the plaintiff. In March 1835, W. Morrall died, upon which the furniture and other effects in and about the mansion-house of Plas Yellen became divisible amongst the seven children of the testatrix. On the 25th of April 1835, the plaintiff Jones and his wife filed a bill against the other children, including the two who were jointly with the plaintiff executors of Mrs. Morrall, for an account of her personal estate. That bill was not actively prosecuted, but lingered on till 1840. In the mean time, C. Morrall, one of the executors, died, and his daughter, Mrs. Gooch, was appointed his executrix. A bill of revivor and supplement was then filed, seeking an account of the personal estate of the testatrix which had come to the hands of C. Morrall and R. Morrall. In August 1840, answers were put in giving the accounts asked for, but no decree having been taken, the bill was dismissed for want of prosecution upon the motion of the defendants. The costs were subsequently taxed, and ordered to be paid by the plaintiff, but had not in fact been paid.

The present bill was filed by Jones and his wife in November 1843, alleging that many of the household goods and other effects left in and about the mansion-house of Plas Yellen at the time of the death of the testatrix had been removed and mis-

applied by W. Morrall during his life, with the sanction of the two executors C. Morrall and R. Morrall; and that the said goods, &c. had not been converted into money nor divided amongst the children of the testatrix as directed by her codicil, but that they had been taken possession of by the defendant R. Morrall, and had become greatly deteriorated in value; and alleging that improper payments out of the estate of the testatrix had been made to W. Morrall, amounting to the sum of 760*l.* 17*s.* 11*d.*; that the defendant R. Morrall had improperly retained in his hands part of the assets of the testatrix, and that the plaintiff's wife had not received what she was entitled to as her share of the estate; and the bill prayed an account of the personal estate of the testatrix, and that it might be declared that C. Morrall and R. Morrall had been guilty of breaches of trust in permitting W. Morrall to receive the rents and profits of the leasehold estate, and in neglecting to divide the furniture, &c. upon the death of W. Morrall; and that the defendant R. Morrall and the representatives of C. Morrall might be decreed to make good the loss occasioned by such breaches of trust, and might be charged with interest upon such sums of money as had remained from time to time in their hands, or had been received by them, or which but for their wilful default they might respectively have received.

The cause came on to be heard in July 1845, and a decree was made referring it to the Master to take an account of the personal estate of the testatrix received by the defendants, and what portion of the estate remained outstanding or undisposed of, with liberty to state special circumstances as to the matters aforesaid; but the decree did not contain any direction to inquire as to what assets might have come to the hands of the defendants but for their wilful default, nor did it direct any inquiry as to interest on balances in the defendants' hands.

By the Master's report, it appeared that the balance of the personal estate of the testatrix received by the executors amounted to 767*l.* 18*s.* 5*d.*, of which the plaintiff's share was 95*l.* 19*s.* 9*d.* That the surviving executor, R. Morrall, was liable to the extent of 88*l.* 14*s.*, and that the plaintiff's

share of the leasehold estate of the testatrix as against the estate of C. Morrall, the deceased executor, amounted to 158*l.* 5*s.* 9*d.*, out of which sum 154*l.* 3*s.* 9*d.* had been paid into court.

The suit now came on upon further directions.

Mr. Stuart and *Mr. Haddan* appeared for the plaintiffs, and

Mr. Malins, *Mr. Piggott*, *Mr. Kenyon Parker* and *Mr. C. Hall*, for the defendants.

Judgment reserved.

May 5. — KINDERSLEY, V.C., (after stating the facts of the case, as already set forth, said) — The questions raised upon the cause now coming on upon further directions are these. First, it is contended for the plaintiffs that one of the defendants, R. Morrall, who is the surviving executor of the testatrix, and the other defendants, who represent the estate of C. Morrall, the deceased executor, ought to be declared liable for the value of certain furniture and other effects remaining in the mansion-house at Plas Yellen on the death of the testatrix. Secondly, that those defendants are liable for interest on balances remaining in their hands from time to time, and ought to account for the rents and profits of certain leasehold property; and thirdly, that the costs of this suit ought to be paid by the defendants; first, because of a refusal on their part to account, and secondly, because they have disputed the plaintiff's claim.

Now, according to the terms of the will of Mrs. Morrall, the eldest son was entitled to the furniture, &c. during his life, and upon his death it was to be divided between her other children, of whom there were seven. After the death of the testatrix, all the executors, C. Morrall, R. Morrall, and the plaintiff himself, Thomas Jones, proved the will. At the time when the plaintiff became bankrupt he was entitled in right of his wife to one-eighth of the residuary personal estate of the testatrix, and to one-seventh of the furniture, &c. at Plas Yellen after the death of W. Morrall. On his bankruptcy, of course, the plaintiff's share passed to his assignees; but

by the deed of 1834 the plaintiff's share was assigned to a trustee for him. Now, as to the first point, regarding the furniture, it appears that the question is raised by the pleadings in the suit; but the decree not only declared nothing respecting it, but gave no directions for any inquiry on the subject, on the result of which the Court could, upon further directions, proceed. What the decree directed was, an account of such personal estate as had been received by the executors, and a direction that an account should be taken of the furniture and other things, so far as such things had been received; but there is no direction for any inquiry as to what they might have received but for their wilful default. If it had been intended to raise that point, the Court ought to have been induced at the hearing to make some declaration or to direct some inquiry, on the result of which, upon further directions, it might act. The rule on this subject I conceive to be this: if the pleadings do not raise the point, it cannot be raised either at the original hearing or on further directions; but if the pleadings do, as in this case, raise the point, whether the defendants are liable for wilful default, it is the duty of the plaintiff, if he can make out a case, to get a declaration by the decree, or if he cannot make a case for an immediate decree, to get an inquiry of such a nature that the Court may, on further directions, make a declaration. If, however, the point was raised on the pleadings, and the Court, by its decree, passed it by, and neither made any declaration nor directed any inquiry, it must be taken, either that it was waived by the plaintiff or that the Court, being urged by the plaintiff, did not think fit to give any relief. Now, here the Court has directed no special inquiry, but in directing the common account of the general estate, has said, —take the account also as to the furniture, that is, of what has been received, not of what might, but for wilful default, have been received. The decree further directs an inquiry as to what is outstanding; so that if any part of the furniture, &c. had not been received, it would come under the words "outstanding estate." Now, the Master has found that there is no outstanding estate, and as no exception has been

taken to that report, the question is concluded. But if it were now open, I think the plaintiff could not have the relief asked. It appears that the plaintiff Jones, as one of the executors, proved the will himself; and thereby took upon himself the execution of the trusts as much as his co-executors; and if a party thus under an obligation to perform a trust does not choose to perform it, but leaves it to his co-executors, he cannot be entitled to call upon them to account for what they and he together might have received. For all these reasons, I am of opinion that there is no ground for making the defendants liable for the value of the furniture and other effects which the plaintiff alleges ought to have been realized and divided.

The second point is this: the plaintiff contends that the defendants ought to be held liable for interest on the balances from time to time remaining in their hands. Now, it appears by the Master's report that, except as to two small sums of 95*l.* 19*s.* 9*d.* and 158*l.* 5*s.* 9*d.*, out of which latter sum, 154*l.* 3*s.* 9*d.* has been paid into court, every part of the plaintiff's share, as well of the general personal estate as of the leasehold rents, has been duly paid. The defendants insist that, applying the rule to which I have referred, the plaintiff cannot claim interest on balances because there was no declaration or inquiry as to balances at the hearing. It appears to me that, according to the proper application of that rule, the plaintiff has a right to raise the question. It is true there was no declaration to that effect at the hearing, but there was a direction to take the common account of what had been received, and that was the first step towards such a declaration. The Court could not at the hearing say whether there were any balances, but the direction to take an account of the personal estate ought to shew what personal estate has been received from time to time, and the receipts and payments should be shewn upon the schedule; and on that report the Court might hear it argued what balances there were in respect of which either an immediate declaration or further inquiry could be made. In this case, then, the question is, whether the circumstances are such as to shew that if there are balances there ought to be interest on those balances.

It appears that Jones the plaintiff became a bankrupt in May 1829, which is twenty-three years ago; and as, at that time, all interest passed out of him, he could not then ask for payment, and no payment could properly have been offered to him. In 1834 his share was assigned to a trustee for him, and he was then in a position to ask for accounts in respect of the personal estate of the testatrix, and directly afterwards he filed a bill, but that bill, after lingering for five years, was dismissed for want of prosecution, and then the present bill was filed in 1843. Now, in order to give a claim for interest there must be a clear case of improper retention of balances to a substantial if not to a considerable amount; but here the total balance retained from the personal estate does not amount to 96*l.*, and the total sum for which the surviving executor is found liable is only 88*l.* 14*s.* Under these circumstances, there is no ground, in my opinion, for decreeing payment of interest on the balances.

The last point is, whether the plaintiff ought to have his costs on the ground of a refusal by the defendant to account. The circumstances as to the refusal appear to be these: that immediately after the execution of the deed by which Edwards became a trustee for the plaintiff in 1835, the plaintiff's solicitor wrote to the two executors, C. Morrall and R. Morrall, asking on behalf of Edwards for an account. An answer was returned within a fortnight, that an account should be rendered, and directly afterwards the bill was filed. In the answers to that bill the accounts were set out, but the bill was dismissed for want of prosecution. When the present bill was filed another application for an account was made, and the answer was that the accounts had been put in upon oath. This certainly does not amount to a refusal to render the accounts. Then, it is said that the defendants have resisted the plaintiff's claim, by suggesting in their answer that the assignment to Jones by his assignees was without a sufficient concurrence by the creditors. I accede to the principle that if a defendant questions the title of the plaintiff and fails, and by that course puts the plaintiff to any costs, the defendant should pay so much of the costs as

were caused by the objection; but here there has been no expense incurred, and the costs must therefore go according to the usual course in administration suits.

LORDS JUSTICES.

1852.

Jan. 15, 16, 17, 19,
20, 22, 23, 24, 26,
27, 28, 29, and 30;
Feb. 9 and 10;
March 15.

REYNELL v. SPRYE.
SPRYE v. REYNELL.

*Fraud — Misrepresentation — Mistake —
Setting aside Conveyance — Champerty —
Jurisdiction of the Court of Appeal as to
Costs.*

S. was aware that R. was entitled to property, but might not at first be aware that the interest of R. was not precarious, and impressed R. with the notion that it was so; S. however became aware that the interest was not precarious, yet he did not inform R. of that fact, but on the contrary still represented that it was both precarious and could not be established without difficulty, delay, and expensive litigation. R. in such a state of circumstances sold one half of the estate to S, the latter giving him an indemnity against all costs of recovering the property, and representing that men of business conducted cases on the arrangement that no law expenses were paid unless the proceedings were successful; but if they were, that law costs were paid out of the money recovered, and the party conducting the proceedings and furnishing the information was allowed half what was recovered to satisfy him for risk of paying law expenses. Subsequently, R. agreed to sell the other half for a stated sum. R. filed a bill to set aside the conveyance and to have the contract for the sale of the second moiety declared void, but died before the hearing, and the suit was revived by his devisee and executrix. S. filed a cross bill for the specific performance of the sale of the second moiety. In the first suit the solicitor of S. was made a party, and was charged with a participation in the fraud. The Court below set aside the conveyance, and as the contract for the sale of the second moiety was based on the former conveyance it declared the same void, and ordered S. to pay

the costs, but dismissed the original suit as against the solicitor, without costs. The Court also dismissed the bill for specific performance, with costs. From this decree S. appealed:—Held, that as R. did not know his rights when he executed the conveyance, nor when he signed the contract for the sale of the second moiety, and that as the former was based on fraud and misrepresentation, and as the latter depended on the former, both must fail, and the decree must be affirmed, with costs.

Where a party has induced another to act on the faith of several representations made by him, any one of which has been made fraudulently, he cannot set up the transaction by shewing that every other representation was truly and honestly made, or was the result of innocent error.

A representation that remuneration for professional services rendered, as above stated, was customary, being untrue, is a ground for setting aside a conveyance and contract founded on it.

Whether the agreement amounted to champerty, or savoured of champerty, still as the parties were not in pari delicto, and as the vendor had no legal advice but that of the solicitor of the purchaser, who adhered more to the purchaser than to the vendor, and failed in his duty to the latter, the Court considered that the vendor's suit ought not to fail, on the ground that he was a party to a contract against public policy or illegal.

Where the Master of the Rolls or a Vice Chancellor has given substantial relief against a defendant, with costs against him personally, it is competent to this Court, in affirming the decree as to relief, to vary it as to costs, if its dissent from the decree as to costs is strong, clear and undoubting.

The Court being of opinion that, although the solicitor had acted contrary to public policy, whether through misapprehension or otherwise, and although his duty professionally prohibited him from assisting where there was aliud simulatum aliud actum, and although he abetted in the composing and uttering of documents which recorded an affair as it was not, yet still as the Court had no firm impression that the decree below ought to have charged him with costs, it refused to vary the decree in this respect.

The facts of this most remarkable case,

disclosed in voluminous pleadings and lengthy evidence, and above all to be extracted from a correspondence, a copy of which occupied more than 200 very closely written brief sheets of paper, can only be stated with comparative shortness in a narrative form; and (throwing out of view all but the prominent circumstances (1) on which the judgment of the Court is founded), these facts were as follows:—

Henry Reynell, of Leatherhead, by his will, dated the 19th of December 1813, devised his real estates consisting of lands and other hereditaments in the counties of Devon, Somerset, and Surrey, of the annual value of 1,200*l.* to Mr. Trower and Mr. Walker in fee simple, upon trust to pay off certain charges, and among them an annuity to Mrs. Williams Reynell, his illegitimate daughter, and then unmarried, until she should attain the age of twenty-one years, and subject thereto, upon trust, for that lady for life, with remainder to her issue in strict settlement, with remainder to Sir Thomas Reynell for life, with remainder to his first and other sons in tail male, with remainder to Sir Richard Littleton Reynell (brother of Sir Thomas) for life, with remainder to his first and other sons in tail male, with remainder to Samuel Reynell for life, with remainder to his first and other sons in tail male, with remainder to Sir Richard Littleton Reynell, his heirs and assigns for ever.

The testator died in 1824 or 1825. At the date of the will and of the death of the testator the whole property was mortgaged in fee, the testator having only an equitable fee simple in it.

In the middle of the year 1843, Mr. and Mrs. Williams Reynell, who were married before the death of the testator, were living, she being aged forty-eight years and he much older; there had never been any issue of the marriage, and the lady was in a very infirm state of health. Sir Richard Littleton Reynell was then dead without issue male, and Mr. Samuel Reynell was also dead without issue. Sir Thomas Reynell was sixty-six years of age, and his

(1) Among the circumstances omitted are long details of an attempt, which proved abortive, to introduce into the will a power of appointment to Mrs. Williams Reynell in favour of her husband for his life.

wife Lady Elizabeth Louisa Reynell was fifty-eight, and there had been no issue of their marriage, which had been solemnized many years. It was not asserted by any one that Sir Richard Littleton Reynell left any female issue. Under this state of circumstances in the middle of the year 1843, the estates of Henry Reynell, the testator, stood, in fact, limited to trustees (new trustees having been appointed in 1828 in a suit then instituted), in trust for Mrs. Williams Reynell for life, with remainder to Sir Thomas Reynell for life, with remainder to the right heirs of Sir Richard Littleton Reynell. If this latter gentleman actually left no issue female, Sir Thomas Reynell was his heir-at-law, and had been so from the time of his death, and unquestionably Sir Richard Littleton Reynell died intestate.

In March 1843 Capt. Richard Samuel Mare Sprye was informed by a surgeon, named Llewellyn, that Sir Thomas Reynell was entitled to interests in the property under the will of Henry Reynell. On the 15th of April following commenced a correspondence between Capt. Sprye and Sir Thomas Reynell. In these letters Sprye inquired of Sir Thomas as to his pedigree, stating as his reason his intention to publish genealogies, and wishing that of the Reynell family.

On the 21st of April one Mitchell, described by Sprye as his clerk, read the will of Henry Reynell at Doctors Commons, and communicated verbally its contents.

By letter, dated the 22nd of April, Sprye stated to Sir Thomas that he had made a discovery, which, though it could not benefit Sir Thomas himself, might benefit his heir. The earliest letter of importance was one from Sprye to Sir Thomas, dated the 29th of April 1843, and was as follows:—"My dear sir,—I hope you received my last note, making inquiry as to who at present stood in the position of your heir-at-law. I sent a sketch of your pedigree for a few of the modern descents, to assist you in discovering it, should you not otherwise know. I think I did not inform you that I have taken to study for the bar, in the genealogical branch, for practice at the bar of the House of Lords, in peerage cases; and that I am, in furtherance of this plan for future life, compiling some genealogi-

cal works for print, to bring myself into notice in that way by the time I am called to the bar. The Reynell family I take particular interest in, collecting a complete history of it for print; and it has been in making researches for it, through my record researches in the several depositories of public records, that I discovered what I conceived to be the means of benefiting your heir-at-law. Since I wrote to you I have employed my clerks in still further investigating the matter, and to see if it was not possible to do the benefit to you, instead of to the other party. It is, as all these things are, doubtful, and can only be tested by legal proceedings, the result of which may give nothing, and may gain something considerable. Now, almost all men are frightened at the idea of law proceedings to recover property, and, consequently, a system has grown up among men of business, of conducting such cases on the arrangement that no law expenses are paid unless success attends the proceedings; in which case they are first paid out of the money recovered, and the party conducting the proceedings and furnishing the information is allowed for his compensation half what is recovered, which is also to satisfy him for the risk of paying the law expenses, without perhaps succeeding. I have mentioned briefly to a legal man the case and mode in which I consider I have discovered a way to benefit your heir-at-law. He has not yet given me a decided opinion, but from what he observed I considered my belief strengthened. He said if he found what I stated to him to be borne out by documents, he would undertake the case legally, on the usual arrangement, as above. There is but a faint chance that the discovery can be made to benefit you, and as, whether for you or for your heir-at-law's benefit, it will be necessary to institute legal proceedings, will you say if you will be content that it shall be done under my direction and controul, on the foregoing plan; that, if you are benefited nothing, you pay nothing, and the lawyers lose their expense and labour; and that if you are benefited, you will allow half of what may be gained to you to them, for their risk and remuneration. I shall be glad to hear from you at your leisure on this point, and also to have

what help you can give in discovering to us your heir-at-law, as that party must be included, even if efforts be first made for you. I write this hastily to save to-night's post. I beg our united compliments to Lady Elizabeth Reynell and family, and remain, my dear sir, yours, &c., Richard Sprye, 6, Chesham Place."

Between the end of April and the middle of July there passed between these parties a vast number of letters, one of which, dated the 12th of May, was addressed by Mr. John Yonge, the solicitor to Sprye (but the draft of which was proved to have been written by Sprye for Yonge to copy), and stated that considerable property might be recovered for Sir Thomas after the death of the present possessors, if Sir Thomas were then alive, but if not, for his heir, and saying that much inquiry would be necessary, and that but for Sprye's discovery the present possessors might have kept the property, and Sir Thomas's claim might have been barred by lapse of time, and alleging that his claim must depend upon surviving the present possessor. That possessor was Mrs. Williams Reynell.

The next letter of importance was dated June 1, and was written by Sir Thomas to Sprye, and dated from Avisford, and contained these words:—"My dear sir,—I am very much obliged to you for the trouble you have taken in explaining to me further particulars of the business in hand, and, after reading over carefully your letter of yesterday, I feel satisfied that the first proposed arrangement, whereby I meant to engage to give up the half of the property recovered, subject to no law expenses, either on success or failure in the suit, is the best for me to pursue, and I therefore agree to it, hoping that the result may hereafter prove to our mutual advantage." The correspondence had, in some of the letters of Sprye, referred to some degree of relationship existing between the family of his wife and that of Sir Thomas.

On the 24th of July 1843 a deed, dated the 15th of that month, was executed, being made between Sir Thomas Reynell of the first part, Sprye and Henrietta Digby his wife of the second part, and Charles Wilson of the third part, which contained the following recitals:—"Whereas the said Sir Thomas Reynell is seised to him and his

heirs in fee simple in remainder or reversion under a will, or alleged will, of Henry Reynell, late of Leatherhead, in the county of Surrey, Esq., since deceased, of and in the hereditaments hereafter mentioned, and one moiety or equal half part whereof is intended to be hereby released, or the said Sir Thomas Reynell is seised of an immediate estate to him and his heirs in fee simple of the same hereditaments as the heir-at-law of the said Henry Reynell. And whereas the said Sir Thomas Reynell has not any issue. And whereas the said Richard Samuel Mare Sprye being connected by marriage with the family of the said Sir Thomas Reynell, and the said Sir Thomas Reynell having lately discovered or ascertained his rights and interests in the estates late of the said Henry Reynell, deceased, through the intervention of the said Richard Samuel Mare Sprye, and from information derived from him, the said Sir Thomas Reynell has determined upon testifying his regard and friendship for the said Richard Samuel Mare Sprye and Henrietta Digby his wife, by conveying and assuring one moiety or half part of the said estates late of the said Henry Reynell, deceased, to the uses and in manner hereinafter declared of and concerning the same."

It was then witnessed that "in pursuance of and for effectuating the said determination, and in consideration of the premises, and for making a provision for the said Richard Samuel Mare Sprye and Henrietta Digby his wife," and for certain nominal considerations, Sir Thomas conveyed to Wilson in fee simple one moiety of and in all manors, lands, estates and hereditaments in the counties of Surrey, Devon and Somerset, or all or any of the said counties or elsewhere in Great Britain of, in, and to which he was or could or might be entitled in possession, reversion, remainder, or expectancy by devise, descent, succession or inheritance howsoever, of, from, by, through, or under the said Henry Reynell, deceased, to such uses as Sprye and his wife should appoint, and in default to the use of Sprye and his assigns for life, with remainder to the use of his wife and her assigns for life, with ultimate remainder to the use of Sprye, his heirs and assigns for ever. Then followed a covenant for further assurance.

Simultaneously with this conveyance Sir Thomas executed to Sprye a power of attorney "irrevocable," to commence, carry on, and prosecute any actions, suits, or other proceedings at law or in equity, he, Sprye, might deem requisite for trying the validity of any will, or alleged will, of Henry Reynell, or obtaining legal and peaceable possession of the real estate to which Sir Thomas was entitled by devise, descent, or otherwise, by, from, through, or under Henry Reynell. Also at the same time, and dated the same day, Sprye executed to Sir Thomas a deed of indemnity against any costs, charges, or expenses occasioned by any action, &c. brought by Sprye in consequence of the power of attorney.

The deed of conveyance had formerly been intended to be in the form of a settlement, but that form was ultimately abandoned. In preparing all the instruments between Sir Thomas Reynell and Sprye, Mr. John Yonge acted as the solicitor for Sprye.

Among the evidence was a draft marked Exhibit R, which was of a proposed deed between Sir Thomas and Sprye, in which, in consideration of services rendered by Sprye in the discovery of Sir Thomas's rights, Sir Thomas was made to convey the moiety, and Sprye covenanted to take all steps necessary for the recovery of it, and to save harmless and indemnify Sir Thomas from all the costs; but this draft was afterwards altered, and ultimately the conveyance was executed as before stated. Added to all this a codicil was prepared for Sir Thomas to sign by way of confirming all the arrangements, but it was never executed.

In pursuance of this power of appointment Sprye and his wife, by deed, dated the 13th of January 1844, appointed the same moiety to William George Watson and James Watson, and their heirs, by way of mortgage for securing 400*l.* and interest; and by another deed, dated the 23rd of April following, they further charged the property with 300*l.* and interest to the same persons.

On the 15th of June 1843 Mr. Stinton, of the Chancery bar, had given an opinion on a case submitted to him by Sprye, in which he stated, speaking of the title to the estates in default of children of Mrs. Williams Rey-

nell, "Sir Thomas Reynell would have an estate for life, with remainder to his sons in tail: the ultimate remainder in fee was given to the late Sir Richard Littleton Reynell, and that estate would by the settlement be vested in any person to whom he may have devised it; but if he did not so devise it, Sir Thomas Reynell would have the ultimate vested remainder in fee, as the heir-at-law of his late brother, which I presume he is."

Upon the evidence it was not plainly shewn when this opinion was communicated to Sir Thomas Reynell, but Sir James Wigram, when the case was originally before him, considered that the opinion was not communicated to Sir Thomas before the 15th of July 1843, and both the Lords Justices came to the conclusion, that Sir Thomas, if it was communicated at all, did not understand his rights when he executed the deed of 1843, and signed a draft of an intended deed (hereinafter mentioned) of 1844. Mitchell, Sprye's clerk, was not examined as a witness in the court below, and was stated to be dead at the date of the appeal.

The second part of the narrative relates to a contract for the sale of the remaining moiety of the property. After the correspondence had gone on for many months, during which Sir Thomas was informed of the proceedings which Sprye had commenced and was prosecuting against the trustees of the will of Henry Reynell, and against Mr. and Mrs. Williams Reynell, Mr. Yonge addressed a letter to Sprye, dated the 17th of April 1844, but which was copied from a draft made by Sprye, which contained the following remarkable passages, and which was forwarded by Sprye to Sir Thomas Reynell on the 18th of the same month, as a letter addressed by Mr. Yonge to him.

"20, Tokenhouse Yard, April 17, 1844.

"My dear sir,—Having endeavoured during the leisure hours of the Easter holidays to give my best consideration to the present position of the Williams Reynell case, I am anxious to put you in possession of the views I have formed, not only as your professional adviser, but as entertaining the highest friendship for yourself and family. You will therefore bear with me while I candidly confess my sentiments,

even if they should happen to differ in some respects from what I know to be your ideas. You must bear in mind that when we commenced operations, although you soon accumulated a good deal of valuable information, we were left in the dark on several points in which we have been in some measure rectified by the answers put in. For instance, we had reason to expect Mr. Reynell left sufficient personal estate to pay off existing mortgages, which, however, appears is not the case, and the mortgages still exist. We were unprepared to find that Mrs. Williams Reynell had ventured to appoint a life interest in the estates in favour of her husband after her decease, and that, in fact, very soon after the testator's death she executed a settlement of the property, giving that interpretation to the trusts of the will which we have resolved to dispute, and vesting the estate upon such in a Mr. Beverley, instead of Monro and Thomas Williams." * * * "The decree when made will direct inquiries in the Master's office as to the testator's estate, and the mortgages and settlement, and perhaps ultimately a new settlement may be ordered, and when after all by the demise of Mrs. Williams Reynell, and if by having previously set aside her husband's life interest, the estates become indisputably yours and Sir Thomas Reynell's, in all probability a fresh resort to Chancery will be requisite to partition the property, as, being so scattered, it may be difficult otherwise to apportion. The value of your interest, to yourself individually, of course, in great measure depends upon your chance of surviving Mrs. Williams Reynell. She is forty-eight, and you, I think I recollect, are three years younger. Female lives, every insurance office will say, are more durable, and if Mrs. Williams Reynell lives on for a few years longer she may possibly live to old age. I think an office would say her present chance of duration of life is at least eighteen years. To this period, then, it is possible your benefit may be postponed, and, though hitherto childless, her having issue I know would by many be considered as a contingency not to be overlooked. Under all these circumstances of the case, the long litigation we may anticipate, and the certain heavy expense incurred, which will involve my often re-

sorting to you for supplies, it well becomes you to consider how far it may be advantageous to you, or otherwise, to proceed. Had it so happened that the whole estate in reversion had been yours, there could not have existed the same ground for hesitation. You might then have found little difficulty in obtaining pecuniary assistance to enable you to buy up or make terms for Mrs. Williams Reynell's life interest, put an end to the suit, and acquire the fee simple. At all events, you would have had more facility in obtaining means to carry on the suit vigorously, and then compel our opponents to an amicable arrangement, or speedily obtain all the Court would enforce. These considerations, I confess, have impressed me with the value of a suggestion hinted to me by more than one with whom I have had occasion to advise,—that if you could feel at liberty to do so, it would be well for you to treat with Sir Thomas Reynell, for the purchase of his remaining moiety in the property. Of course, one would take every means of ascertaining what, under the circumstances of the case, with all contingencies, would be a fair price for you to offer, and for him to accept, and, agreeing upon this, I cannot but think it would be the most eligible arrangement possible for yourself and family, while Sir Thomas would realize at once a present benefit, instead of having the mere title to a prospective advantage, which, at his age, might be realized only in his declining years. Should the suggestion meet your view, and the proposal be not unacceptable to Sir Thomas I should advise that a statement of Sir Thomas's interest be prepared in such a manner as shall be mutually approved by him and yourself, and then that each obtain the valuation from an actuary of his own selection. It will then be for you to adopt measures for providing sufficient funds to complete the purchase, and acquire the entire reversionary interest. Having now candidly expressed to you my mind, I leave the matter to your thoughtful consideration, and should recommend you to talk it over also with Mrs. Sprye and her trustee. Your determination I shall wait for ere I press forward for getting the bill amended; if you decide that it is ineligible to communicate with Sir Thomas on the matter, let me know, and then we

will resolve how to proceed. I remain, my dear sir, very truly yours, John Yonge."

The correspondence proceeded, Sprye still adhering to his representation that the issue of the litigation was doubtful; yet, in a letter of the 26th of April, he offered to buy the remaining moiety at its full value; and although he spoke of the investment of his money in such a purchase as a "lottery investment," and although Sir Thomas, in his answers, expresses reluctance to sell to Sprye property which he (Sir Thomas) did not possess, and to involve him in risk, Sprye, on the 11th of May, addressed a letter to him, offering to buy, and urging him to sell at a value to be determined by an actuary, the other half, "with all its doubts and risks, the Chancery suits pending, of your share of the reversion. If receiving the money while matters are in uncertainty is objectionable in the doubtful state of our suit in Chancery, the sale may be made conditional on your right, whenever the reversion shall fall in." * * * "The money may be invested, but I had rather purchase at once." This letter contained a valuation of the reversion at 5,000*l.*, which, from the evidence, was not that of an actuary; and Mr. Yonge in his answer on oath denied it to be his. Sir Thomas, in reply to this, addressed a letter, dated the 11th of May, to Sprye, which, after speaking of the Chancery suit, went on thus:—"but I assure you, that I dislike it and our future prospects, more on your account than my own, having already undergone heavy expenses in prosecuting your able researches, and having now such a prospect of large law expenses, particularly if they succeed in visiting you with their costs. I wish that I was a rich man, and could afford to assist you in your difficulty; but you are aware of the case, and I have little but my military income to look to, as the purchase of this place, and the expense to which I have been put to by it, has swallowed up all the little spare money I possessed. I am most anxious that you should not injure your finances by this business. I am ready to withdraw when you find that there is no hope of success remaining, and that a favourable moment has arrived for doing so. I have from the first put myself in your hands, and have implicitly conformed

to what you advised and recommended, and will continue to do so." And in still further reply to communications from Sprye he wrote the following letter to him:—

"Avisford, 14th May 1844.

"My dear Captain Sprye,—I have much gratification in acquainting you that your despatch received this morning, with Mr. Yonge's estimate of the half of the reversion, has completed the work of reconciling me to the sale, as recommended by you and him, and removing the scruples I had entertained to that measure. I have so good an opinion of Mr. Yonge, and of his reasoning upon the subject, that I will not press any other valuation than his, but will consent to accept from you the sum of 5,000*l.*, and in the simple, and direct, and ordinary plan, according to your wish, in preference to investing the money in the funds to accumulate until the settlement of the suit, which I will endeavour to believe will prove most favourable to you and yours, rewarding you amply for your trouble, and reimbursing you for your outlay. * * * Believe me, my dear Capt. Sprye, always faithfully yours,

"Thomas Reynell."

Two days later Sprye, in a letter to Sir Thomas, said, "I feel equally glad you are satisfied with Mr. Yonge's valuation, who is a good and honest creature;" and, subsequently, the correspondence contained allusions by Sprye of an intention to compromise the litigation, and expressions by Sir Thomas of his gratification at the idea of compromise, as he never viewed the matter in the same sanguine light that Sprye did. On the 25th of May, the draft of the conveyance of the second moiety was prepared and was approved by both parties, but it was never executed.

Mrs. Williams Reynell died in February 1846, and on the 18th of the following month, Mr. Yonge forwarded to Sir Thomas the drafts of the deeds of conveyance of the second moiety, altered so as to meet the fact of the death of that lady; and in his letter Mr. Yonge recommended Sir Thomas Reynell to employ his own solicitor. The matter was then placed by Sir Thomas in the hands of Messrs. Walker, Grant & Co., his solicitors, under whose advice the original bill was filed, on the 2nd of April 1846, by Sir Thomas Reynell

against Sprye and wife, Yonge and Wilson, praying a declaration that the deed of 1843 was procured by fraud practised on the plaintiff by Sprye and Yonge his solicitor; and that the same was void for fraud and champerty, except as regarded the mortgages of January and April 1844; and that it might be declared that the contract contained in the letter of the 14th of May 1844 was fraudulently obtained by Sprye and Yonge, and that such contract was void, and that the approval of the draft deeds of the 25th of May 1844 was obtained by the fraud of Sprye and Yonge, and that those two persons might be decreed to pay off the mortgages and procure the reconveyances from the mortgagees; and that the deed of 1843, the letter of the 14th of May, and the approval of the 25th of May 1844, and the drafts might be cancelled; and that Sprye and wife and Yonge might be restrained from interfering with the property, and also that Sprye and Yonge might pay the costs of the suit.

On the 28th of August 1846, Sprye and wife filed a cross-bill against Sir Thomas Reynell and Wilson, praying specific performance of the contract contained in the letter of the 14th of May 1844.

Sir Thomas Reynell died pending the suits, and the same respectively were revived by and against the universal devisee and legatee and executrix Lady Elizabeth Louisa Reynell.

The causes were heard before Sir James Wigram during five days in April 1849, and ten days in the following month, and judgment was given on the 6th of November in that year, when he made this decree:—Declare the deed of 1843 void, except as to the two mortgage deeds of, &c.; and that the contract in the letter of the 14th of May 1844 is also void. Declare that the defendant Sprye is bound to pay to, &c. (the mortgagees), their executors, &c. principal, interest, and costs due on the mortgages, and to procure at his own expense a re-conveyance to Lady Elizabeth Louisa Reynell, or as she shall direct; take an account, &c. due on mortgages; direct Sprye, on or before, &c. to pay, &c. (the mortgagees) the amount found due. Declare the plaintiff is to be at liberty to use the names of Sprye, wife, and Wilson in procuring the re-conveyance; and that

she is entitled to recover against Sprye principal money, interest, and costs she may properly pay to the mortgagees for procuring the re-conveyance. And, upon satisfaction of the mortgagees, deliver up the deed of 1843 to be cancelled. Let letter of the 14th of May 1844 be forthwith delivered up to be cancelled. Injunction against Sprye as prayed, except for procuring the re-conveyance. Dismiss the bill *Reynell v. Sprye*, as against the defendant Yonge, without costs; dismiss the bill *Sprye v. Reynell*, with costs; such costs, and also the plaintiff's costs in *Reynell v. Sprye* (including the costs of Sir Thomas Reynell deceased), to be paid by the defendant Sprye.

From this decree Capt. Sprye appealed, and during the argument it was stated from the Bench that as in the judgment of the Court it might be necessary to mention the name of Mr. Yonge, the counsel for that gentleman had their Lordships' judicial authority to address the Court on his behalf. This offer was refused on the ground that Sir James Wigram had acquitted Mr. Yonge of all immoral conduct. The Court also permitted an affidavit to be read, proving the death of Mitchell, Sprye's clerk, between the hearing of the original cause and the appeal. Their Lordships also sanctioned an offer made by the counsel for Lady Elizabeth, to allow the answer of Mr. Yonge to be read in evidence, as an affidavit or deposition in favour of Capt. Sprye. The offer was declined, and Lord Cranworth remarked that no inference detrimental to Capt. Sprye could be drawn from the refusal, because the argument of his counsel was, that if Mr. Yonge were examined before a jury he would prove, not only what was contained in his answer, but much more which would be beneficial to Capt. Sprye.

Sir Fitzroy Kelly, Mr. Lloyd and Mr. Shapter supported the decree of the Court below.

The Solicitor General (Sir W. P. Wood), Mr. Bethell and Mr. Terrell appeared for the appellant.

Mr. C. P. Cooper was counsel for Mr. Yonge.

The argument of the counsel for the appellant was in substance as follows:—The case has been conducted on a theory most extraordinary, namely, that Capt. Sprye having found with ease and without trouble, that Sir Thomas was the owner of a clear and indisputable estate absolutely, subject only to the life interest of an infirm lady, had set to work to form a scheme of fraud and misrepresentation, by which to induce Sir Thomas to part with his property. It was said that the title of Sir Thomas was clear, plain, and indisputable, the only present obstacle to immediate enjoyment being the life of a lady of forty-six years of age. It was said that Capt. Sprye knew the title was clear; that he knew Sir Richard had died, and left no heir other than Sir Thomas. So far from that being so, in truth, the case at the outset was involved in doubt and difficulty, and so continued up to a very late period before the conveyance of the first moiety of the property; yet wonder had been expressed at the ingenuity and wickedness which could have raised a doubt—could have surrounded Sir Thomas with mystification of fraud and falsehood. All this was the theory of the bill, and well did counsel follow such instructions. It had been said that the title was plain, no doubt, no difficulty about it; and so Capt. Sprye knew, and all he had to do as an honest man was to tell Sir Thomas, that he could at once, after the death of the lady, walk unmolested into the estate. The estate was represented to be "at home" with most respectable trustees, and that the life estate was vested in a most respectable lady. What, however, was the truth? The trustees of the will of Henry Reynell renounced, and new trustees were appointed, and they were appointed in a suit instituted in the name of Sir Thomas, without his consent and without his knowledge. As to the estate, the trustees had none, for the legal estate was in mortgage. All this theory was adopted by Sir James Wigram, who believed from first to last that all the representations of Capt. Sprye were false—were mere inventions. So far from that theory being correct, it is clear that but for Capt. Sprye's great exertions the property would have remained under the power of the Williams Reynells, or their

devisees, or others claiming under them. The impression on Sir James Wigram's mind, that the trustees were most respectable persons, could never be removed; nor was their respectability questioned; but the learned Judge always seemed to refer to the fact that persons of such respectability would not engage in such a fraud. No one said they did. It is plain that Sir Thomas Reynell had as much knowledge of the subject after the discovery of the will, and before the transaction of the purchase of the first half, as Capt. Sprye himself had; that before and after, and up to the execution of the second contract, he was in possession of every fact that Capt. Sprye knew of the title. The true history of the knowledge of Capt. Sprye of the title to the property was disclosed in his answer to the plaintiff's bill, and was this,—one Llewellyn, a surgeon, told the Captain that the Reynells were entitled to property, and asked him whether Sir Thomas had succeeded to any. On this the Captain, who was intimately conversant with the Reynell pedigree, turned his attention to that, and, after tracing its steps, came to the second Baronet, and believed that the property vested in him "and his heirs in tail for ever" was the property alluded to by his informant. Llewellyn, however, told him that was the wrong clue, and added, that old Henry Reynell, of Leatherhead, had often told him (Llewellyn) that Sir Thomas was his heir, and would have his property. Capt. Sprye, thereupon, said that was not possible, for Henry Reynell left a daughter; but Llewellyn added she was not legitimate: upon which Capt. Sprye declared that must be a mistake, for in *Burke's Landed Gentry* it was said that Henry Reynell left a daughter, who inherited his estate. Llewellyn, however, still persisted, and this led Capt. Sprye to make further inquiries, and convinced him that, whatever the will of Henry Reynell might be, it must be sought for, and the facts ascertained. But up to this time he knew nothing of the will—did not know that there was one; and yet the case had been commented on as if the will had been seen, examined, understood, and kept back from the knowledge of Sir Thomas Reynell. The first thing done by Capt. Sprye as to the will was to send his clerk,

Mitchell, to read it, and subsequently he obtained a copy. Finding reason to believe what Llewellyn had said about the Williams Reynells, they in fact having been married secretly, he suspected that the will might not be a fair and clear transaction, and, doubting the legitimacy of the daughter from the positive assurances of Llewellyn, Capt. Sprye did entertain very grave doubts of the conduct of those parties. That his doubts were reasonable is tolerably plain both from the frame of the will and the conduct pursued towards it at Doctors Commons. The will was that of an attorney, and was altogether holograph. It was constructed of paper differing in hue and character, and the fourth and fifth sheets did not tally with the remainder at all, nor was the writing similar in different parts of the will,—these two sheets, in particular, being in the hand apparently of a lady. The sheets, however, purported to follow on, and the will to have been composed and written at one and the same time. It was plain that such was not the fact. Capt. Sprye found all this to be so, and, therefore, he suspected, and was right in suspecting, the Williams Reynells. When Capt. Sprye found that the very material paper not affixed by the testator to his will, and which gave a power to the daughter to appoint a life interest to her husband, had been fastened to the will by the husband after the testator's death, he had a fair ground of suspicion, and when he found this out, he communicated it to Sir Thomas Reynell. When he discovered, as he did from the affidavit of the husband himself, that that will had been examined by him and his attorney during the testator's lifetime, he had more than ground for suspicion—his doubts and suspicions were confirmed. When the probate was seen, that most important paper was copied, as if it had been wholly incorporated by the testator himself in his will. The observation made by one of your Lordships that the knowledge of real property law possessed by solicitors is generally sound, is a very true representation if confined to country solicitors; but the easy access of London solicitors to conveyancers induces them to rely more on others than themselves, and, therefore, they are generally in the habit of referring every question for

the opinion of counsel. This would fairly account for Mr. Yonge having laid the case on the will before Mr. Stinton instead of coming to a conclusion himself. If, then, it was not improper for the solicitor to seek that advice, still more was it to be expected that Capt. Sprye himself would not be able to form a clear and definite conclusion on the legal rights of the parties. Yet great stress has been laid on the fact of Mr. Yonge taking legal advice. In each place where Capt. Sprye used the word "contingency," it is put down to fraud, because it is said Sir Thomas Reynell was known to have a vested estate; whenever it is said that the benefit to Sir Thomas was contingent on surviving Mrs. Williams Reynell, it is alleged to be wilfully false, the fact being that Capt. Sprye, like any other man not a lawyer, considered the benefit to be contingent, for Sir Thomas, at his age of sixty-six, was not likely to outlive a lady of forty-eight. Is it to be said that because a man of sixty-six has a vested estate, the enjoyment of which must be postponed until after the death of a person forty-eight years old, it is a falsehood if represented as a contingent benefit? It is said that Sir Thomas Reynell's title was clear; but so far from it, there were three contingencies: first, whether he would survive Mrs. Williams Reynell; secondly, whether he could obtain possession, if entitled, without litigation; and, thirdly, what was the nature of the property, and whether it was worth anything, considering the incumbrances upon it. It must be admitted, as more than once said by one of your Lordships, that the representation of business being conducted by a gift of half the property being the consideration for the lawyer's services, was "unlucky," and could not be defended; still that did not displace the truth of the later parts of the case. In the court below it had been said, and Sir James Wigram concurred in the view, that the onus lay on Capt. Sprye to shew that the opinion of Mr. Stinton had been communicated to Sir Thomas Reynell. Having remarked on the propriety of the taking of Mr. Stinton's opinion, it remains to be observed that the evidence is contradictory as to the time of its being communicated to Sir Thomas Reynell. In the first

place it is obviously most improbable that Sir Thomas Reynell did not see the opinion given by Mr. Stinton, and which in plain terms disclosed his rights; and, secondly, the opinion being in such plain terms, and in a narrative form, it was most improbable that he did not understand it. No one had ever ventured to allege that Sir Thomas Reynell could not understand what any ordinary man could comprehend; nor had those who had put the words of his sworn answer into his mouth ventured to permit him to swear more than that he did not recollect seeing the opinion, and that if he did see it, he did not understand it. That is a very tender mode of swearing. Accepting the acquittal of Mr. Yonge as proved, then the real case is that he made an erroneous conclusion of law as to Sir Thomas Reynell's title, and Capt. Sprye as innocently made the representation, and that representation has been unfairly described as a fraud and a falsehood. The truth about the rights of Sir Thomas being unknown, if it were so, to himself was no person's fault but his own. All he said was, that if he did see the opinion of counsel he did not understand it. A gentleman of ordinary faculties could have understood it, and a gentlemen of fortune could have obtained advice. If he would shut his eyes—if he would abstain from inquiry, the fault was at his own door. The Court will not, and ought not, to help him. Complaint is made of the presentation of this petition of appeal, but, independently of Capt. Sprye, the case is thus:—A gentleman complained of having had a bill filed against him containing charges of the grossest fraud and practices of the most obvious dishonesty, and the plaintiff, well knowing that the solicitor would be the most important witness to disprove those things if they were untrue, or to explain those transactions and their true nature, deliberately and for the purpose, it was fair to infer, of suppressing that evidence, made that solicitor (Mr. Yonge) a defendant to the suit. For such a reason alone justice has not been done, and the appeal is proper to be heard. The Vice Chancellor made strong observations on this fact, in the course of his judgment in the court below, and gave that gentleman the acquittal to which allusion has before been

made in these emphatic words:—"If I am to hold Mr. Yonge liable for the costs of this suit, it certainly will not be upon the ground of moral delinquency, but upon the ground that he has so mixed himself up with Sprye's acts that he must, for judicial purposes, be considered as identified with Sprye in those acts. But I think I should be going too far in so treating the case." And, again, his Honour says, "A solicitor is not necessarily answerable for writing a letter to his own client for the purpose of being shewn to others; and, if that be so, the circumstance that Yonge was expressing Sprye's opinions would not make the act fraudulent, provided those opinions were Yonge's also. I think the case is not brought within the anomalous rule relied on by the plaintiff for making Yonge a defendant in the suit." As to the first contract, it is an error to say it was a bargain obnoxious to the law relating to champerty; and as to the second agreement, it was not an undervalue. On the second, the evidence of four different persons well versed in the affairs of reversions proves that the 5,000*l.* was above the value. Champerty was defined to be a bargain to divide the land between the parties, if it were recovered at law, and by which one was to carry on the other's suit at his own expense. That was not so here. Here there was a deed of gift of half of whatever Sir Thomas was entitled to, if anything, and Capt. Sprye was to proceed to recover that half for himself and the other half for Sir Thomas. There was no covenant, no agreement, no contract by Capt. Sprye to prosecute the suit, and, therefore, the bargain did not amount to champerty—*Wood v. Downes* (1), *Strachan v. Brander* (2), *Co. Litt.*, and *Fitz. N.B. tit. 'Champerty.'* But supposing champerty to infect the case, in the first place the frame of the suit is erroneous, and in the second place the Court will give no relief to the champertor. If Capt. Sprye is incriminated by his proceedings, so is Sir Thomas Reynell; they are *in pari delicto*. Look at the case made by the bill. The main ground on which relief is sought is, that a fraud has been practised by Capt.

(1) 18 Ves. 120.

(2) 1 Eden, 308.

Sprye, in concert with Mr. Yonge, his solicitor, on Sir Thomas Reynell, and yet the evidence totally disproves this case. If Sir Thomas was deceived at all, it was not by Mr. Yonge in concert with Capt. Sprye, but by Capt. Sprye apart from Mr. Yonge; and it is contrary to every principle which governs the proceedings of the Court that a plaintiff shall make a case of joint fraud by his bill, and sustain his case by proof of a fraud by one; he can no more do this than he can make that sort of case by his bill, and bring another and totally different case before the Court by his evidence. Here the bill is filed, charging the fraud on both defendants, and if it be proved at all, which is denied, it is proved against only one, and on the authority of the case of *Wilde v. Gibson* (3), decided by the House of Lords, this Court is not at liberty to give the relief sought. With regard to the charge of champerty, no benefit can accrue to Sir Thomas Reynell or his devisee, if it be proved; for by the statute 32 Hen. 8. c. 9. s. 2. it is enacted, that both champertor and accomplice shall be deemed equally guilty, and the subject-matter be forfeited to the Crown. This decree ought, on every ground to be reversed; or, at any rate, the matter ought to be sent to a jury, when both Mr. Yonge and the present plaintiff could be put into the witness-box, and examined on behalf of Captain Sprye.

The reply of *Sir Fitzroy Kelly* contained the following expressions:—Is the allegation in the bill that the agreement for the conveyance of the first moiety of the estate was obtained by fraud and misrepresentation—rank fraud and gross and wilful misrepresentation—disproved by the defendant? I say it is not. Is it proved by the plaintiff? I say it is. Upon the evidence it is clear that the representation that Capt. Sprye had discovered Sir Thomas's heir-at-law to be entitled to some property, through his record searches in the several depositories of public records, was a clear, plain, palpable, and deliberate falsehood, and known by Capt. Sprye to be so. I prove it to be false from Capt. Sprye's own account, for he says that he was told Sir Thomas was entitled to something by

Llewellyn, and he knew it to be a fact from the will at Doctors Commons. It was untrue that the property, whatever it was, could not be recovered excepting by protracted, by expensive, and precarious litigation. It was untrue that the practice of solicitors—of respectable solicitors, and other professional men, is to conduct litigation for half the property recovered. To say so, is a libel on the profession, is a libel on the solicitors. It was utterly untrue, for no such practice did or does exist; and although Capt. Sprye has never been interrogated as to how or where he learnt that such a practice existed, he knew that a representation made by him, holding the rank of an officer and a gentleman, to Sir Thomas Reynell, an officer and a gentleman, was enough to make his assertion implicitly believed. In that sense, if in no other, it was a false and fraudulent misrepresentation. It was untrue, as stated by Capt. Sprye to Sir Thomas, that a suit was necessary to set aside the will of Henry Reynell to enable the Baronet to take the ultimate benefit. In all these points, and in more, plain falsehood was told; and the fraud and misrepresentation contained in the letter of the 29th of April 1843, were never abandoned, and that letter formed the basis of the transaction between the parties.

Their Lordships reserved their judgment.

MARCH 15. — LORD JUSTICE KNIGHT BRUCE.—In these causes the original plaintiff, Lieut.-Gen. Sir Thomas Reynell, sought, and after his death, Lady Elizabeth Reynell, as his devisee and executrix, obtained, from a learned Judge of this Court, not now on the bench, relief against two instruments as effected in equity by unfair or improper dealing alleged to have taken place on the part of Capt. Sprye, who, with Mrs. Sprye, his wife, claimed the benefit of those instruments, their alleged rights under which they, by their suit sought, but in the opinion of the Vice Chancellor who dismissed their bill, were not entitled, to enforce. The earlier instrument is a deed, by which Sir Thomas Reynell purported to convey, for the absolute benefit of Capt. and Mrs. Sprye,

(3) 1 H. L. Cas. 605.

the interest of Sir Thomas Reynell in an undivided half of the freehold estates that had belonged to his distant kinsman Henry Reynell, at the death of that gentleman, who died in the year 1824, owning freehold estates in Somerset and Devon of considerable value, and leaving an only child, a daughter. She was not legally related to him. This lady, with her husband, a clergyman, named Williams, but called after Henry Reynell's death, Williams Reynell, was in the enjoyment of those estates from that event to her own decease, which happened early in the year 1846. The deed was executed by Sir Thomas Reynell in July 1843. The other instrument is an agreement for the sale by him of the interest in the other half of the estates to Capt. Sprye for 5,000*l.*, a sum of which no part has ever been paid. Under this document, signed by Sir Thomas Reynell in May 1844, there seems to have been some colour, at least, for suggesting that Mrs. Sprye had acquired or might claim an interest, as well as her husband. The case brought before us upon a petition of appeal or re-hearing, presented by Capt. and Mrs. Sprye, in each of the causes, occupied here, as it had done before Sir James Wigram, a length of time fully commensurate to its bulky materials and to the demands of justice—whether too long a time, or, if too long a time, whether the excess ought to be ascribed to the Court, or the Bar, or both, I need not now consider. The present is one of those instances of cross litigation, in which a dismissal of each of the contending parties is incapable of terminating the dispute between them, for that course taken here would leave Capt. Sprye at liberty to sue Lady Elizabeth Reynell (whether without or with a reasonable chance of success), for the purpose of recovering against the assets of Sir Thomas Reynell pecuniary damages (substantial or nominal) upon the agreement of 1844, and the covenant contained in the conveyance of 1843. It is therefore necessary, not only with respect to the costs, but also otherwise, to determine whether relief ought to be given upon the bill filed by Sir Thomas Reynell, against which the suit of Capt. and Mrs. Sprye, it must be observed, cannot be viewed in the light merely of a

defence, or merely of being auxiliary to the defence—and this, not because the bills of Capt. and Mrs. Sprye pray relief, but because they pray such relief as they do. Whatever may become of the suit of Sir Thomas Reynell, I apprehend that if we shall dismiss or affirm the dismissal of the bills filed by Capt. and Mrs. Sprye, that will amount to an adjudication that the two instruments in question (of which, if either confers any title at law, it is only a title to sue for pecuniary damages, inasmuch as H. Reynell's interest in his real property was equitable only), confer in equity, either no title at all, or nothing beyond a title to proceed against Sir T. Reynell's assets for the recovery of pecuniary damages; while it is obvious that the success of Capt. and Mrs. Sprye, in their suit, must be destructive of Sir T. Reynell's suit, which on the other hand, cannot succeed without causing the total failure of the other. But there would be nothing absurd or anomalous in a dismissal of each of the bills; and as in most instances, so especially in this, the attack on each side requires a more forcible and clear case than the defence. I have but another word in the nature of preliminary observations to say, which is this—upon the assumption of the decree being right, as far as it goes, it might well, I think, have restrained Capt. Sprye in terms from suing Lady E. Reynell at law upon the two instruments respectively, an addition which I suppose that the Vice Chancellor, if asked to make, would have made; for though an injunction of that kind is not, I believe, prayed on the record, the omission was, I apprehend, at the hearing of the causes, immaterial, whatever the rule may be as to interlocutory applications. The decree would, perhaps, have also contained provisions concerning some other documents in evidence in the cause, if this had been asked at the bar—[His Lordship then read at length the deed of the 15th of July 1843 and a letter of the 14th of May 1844].

As to the origin of these documents, it seems that in or before April of the year 1843, Capt. Sprye, perhaps in the course of some genealogical inquiries, perhaps otherwise, did, without any request from Sir T. Reynell, or employment on his part,

discover or hear of the fact that H. Reynell had left a will, conferring reversionary interests in real property on Sir T. Reynell and his elder brother, Sir R. Reynell, which was proved, and deposited at Doctors Commons. It must also be taken that Capt. Sprye, in a manner open to some remark, did, between the end of March 1843 and the end of June 1843, communicate the fact of the existence of the will to Sir T. Reynell, and inform him that he was, or might possibly be, either under it if valid, or by heirship, interested importantly in the landed property of H. Reynell, property of considerable value. It may, moreover, be fairly considered as true, that Sir T. Reynell, though he had been acquainted slightly at least with that gentleman, and aware of a relationship between them, had, previously to receiving this information from Capt. Sprye, neither cared nor thought whether H. Reynell had left a will or property. Now, that possibly but for Capt. Sprye, the life of Sir T. Reynell might have ended without any attention on his part having been given to any such matter; that possibly but for Capt. Sprye, it might at this moment have been unknown to Lady E. Reynell that H. Reynell left either will or property; and that but for Capt. Sprye, possibly Mr. W. Reynell might now have been receiving and enjoying the rents of the estate—a possession which not very improbably might have continued until his death—there is, I think, no gainsaying. And inasmuch as the estates in question may be taken to be worth not less than 25,000*l.* clear, after discharging the burthens upon them, as at the time when the communication was made by Capt. Sprye to Sir T. Reynell, the true and real title to the estates was, for all purposes material in the present case, thus: that Mrs. W. Reynell was tenant for life, subject to impeachment of waste, with remainder or reversion (immediately in substance) to Sir T. Reynell in fee—as some timber had been cut irregularly—as some colour had been given for an unfounded claim on the part of Mr. W. Reynell, to an interest for his own life—and as there was at least probable ground for questioning the propriety of the conduct of Mr. and Mrs. W. Reynell, and of the trustees or sup-

posed trustees under the will, or one or some of them, in having omitted to inform Sir T. Reynell of the will, and in having dealt somewhat singularly with the paper under which that unfounded claim arose, it cannot, I think, be denied, that Capt. Sprye, by merely telling Sir T. Reynell of the existence and the nature of the will and of the place of its deposit, might have done a valuable act of service to him—a service which Capt. Sprye might have rendered in several ways; as, for instance, he might have said to Sir T. Reynell, “I am glad to be able to inform you of a circumstance which you are possibly not aware of—your kinsman H. Reynell, of Leatherhead, left a will, under which some important interests in landed property appear to be given reversionarily to you, and to Sir R. Reynell—had you not better look after the matter? The will is at Doctors Commons.” Now, if Capt. Sprye, on becoming aware of the will and the place of its deposit, a notorious and sufficiently accessible place, had taken this course, without any bargain or other motive than the wish to do as he would be done by, or to perform an act of mere good nature or courtesy to a respectable acquaintance—I say nothing of their common profession, or of Sir T. Reynell's age, services, and station—Capt. Sprye would have acted as, I hope, three out of four men in this country similarly circumstanced would have acted. Or it might have been thus:—I have more than once, as probably many others have, received letters proposing to furnish some unexplained information alleged to be of an advantageous kind, in exchange for a preliminary coin, I think a sovereign, upon the safe transmission of which, but not before, the mystery was to be unfolded. If Capt. Sprye, taking such a course, had, before giving any information, required and received a promise from Sir T. Reynell that he would, upon learning something beneficial to him from the Captain, give the Captain half, or a quarter, or an eighth, of the value of what the information should enable or lead Sir T. Reynell to acquire, it may be that a jury would, in an action of assumpsit, upon the promise, have given the Captain pecuniary damages, and that the verdict would not have been disturbed; but I do not think it likely

that a court of equity would have assisted such a transaction, beyond not refusing to recognize, as an effectual judgment for damages, or damages and costs, a judgment at law obtained fairly in such an action. Again, Capt. Sprye might have withheld the information from Sir T. Reynell until the latter had promised him a fair or sufficient compensation or reward in general terms for the communication. This, certainly, would have been a contract merely of legal cognizance, but if a judgment at law for damages, or damages and costs, had been obtained by Capt. Sprye upon it fairly, a court of equity would have recognized that as an effectual judgment for its proper legal purpose.

How far he acted in a manner similar or analogous to any of these modes, the pleadings and proofs before the Court shew. There may certainly be a difference of opinion among civil, if not among military, moralists, upon the question whether none of the possible lines of conduct that I have been mentioning would have been in any degree open to animadversion; but as to one of them, there could not have been the least difference or doubt; and as to the others, if not of the highest elevation, they would, at least, not have been of a perplexed, puzzling and cabalistical kind—there would have been something in a sense straightforward belonging to them—they would, in a word, not have been of that generally unlucky description—*acuminis nimii*. I have used the expression “valuable act of service:” the worth and extent, however, of that act, of that service, should of course be neither over-rated nor under-rated. The title and claims of Mrs. W. Reynell and her husband were merely and solely under the will. It was of the utmost importance to their interests that the will should be held valid and effectual; nor has it been shewn or suggested that either of them, at any time, denied or questioned, or thought of denying or questioning, its existence or validity. They desired, indeed, perhaps fairly, perhaps unfairly, but certainly without any foundation, to give testamentary validity, as concerning the freehold property, to an invalid paper—(a paper at least invalid as to the testator’s freehold property—and he does not seem to have had any copyhold property)—a

paper, the sole effect of which, if valid as to freehold estate, would, through the execution by Mrs. W. Reynell of the power it purported to give, have been to confer a life interest on the husband. This wish, however, must have increased rather than diminished their inclination to support the will; which, in fact, is safe in Doctors Commons, and has continually been so for the last twenty-five years and more, including as part of it the paper professing to give the power just referred to.

H. Reynell’s title-deeds, I believe, were, at his death, and have ever since been, held by none of the persons whom I have mentioned, but by a mortgagee under a mortgage, created, I think, by H. Reynell, which seems to be still unsatisfied, and by reason of that incumbrance the legal estate in fee in the property in question, as I collect, was at the time of the making of the will, and has ever since been outstanding. The will speaks of “monies secured on my estates in the counties of Devon and Somerset, in mortgage to Mr. John Beague,” and of “the said mortgage money due to the said John Beague.” The testator describes himself in it as H. Reynell, of Leatherhead, and it seems highly probable that many persons at Leatherhead, and some, if not all, of the occupying tenants of the property were aware or had heard long before the year 1843, that Mrs. W. Reynell was not legitimate, and was entitled under the will of her reputed father, H. Reynell, of Leatherhead, to the real estate of which she and her husband were in the enjoyment. Upon the whole, if Capt. Sprye, at any period of the year 1843, thought it likely that, without and independently of any aid, interference, and communication on his part, Sir T. Reynell and his heir or devisee, if any, would remain for ever or for so long a period as a twelvemonth, after the death of the survivor of Mrs. W. Reynell and her husband, ignorant of the existence, nature, or contents of H. Reynell’s will, that opinion so entertained by Capt. Sprye was, in my judgment, founded on wrong calculations of chance and of probabilities, and in error.

But let us suppose that Capt. Sprye, acting gratuitously, had merely taken the first line that I have mentioned and then

left Sir T. Reynell to himself. In what manner would Sir T. Reynell, if assumed to have had ordinary prudence or common discretion, have acted? He would have resorted to a competent solicitor, a man of consideration and experience; and accordingly, if not then knowing one of that description, would have procured some judicious friend to recommend him one. To this solicitor he would have stated the matter. The solicitor would have inspected the original will and have bespoken and obtained a copy of it, and have learnt from Sir T. Reynell the state of his family, including the probability that Sir R. Reynell, who certainly survived H. Reynell, had died intestate, leaving Sir Thomas heir of Sir Richard. The solicitor then would have made inquiries at Leatherhead and elsewhere, and would very easily and soon have ascertained the place of residence of Mr. and Mrs. W. Reynell, and the fact that she had never had, and was not likely ever to have, a child, and would also have guessed at least that an attempt would be made to give a life interest in the property to her husband, but would of course have felt perfectly satisfied that the attempt could not succeed, for the mere inspection of the will would have shewn that though its validity as to freehold property was probable in the highest degree, except as to the paper under which alone a life interest could be claimed by him, that paper was clearly of no value as to freehold estates. The solicitor would also have felt convinced that Mrs. W. Reynell was neither heiress nor co-heiress of H. Reynell, and that she and her husband in all probability considered it most desirable for each, most material and important for the interests of each, that the will, whether without or with the unattested paper, should be supported as a good will of all the testator's property. The solicitor, having thus informed himself, which he would have done at a small expense, would then have applied by letter or personally in a civil and business-like manner to one of them, and so have learnt the name, abode, and calling of Mr. Monro, one of the trustees, and his connexion or former connexion with the property. But it must be recollected also that Mr. Monro is a deponent, or was intended to be a depo-

nent, in the affidavit deposited with the will at Doctors Commons. By means of communications with that gentleman, Mr. T. Williams and Mr. and Mrs. W. Reynell, or one or more of them, the solicitor would have acquired a sufficient knowledge of the property, the timber cut, and the possession of the title-deeds by H. Reynell's mortgagee. This, too, would not have taken much trouble or time, and the solicitor would then have told Sir T. Reynell there was no doubt or perplexity or difficulty about the case, and that the freehold estates of H. Reynell, encumbered, however, of course as he had encumbered them, must be considered as certainly and safely the absolute property of Sir T. Reynell, subject only to these qualifications: first, the life interest of Mrs. W. Reynell, and the possible but necessarily hopeless claim on her husband's part of a life interest to himself; secondly, the very improbable possibility that Mrs. W. Reynell might bear a child; thirdly, the circumstance that the husband or wife, or both, having cut timber irregularly, might do so again; fourthly, the improbable possibility that Sir R. Reynell had left issue or a will disinheriting Sir T. Reynell; fifthly, the possibility that Sir T. Reynell might have issue, who would after his death be entitled.

Now, if the view and estimate of the facts and probabilities that I have stated are substantially, as I believe them to be, correct, two questions seem to suggest themselves: first, did Capt. Sprye render any important or considerable service to Sir T. Reynell beyond the mere fact of informing him that there was a will of H. Reynell's, under which Sir T. Reynell took valuable interests, whatever may have been the worth or merit of a service of that simple kind? A question which must, I think, be answered in the negative. Secondly, what are we to think of the course of conduct pursued towards Sir T. Reynell by Capt. Sprye and his solicitor, Mr. Yonge, during the interval between the time when Capt. Sprye learnt the existence of the will and the time of Sir T. Reynell's execution of the impeached deed of conveyance in July 1843? In considering this second question, we should probably proceed at once to that instrument itself which I have already

read—a deed which, if its nature, foundation, and intention are to be collected merely from its language and contents, is simply voluntary, purely gratuitous. It does not mention or indicate that Sir T. Reynell had employed Capt. Sprye, or owed him money, or was or had at any time been liable to be sued by him at law or in equity: nor does it bind, or profess to bind him by covenant or otherwise to take any proceedings on the account or for the benefit of Sir T. Reynell, or to render Sir T. Reynell any services whatever. I may also observe that the connexion by marriage which it mentions—a connexion not proved or not otherwise proved—must have been slight or distant, if there was any at all; for though the connexion is stated on the part of Capt. and Mrs. Sprye to have been constituted by consanguinity between that lady and Sir T. Reynell, there is no suggestion or any probability that either of them was descended from any great grandfather or grandmother of the other. Indeed, in a letter, to Mr. W. Reynell, of the 15th of April 1843, Capt. Sprye speaks of his own son's descent "from the old Devonshire branch of the family of Reynell, by matches of two or three centuries back, but nothing connected with the branch from which Mrs. Williams Reynell descends and represents." It seems, moreover, that previous to the year 1835 there had been no acquaintance whatever between Sir Thomas and Lady Elizabeth Reynell or either of them, on the one hand, and Capt. and Mrs. Sprye or either of them on the other, and that if there was any intimacy it began in or after April 1843: still, if the deed was not founded on an improper consideration, was not *turpi ex causâ*, was intended by Sir T. Reynell to be in substance what it appears on the face of it to be, and was fairly obtained from him, it would be impossible to give relief against it. But how do those two or three circumstances stand? They stand as I now proceed to mention, first saying, however, though perhaps superfluously with reference to the expressions "improper consideration" and "*turpi ex causâ*," that notwithstanding the solemnity and force which the law ascribes to deeds and all the strictness with which in general it prohibits the introduction of extrinsic

evidence to prove that an instrument goes beyond, or does not fully contain, or incorrectly exhibits, the terms of the contract, which it was written and signed for the purpose of expressing or recording, the rule is settled, and not merely in courts of equity, that a deed *ex facie* just and righteous, may be vitiated and avoided by alleging and adducing extrinsic evidence to prove that it was founded on a consideration, or had a view or purpose contravening law or public policy; nor would I mention the well-known case of *Collins v. Blantern* (4), but for the sake of referring, as I pass, to the very useful note appended to it in Mr. John Wm. Smith's collection, vol. 1, p. 154.

Besides the conveyance of July 1843, there are in evidence two deeds, each of the same date with that. All were executed in July 1843; two of those are produced, the other is proved by an admitted copy, and one of the two produced is the conveyance just mentioned, which the decree declares void. The deed proved by the admitted copy is a power of attorney from Sir T. Reynell to Capt. Sprye. The remaining deed produced is a deed of covenant to indemnify, from Capt. Sprye to Sir T. Reynell. Not however so, was the first intention of Mr. Yonge and Capt. Sprye, by whom or by Mr. Yonge as Capt. Sprye's solicitor, which is the same thing: it seems to have been meant originally, if I draw a correct inference from the papers which I have seen, that there should be only two instruments, embracing, however, the objects of the three actual deeds, but in a form differing, and a mode varying from them.—[His Lordship then proceeded to refer to and remark on the instructions laid before counsel, the observations of counsel on the drafts, and the final frame of them as executed in 1843; and then read *in extenso* the power of attorney and the deed of indemnity.]

Now, these three instruments, viewed together, do form certainly, even in their actual state of polish, no commonplace assemblage; but if we break the group into individuals, or into an unit and a pair, the result will not be less odd. Who saw ever before such a document as the im-

(4) 2 Wils. 341.

peached conveyance? And would it remove the surprise of any learned or unlearned person, having read that deed without any knowledge of the extrinsic facts, and immediately afterwards being informed of the existence of the two other instruments, to read them and find them what they are? In saying this, I do not exclusively allude to the word "irrevocably," contained in the power of attorney. Again, I apprehend that the power of attorney and deed of indemnity read in ignorance of the impeached deed and of the extrinsic facts, would create a strong suspicion of illegal or improper dealing. The appointment of an attorney irrevocable by an instrument having apparently no other purpose, and the taking of an indemnity from that attorney against the costs of the suits which, as the attorney, he shall institute, the indemnity being by a simultaneous instrument, having no other object, may well be thought out of the ordinary course of fair transactions. It is mere repetition, to observe, however, that the three documents together do not contain or express, do not profess to create, any agreement or obligation on the part of Capt. Sprye to institute or prosecute any suit, take any proceedings, make or pursue any investigation, or perform any operation whatever. Do then the three instruments, taken together, express the true intention and the whole agreement of the parties to them, or at least of Sir T. Reynell and Capt. Sprye, so that it could be fair or right, independently of any question of misdemeanour or public policy, to act on the impeached deed of conveyance simply according to its purport, or as affected only by the purport of the two other instruments?—[Here his Lordship referred at great length to, and read throughout, the draft of the intended conveyance of the second moiety of the estates, and which is before referred to as Exhibit R, and also made reference to many letters in the correspondence as illustrative of the agreement between Sir T. Reynell and Capt. Sprye.]

The understanding, the agreement, that I have been just mentioning, appears to me to have been in substance and effect this: that, inasmuch as H. Reynell was believed by Sir T. Reynell and Capt. Sprye to have died the owner of freehold estates consider-

able in extent and value, as Sir T. Reynell was neither in the possession or enjoyment of that property or any part of it, nor correctly aware of its particular situation or rental, but as they believed that in the character of heir, if he was the heir, of H. Reynell, or in the character of heir, if he was the heir, of Sir R. Reynell, or in character of devisee under the will, if there was a will, of H. Reynell, valid as to his freehold estates, or in more than one or each of these modes, Sir T. Reynell had some right or rights, immediate or not immediate, of more or less value or importance, to or in these estates, and as this right or supposed right, these rights or supposed rights, Capt. Sprye represented to Sir T. Reynell, and which he accordingly considered to be, of uncertain extent, likely to be resisted or questioned, nor susceptible immediately or easily of proof, the ascertainment, assertion, and establishment of this right, or these rights, if any, whether on the footing of intestacy on the part of H. Reynell, or otherwise, were to be, and were, undertaken by Capt. Sprye, so far at least as reasonable diligence and reasonable endeavours on his part would extend and could be effectual; that the expenditure for the purpose should be his; that Sir T. Reynell should be at no expense nor incur any liability, and that upon those terms Capt. Sprye should have half the benefit of what should be so ascertained, asserted, and established, that is to say, should, subject to the life estate if there should prove to be any, in Mrs. W. Reynell, to the life interest, if there should prove to be any, of her husband, to the interest, if any, of her possible issue, to the interests, if any, of Sir T. Reynell's possible issue, to the interests, if any, of Sir R. Reynell's issue, if any, and of his devisee, if any, and to the questions, whether material or immaterial, of Sir R. Reynell having been H. Reynell's heir, and Sir T. Reynell being Sir R. Reynell's heir, have half the freehold property of H. Reynell whatever it might be. Such an understanding, such an agreement, which were in my opinion expressed substantially with sufficient accuracy upon the Exhibit R, in its original state, nor ever abandoned by Capt. Sprye or Sir T. Reynell, however affected by the agreement of

May 1844, may or may not have amounted strictly in point of law to champerty or maintenance so as to constitute a punishable offence, but must in my judgment be considered clearly against the policy of the law, clearly mischievous, clearly such as a court of equity ought to discourage and relieve against. I need not repeat a reference to the authorities quoted during the argument, nor need I mention *Wallis v. the Duke of Portland* (5), *Kenney v. Broune* (6), *Burke v. Greene* (7), and *Stevens v. Bagwell* (8), if they were not particularly cited. It was suggested, by one at least of the learned counsel, that cases between solicitors and clients, and cases where the illegality of a contract, or its contravention of public policy, has been effectually alleged by a defendant against a plaintiff, furnish little or no support to a bill such as that of Sir T. Reynell; and it may be true that principles or rules are applicable to transactions between solicitors and their clients, which are not applicable to those between persons standing not in any such or any similar relation to each other; but it was not, nor could reasonably have been said, that a transaction may not be bad for champerty or maintenance, or to use a phrase more than once found in the books, as "savouring of champerty," though between persons not affected by any such or any analogous connexion. Again, we know that there are instances in which a case, available and effectual in this court for defeating a plaintiff, is unavailable and ineffectual for the purpose of obtaining a decree against a defendant. Upon many a contract, whether bad or good at law, this jurisdiction has refused to act whether for or against the instrument or transaction, and in the present instance of course the dismissal of the bills of Sir Thomas and Lady E. Reynell would not necessarily be inconsistent with the dismissal of the bills of Capt. and Mrs. Sprye. It is obviously true, that Sir T. Reynell participated in the transaction which I have just described and characterized, and if he and Capt. Sprye had been, to use the old legal phrase, *in pari delicto*, and public policy ought not

to be considered as interested in favour of allowing one to sue the other for relief against the contract, there might possibly be ground for contending that Sir T. Reynell's suit ought to fail. But where the parties to a contract against public policy, or illegal, are not *in pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him, as we know from various authorities, of which *Osborne v. Williams* (9) is one. Here it cannot reasonably be said that Capt. Sprye, in the matter of the impeached deed of July 1843, was not more blameable than Sir T. Reynell, who either had not a legal adviser as to the matter or had none but Mr. Yonge, and if Mr. Yonge was so, then he adhered much more to Capt. Sprye than Sir T. Reynell, and failed in duty to the latter, who I am, upon the evidence, convinced did not suppose that in entering into the agreement on the basis of which the impeached deed was executed by him, or in executing it, he was doing an act contrary to public policy, or illegal, or open to the censure of a Court of justice. I believe he did not mean to do anything wrong.

But what are we to say or think of Mr. Yonge, and Capt. Sprye who had had Mr. Yonge for his adviser? Did either of them suppose the agreement unobjectionable? If so, why was the conveyance framed as it was? Why did it not express and embody what was the true bargain, the true arrangement? Why, as I said before, were there three instruments? Whatever the case was between Sir T. Reynell and society at large, he was, as between himself and Capt. Sprye, entitled to believe the incorrect and unwarrantable statements contained in the letter of the 29th of April 1843, in these words—"A system has grown up among men of business, of conducting such cases on the arrangement that no law expenses are paid unless success attends the proceedings; in which case they are first paid out of the money recovered, and the party conducting the proceedings and furnishing the information is allowed

(5) 3 Ves. 494.

(6) 3 Ridg. P.C. 462.

(7) 2 Ball & B. 517.

(8) 15 Ves. 139.

(9) 18 Ves. 379.

for his compensation half what is recovered, which is also to satisfy him for the risk of paying the law expenses, without perhaps succeeding." And again, when speaking of "a legal man" unnamed, the writer uses this expression—"He said, if he found what I stated to him to be borne out by documents, he would undertake the case legally on the usual arrangement as above." I call these statements incorrect and unwarrantable, on the supposition, which I think reasonable, that Capt. Sprye in using the words "men of business" and "legal man," meant Sir T. Reynell to understand him as referring to decent people, to persons of possible respectability, and not to barristers or counsel whom no Inn will own, and solicitors estranged from every roll. What too can be said for Mr. Yonge's letter of the 12th of May 1843, in which, without any expression of surprise, dissent, or disapproval, he, an admitted and enrolled attorney, writes of the "informant" or supposed informant of Capt. Sprye, considering himself "entitled to half the property when recovered, after payment of all expenses, which, however, he was to defray if unsuccessful," and afterwards uses (not as it seems ironically, or at least not with apparent irony) the word "*generously*," the same letter recommending "some legal document stipulating to the above effect"? Some legal document! Whatever may have been the object or influence under which Mr. Yonge consented or submitted to write that letter, is Capt. Sprye at liberty to allege, for any effectual purpose in this litigation, that Sir T. Reynell was not entitled to believe it the spontaneous letter of a professional man, able and willing to advise according to his position and station? A letter less objectionable might have been made worse by the fact that its language was dictated or suggested to the writer by the person to whom it was written; but this letter seems beyond any such heightening.

Perhaps it might with some plausibility be suggested, as an argument against the illegality of the deeds of 1843, or their contravention of public policy, that Sir T. Reynell's rights were so certain, plain, and clear as to exclude any notion of rational controversy. It must, however, be recollected that the validity of H. Rey-

nell's will, as a will of freehold estates, had been represented to Sir T. Reynell, and must be taken to have been considered by him as questionable—that the same may be said of the possible result of the claim to a reversionary life interest for Mr. W. Reynell—that difficulties had been suggested as to the heirship and intestacy of Sir R. Reynell, which cannot be thought to have had no influence on Sir T. Reynell's mind—and that his notions of the construction and effect of the will were vague and obscure. To his apprehension, therefore, and in his understanding when he executed the deeds of 1843, and when he signed the draft of 1844, his rights were not certain, plain or clear. Believing them to be otherwise, he acted on that idea, and, ignorant of the law, entered into a bargain with views and for purposes prohibited by law. It was his intention to break, not knowing, the law. No man can say that Sir T. Reynell would have executed any one of the deeds knowing at the time the nature and extent of his rights, and that they were plain and clear, nor capable of being rationally opposed.

The possible argument to which I have just been referring, exhibits also this dilemma: if from the certainty, clearness and plainness of Sir T. Reynell's rights there was no breach of law or public policy in the transaction of 1843, and the facts and circumstances of that transaction have been correctly viewed by me, what answer is there to the case alleged of mere fraud? I repeat distinctly, that in my judgment Sir T. Reynell did not know or did not understand accurately or sufficiently the material facts, the extent of his rights, their nature, and the rules of law applicable to the will, when he executed the deeds in question, or when he signed in 1844 the draft of the proposed conveyance under the agreement of May, a draft recognizing and purporting to confirm the conveyance of July, each of which acts he did either without any legal assistance, or with worse than none.

Anything, to my apprehension, more thoroughly bad in equity upon the whole than the deed impeached I never knew; nor after close attention to the subject, can I hesitate as to relieving against it in Sir T. Reynell's suit. If, indeed, after

its execution, he had, with sufficient knowledge of the true state of the facts and of his rights, either confirmed the deed or allowed Capt. Sprye to bestow labour and incur expense on the basis of it, and in reliance on it, a different course might very possibly have been correct; but no such case is proved, or in my opinion proveable. There was no substantial difference, it is plain, in my judgment, between the state of his mind and information when he executed the deeds of 1843 and when he signed the draft of the conveyance. I have, before proceeding to the consideration of the agreement of May 1844, but one thing more to say, that is, to express pointedly my regret that the letter of the 12th of May 1843 should have been written; that it should have been transmitted to Sir T. Reynell, and that the episode of the suggested codicil, by which among others these papers are diversified, should have been possible; though whether the first idea of the codicil formed itself in a mind familiar with the case of *Powell v. Knowler* in the second volume of *Atkyns' Reports*, p. 226, I know not, nor attempt to guess.

With respect to the agreement of May 1844, it is so closely connected, so intimately associated, with the impeached deed, that the deed failing, I do not see how the agreement can with propriety be supported. Can it be alleged that without the deed, without the transaction upon the basis of which Sir T. Reynell was induced and intended to execute the deed, can it be safely said that free, and knowing himself to be free, from that transaction and the deed, he would have made the agreement? Would not to hold the latter binding on him be in a sense to give a degree of force and effect to the deed? Retaining the agreement, would not Capt. Sprye be retaining a benefit substantially under the deed? I am of opinion that Sir T. Reynell having entered into the agreement under the erroneous notion that he was bound by the deed, from which, in my judgment, his devisee is entitled to be delivered, and relieved, that lady is entitled to be delivered and relieved from the agreement also. And this I say independently of the very questionable means (they were probably more, indeed, than questionable)

to which, subsequently to October 1843, Mr. Yonge and Capt. Sprye, or one of them had recourse, for the purpose, I will not say of driving, I will not say of coaxing, I will say of conducting Sir T. Reynell into the agreement, in which matter as to legal or professional advice he stood as he did in the matter of the deeds. It is impossible, however, without deep concern, to see what the case is with respect to the letter of Mr. Yonge of the 17th of April 1844, transmitted by Capt. Sprye to Sir T. Reynell, and with respect also to the document transmitted to him in Capt. Sprye's remarkable letter of the 11th of May 1844, written at Tonbridge Wells—a document as to which Capt. Sprye, in a later letter to Sir T. Reynell of the 16th of that month, says—"I feel equally glad you are satisfied with Mr. Yonge's valuation, who is a good and honest creature." By calling, however, the letter of the 11th of May "remarkable," I do not mean to attribute that distinction to it exclusively among the letters—far from that—though it does mention "an actuary," and speaks of "doubts and risks and Chancery suit pending," and "the doubtful state of our suit in Chancery." Sparing myself the task of saying more on this topic, I proceed to state that the conveyance of July and the agreement of May must, in my opinion, fall together and be dealt with not differently.—[His Lordship then read the instructions then laid by Mr. Yonge before counsel for the preparation of the conveyance of the second moiety, the draft of that deed itself, the alterations in it, and the fact of Mrs. Sprye's name being introduced into the transactions, and Sir T. Reynell's surprise thereat, and other particulars disclosed in the evidence.]—Much has been said with more or less weight on the subject of Mr. Stinton's opinion, and the disabling Mr. Yonge as a witness by making him a defendant. The opinion of Mr. Stinton may or may not have been seen by Sir T. Reynell before he executed the deeds, but this I believe, that whether without or with any bad motive, the opinion, if communicated, had not been explained to him properly or sufficiently, if at all, before he executed them, or before he signed the draft of 1844; and that, as I have said, when he executed them, and

when he signed the draft of 1844, he did not sufficiently understand his true position and circumstances with respect to the property in dispute. How otherwise are we to account for his letter of the 11th of May 1844? Is it to be attributed to forgetfulness, cunning, or to what? Perhaps this document is the most observable of the many, I had almost said unaccountable papers which this case contains.

Stress was also during the argument professed to be laid on a case decided by the House of Lords in the year 1848, reported by Messrs. Clark & Finnelly (10), which, however can be better and more thoroughly understood by reading the printed appeal papers belonging to it, but especially the examination of it, in a treatise of the law of property as administered by the House of Lords (11), published in 1849, a well-known and valuable work, where the learned author has elaborately considered the case, on which if his comments are well founded, it is perhaps as remarkable as any in the history of civil judicature of the House of Lords. But whether his view of the facts, the equity and the law of it, or on the contrary those taken by the peers, who advised the House of Lords upon it, are correct, it is binding here as an authority, and, if it can, ought to be applied in this instance. I do not find myself able however so to apply it, or to agree with the learned counsel for Captain and Mrs. Sprye, in their assimilation of it to the present. I do not consider the former as furnishing a rule or precedent for the latter. It has been contended, that fraud or impropriety of conduct has not been alleged by Sir T. Reynell's bill, except as against Capt. Sprye and Mr. Yonge jointly, and that as Mr. Yonge has been dismissed, though without costs, and there has not been a petition of re-hearing or appeal by him or Lady Elizabeth Reynell, the consequence must be the dismissal of Sir T. Reynell's bill. To this, however, I cannot accede. Upon the circumstance that the actual petition of rehearing or appeal is general and unlimited, and that Mr. Yonge, a respondent to it, has appeared upon it, I lay no stress. I give no

opinion whether *rebus sic stantibus* the Court has jurisdiction to vary the Vice Chancellor's decree in a manner favourable to Mr. Yonge, or unfavourable to him. But I apprehend it was clearly within the judicial power of the Vice Chancellor, dismissing Mr. Yonge, to make with consistency the decree which I find made against Captain and Mrs. Sprye. The argument has in effect gone the length of contending that if relief in equity is sought against a man alleged to have obtained an instrument by fraud, or otherwise improperly from the plaintiff for the benefit of the defendant, and the facts alleged as constituting or shewing the fraud or impropriety, are proved against him, and do constitute or shew the fraud or impropriety, the suit must fail, because the bill has incorrectly and untruly alleged the third person to have been a participator and actor in the facts, with such intentions and in such a manner as to have been guilty of the fraud or misconduct equally, and in co-operation with him. That incorrect and untrue mode of stating the case may affect the costs, but to say that it can do more is to contradict alike theory and practice, precedent and principle. Where, indeed, it can reasonably be suggested that the defendant may have been to his prejudice crippled or misled in his defence by the plaintiff's inaccurate mode of stating his case, the Court has the means of providing a remedy for any possible injustice, not only, as I have said, in point of costs, but by giving the defendant an opportunity of adducing evidence, or further evidence, before itself, or a Master, or a jury. Here, in my judgment, neither Captain nor Mrs. Sprye has been crippled or misled in their defence.

And let me observe, that whatever ought to be thought of Mr. Yonge's conduct, as fraudulent or free from fraud, it is clear that in a course of acting contrary to public policy, and to rules by which a professional man especially ought to hold himself bound, Mr. Yonge has, through misapprehension or insufficient information, or otherwise, without or with censurable intentions, directly participated, and as he was personally mingled with the case in 1843 and 1844, so he appears in it in a questionable light often enough

(10) *Wilde v. Gibson*, 1 H.L. Cas. 605.

(11) By Sir Edward Sugden (Lord St. Leonards), p. 614.

to relieve from blame and to prevent much wondering at the act of making him a defendant. Nor am I sure that if Mr. Yonge had been made by the Vice Chancellor liable for the plaintiff's costs in Sir T. Reynell's suit, I should have been prepared to dissent from that. Here there was a masked transaction. A solicitor ought to know that his duty professionally prohibits him (if as a man he is not by instinct drawn back) from assisting or lending his name or credit where there is *aliud simulatum, aliud actum*. Here there was *aliud simulatum, aliud actum*. Mr. Yonge was an abettor in composing and uttering documents which, not recording an affair of business as it truly was, did record it as truly it was not. And why? Because the true transaction was unlawful—because, truly told, it announced its own failure, vanity, and nothingness (to use no harsher term), and this is done by a minister, an officer of the superior courts of justice. If Capt. Sprye (whether student or not) was unaware of how the English laws regard the traffic of merchandising in quarrels, of huckstering in litigious discord, or was ignorant of the value of truth merely as a commodity in business, Mr. Yonge should have informed him better; nor in any event should Mr. Yonge have allowed Sir T. Reynell to remain at once without a solicitor and without a due understanding of the manner, the grave manner, in which he, a gentleman and a soldier full of years and honour, was committing himself. Still I cannot say that I have a firm impression that the decree ought to have charged Mr. Yonge with the costs, and he will be neither charged nor relieved on this occasion. It has not indeed been suggested for him, that he ought to have his costs.

It has been said likewise, that Sir T. Reynell's bill, so far as it is directed against Capt. Sprye on the ground of fraud distinct from champerty, or supposed champerty, and distinct from any question of public policy, is, if not groundless, at least exaggerated and inflamed in a manner to be disapproved and discouraged.

For this argument, whatever its weight or extent, there was probably more foundation in a former than in the present state of the bill, and perhaps even in its actual

state there is some room. The mode of acting, however, which Capt. Sprye seems to have thought justifiable, was such, on his part, that he cannot, I think, well complain that it was viewed unfavourably even without regard to any question of mere law or public policy. And if it was merely an error even without regard to any question of mere law or public policy, still, if so far as Sir T. Reynell's suit is concerned, the decree had exempted Capt. Sprye from a portion at least of the costs, it may be that I should have agreed. Sir T. Reynell was not a young, an embarrassed, or an isolated man; he was not out of society; was well connected; was the brother-in-law of an archbishop; was often or occasionally in London; was in good circumstances; of high military rank; and had the means of obtaining with facility the best advice. If he was deceived, he was so under circumstances that do not, it is true, induce me to say, *qui vult decipi decipiatur*, but may remind one perhaps of the saying. And if it was merely in error, he recalls that passage in the *Digest* (Lib. xxii. tit. 6, ix.), where Paulus tells us—"Sed facti ignorantia ita demum cuique non nocet, si non ei summa negligentia obijciatur. Quid enim, si omnes in civitate sciant quod ille solus ignorat? Et recte Labeo definit: scientiam neque, curiosissimi, neque negligentissimi hominis accipiendam, verum ejus, qui eam rem diligenter inquirendo notam habere possit. Sed juris ignorantiam non prodesse, Labeo ita accipiendum existimat; si jurisconsulti copiam haberet vel sua prudentia instructus sit, ut, cui facile sit scire, ei detrimento sit juris ignorantia. Quod raro accipiendum est."

Sir T. Reynell, too, though not as I have said in equal fault with Capt. Sprye, was a party to a bargain against public policy. Yet if these considerations are insufficient, as of course they are, to justify disingenuousness, how very far are they from affording an excuse for turning to advantage the unsuspecting trust of confiding simplicity. Whatever may formerly have been the course, or supposed course of this jurisdiction, it is now, I apprehend, considered, that where the Master of the Rolls or the Vice Chancellor has by decree given substantial relief against a

defendant, with costs against him personally, it is competent to this jurisdiction, upon a rehearing, by way of appeal, affirming the decree as to the relief, to vary it as to the costs; but I conceive that to render this course correct, there ought to be a judicial dissent as to the costs, strong, clear, and undoubting. That the decree here, so far as it goes, is certainly right in the relief which it gives, I have no doubt; and as to the costs of Sir T. Reynell's suit, if I doubt, I cannot say that I do more; or that the inclination of my opinion is not with the decree in this respect.

It is of necessity included in what I have said, that in my opinion the bills of Capt. and Mrs. Sprye must stand dismissed; but I will add that this I should have thought right, even had it appeared to me correct to dismiss the other bills; for upon all the principles which have guided the Court of Chancery during a long series of years and now regulate it, the indisputable facts of the case shew an absence of all title on the part of Capt. and Mrs. Sprye to ask what their bill asks from a court of equity. This is plain and clear, nor perhaps would it be wrong to say, too plain and clear for argument. To suppose a court of equity capable of interfering for the purpose of giving specific effect to either of two such instruments as the conveyance of July 1843 and the agreement of 1844, obtained as they were, is surely to suppose it capable of forgetting or abandoning every rule of rational jurisprudence. The claim, indeed, of Capt. Sprye, as a plaintiff, ought to be carefully all along distinguished as I have just been distinguishing it, from his resistance as a defendant. The claim of Capt. Sprye as a plaintiff, brings to mind the commencement of one of Lord Hardwicke's judgments (12), in which he says, "Next to the surprise and concern one has to see persons enter into such a combination as this, is the surprise to see it contended in a court of justice. It is most extraordinary to think a court of justice can wink so hard as to suffer it to be supported." That case is particularly mentioned by Lord Eldon in another, where the most striking perhaps of Sir Samuel Romilly's

replies was made—*Huguenin v. Baseley* (13); the judgment delivered in which contains more than one remark not without bearing here. There, too, the person alleging that she had been unfairly dealt with, or unduly influenced, was plaintiff. It is impossible, I think, to doubt that the Vice Chancellor disposed justly and correctly of the costs of the suit of Capt. and Mrs. Sprye, and I consider the costs of the appeal ought to be borne in the same way.

There are two or three matters, not probably of much importance, which the decree has not, but which very possibly the Vice Chancellor, if asked, would have provided for: first, I think, that Lady E. Reynell should undertake to abide by such order or orders as the Court shall now or hereafter make concerning the deed of indemnity; and that the deed of indemnity and any draft or drafts in existence which Sir T. Reynell has signed of the three instruments, or any one or more of them, or of the conveyance under the agreement of 1844, should be deposited in the Master's office, subject to further order. Next I consider that, if Lady E. Reynell shall desire it, there should be an injunction restraining Capt. Sprye from bringing or prosecuting any action, or proceeding at law against Lady E. Reynell as the executrix or devisee of Sir T. Reynell, upon or in respect of the two instruments which the decree declares void, or either of them, or any draft or drafts signed by him of the deed which the decree declares void, and of the conveyance under the agreement of 1844, or either of them. I have reason to believe that in affirming the decree, with costs, and with the additions to it that I have mentioned, and in the undertaking to be required, and which has now been given, Lord Cranworth agrees with me. Whether he does so in the mode I have arrived at this conclusion, the Bar will, I doubt not, have the satisfaction of hearing from himself.

LORD JUSTICE LORD CRANWORTH.—Sir T. Reynell the original plaintiff, rested his right, and Lady E. Reynell, as representing him, now rests her right, to the relief sought to be enforced in this suit on two

(12) *Bridgman v. Green*, 2 Ves. sen. 627.

(13) 14 Ves. 284.

grounds: first, that the instruments impeached are void on the ground of fraud; and, secondly, that they are so as founded on champerty. Sir James Wigram decided in favour of the plaintiff on the first ground; and, after a full consideration of the facts, I am of opinion that they do disclose a case of fraud, entitling the plaintiff, on that ground, to what he seeks by his bill; so that the decree is in all essential points correct. My learned Brother has gone so fully into the case, that agreeing with him, as I do, in the result at which he has arrived, it might perhaps have been enough for me simply to express my concurrence, and so leave the matter where it now stands. But considering the nature of the dispute, we thought it more fair to the parties to reduce to writing each of us his view of the case, so that it might not only appear that we concurred in the same result, but also that the reasoning which each of us had, separately, deemed sufficient to warrant the conclusion at which we had arrived, might be explained.

I have said that the facts established in proof disclose a case of fraud fully warranting the decree. It may be impossible to give a definition of what constitutes fraud in the contemplation of a court of equity, so as to meet all the various combinations of circumstances to which the word may apply; but there can be no difficulty in saying that whenever any one has, by wilful misrepresentation, induced another to part with his rights on the belief that such representations were true, this is, in the plainest and most obvious sense, a fraud which this Court will not tolerate. Now, I am of opinion that beyond all doubt Sir T. Reynell was induced to execute the conveyance of the 15th of July 1843, which it is the principal object of this suit to set aside, by repeated misrepresentations made to him by Capt. Sprye, and so that this Court cannot permit that conveyance to stand. The conveyance was executed in pursuance or in consequence of an agreement contained in a letter of Sir T. Reynell, dated the 1st of June 1843. By this letter Sir T. Reynell agrees to give up half the property to which he might be eventually found entitled, in consideration of his being indemnified against all costs whatever in-

curred in the attempt to recover it, whether that attempt should or should not prove successful.—[His Lordship then read the material parts of the letter of the 29th of April 1843.]—Looking, then, to this letter as the basis of the subsequent treaty, the question is, whether it contains any untrue statements calculated to mislead Sir T. Reynell, for if it does, and if they were known to Capt. Sprye to be inconsistent with truth, and were in any degree calculated to influence the mind of Sir T. Reynell, they will render invalid all the subsequent negotiations based on them. Now, after fully considering this part of the case, I feel bound to conclude that in this letter Capt. Sprye was misleading Sir T. Reynell on more than one point; he was misleading him on the subject of what he represents to be the usual course among men of business in conducting litigation, that is, that the parties for whose benefit it is conducted, should be indemnified from costs, and then should give up half the property recovered as a compensation or reward to the party carrying on the proceedings. Capt. Sprye distinctly states that this is the usual practice, and so states it as evidently to imply that it is both a lawful and an honourable practice. But though this is contrary to the fact, yet it may be said perhaps Capt. Sprye might have supposed he was only stating the truth. Let us see how that is. Capt. Sprye not only states the practice to be usual and impliedly honourable, but he says that he had mentioned it to a legal man, who had said he would, if Capt. Sprye's representations on the subject of Sir T. Reynell's rights were borne out by the documents, undertake the case legally "on the usual arrangement as above." I quote the very words. This amounts impliedly to a representation, first, that the person designated "a legal man" had represented the arrangement as usual; and, secondly, that he had undertaken to act on it. Who, then, was that legal man? Mr. Yonge was then Capt. Sprye's solicitor; and Capt. Sprye, in his first answer, says, that if Mr. Yonge was not the person referred to as the legal man, he does not know who it was. It is true that in the second answer, he says he thinks the person intended as the legal man was his clerk Mr. Mitchell; but that cannot be, for,

in the first place, the legal man, according to the letter, had said that he would on certain contingencies undertake the case legally, that is, professionally; and this shews that the legal man must have been an attorney or solicitor, whereas Mr. Mitchell was a mere clerk or assistant to Capt. Sprye, aiding him in his genealogical inquiries—who could not, if he would, have conducted the case, professionally;—and, secondly, the legal man is represented as having said that if he found what Capt. Sprye had stated to him was borne out by documents, he would undertake the case. This is altogether inapplicable to Mitchell. There were no documents except the will, and that had been communicated by Mitchell himself to Capt. Sprye, and, of course, therefore, was not a matter to be communicated by Capt. Sprye to Mitchell. Clearly, therefore, this allusion in the letter to a legal man, must have been altogether unfounded, or else it must have meant to represent that Mr. Yonge had agreed to undertake professionally the conduct of the law proceedings necessary for enabling Sir T. Reynell, or his heir, as the case might be, to obtain the property on the terms that he represented as the usual terms, namely, that Sir T. Reynell was to incur no costs, and that Mr. Yonge should, if the suit should be successful, receive one half of the property recovered by way of payment for his services; but that if nothing should be recovered, then he should himself bear all the costs. With such a representation, Sir T. Reynell, supposing him to place reliance on its accuracy, might well think that the most prudent plan for him to pursue would be to follow the course thus considered both by Capt. Sprye and Yonge to be the most fair and usual in similar cases, that is, to enter into the agreement contained in his letter of the 1st of June.

Let us now consider, whether on the evidence we can believe that Yonge had, in fact, made the statement to Capt. Sprye which the letter says he made: that is, did represent the proposed terms as being the usual mode of conducting litigation, and did offer himself to undertake the business on those terms. I cannot reconcile the hypothesis of any such proposal having been made by Yonge, with his letter to Capt. Sprye of the 12th of May. I will

for the present treat that as the genuine letter of Yonge, and in it I find this passage:—"It appears you have already communicated to Sir T. Reynell that your informant considered himself entitled to half the property when recovered, after payment of all expenses, which, however, he was to defray if unsuccessful, and that he had afterwards generously offered that what he would thus have retained should be made over for the benefit of your wife and daughters. I am glad to find from Sir T. Reynell's note that this arrangement will be quite agreeable to him, but as life is uncertain, and to provide against any future misunderstanding, I agree with your friend in his suggestion, that before moving in this matter Sir T. Reynell should sign some legal document stipulating to the above effect. You on your part, at the same time binding yourself to indemnify him against any expenses whatever." Now, this is a representation materially different from that made in the letter of the 29th of April. The plain meaning of that letter was, that Mr. Yonge had undertaken, if satisfied with the documents, to run the risk of the litigation, looking to the eventual receipt of one half as his remuneration; whereas, according to Mr. Yonge's own letter of the 12th of May, he was to run no risk, he was to be employed professionally by the person described as the informant, who was to get half of what should be recovered, and then had agreed, after reimbursing himself his costs, to give it up to Capt. Sprye's wife and daughters. As far as Sir T. Reynell was concerned, it was of no consequence whether the half of the property recovered should go to Yonge or to any other person; but the discrepancy between the two statements is important, as shewing that the letter of the 29th of April, on which the whole negotiation depended, contained representations not consistent with truth; representations calculated to make Sir T. Reynell believe that the proposed arrangement was one in the ordinary course of business, approved by Mr. Yonge, and on which he had himself offered to act. This could not have been an accidental misrepresentation—Capt. Sprye could not have supposed that Yonge had made the offer to conduct the litigation on the stated terms, if he had not

done so; and he could not possibly have meant to describe Mr. Llewellyn as the legal man—and yet the plain inference from Yonge's letter is, that Llewellyn and not Yonge was the party who was to get the half of the property, though he had agreed to give it up, after payment of the costs, to Capt. Sprye or his family.

But the deception on this head does not rest here. I have already alluded to Yonge's letter to Sprye of the 12th of May, and have supposed it to be the genuine letter of Yonge. In truth, however, it was no such thing. It was most important to Capt. Sprye that Sir T. Reynell should consider the proposed arrangement as being the ordinary established mode of conducting litigation under similar circumstances. Capt. Sprye told him that it was so—if the information so conveyed to Sir T. Reynell had rested wholly on the assurances of Capt. Sprye, it was possible that Sir T. Reynell might inquire further on the subject—at all events the mind of Sir T. Reynell would be much more likely to acquiesce in the notion that the proposal was in conformity to ordinary usage if he was informed by some professional person that such was the case, than if the whole rested on the representation of Capt. Sprye alone; it was, therefore, most important to Capt. Sprye that he should be able to put into the hand of Sir T. Reynell some document which should lead him to suppose that Yonge viewed this proposed arrangement in the same light, in which it had been represented by Capt. Sprye himself in the letter of the 29th of April, that is, as an arrangement such as honourable men were accustomed to act on, and the letter written by Yonge to Capt. Sprye on the 12th of May was exactly calculated to have that effect; for he there, in the passage to which I have already referred, alludes to the proposed arrangement as to dividing the property without making any comment on it as being unusual or illegal, and only expresses admiration at the generous way in which the informant had agreed to forego his share, after payment of the expenses, in favour of Capt. Sprye's wife and children. So, again, he approves of the suggestion said to have been made by Capt. Sprye's friend, that the parties should bind themselves by some legal document, in order

to guard against the contingencies of life and death. This letter was forwarded on the 15th of May by Capt. Sprye to Sir T. Reynell, and its effect on his mind (assuming him to have treated it, and no doubt he did treat it, as a genuine letter of Yonge) must have been to make him think that the transaction was, in the opinion of Yonge, one of ordinary occurrence, or differing only from the usual course of such transactions, in the generosity which as between the informant and Capt. Sprye, had led the former to forego his share of the property in favour of Capt. Sprye or his family. This would, I say, necessarily be the effect of such a letter on the mind of Sir T. Reynell, supposing him to treat it as the genuine letter of Yonge. It could have no such effect, or at all events much less effect, if Sir T. Reynell had known that it was in truth not the letter of Yonge, but a letter prepared under the directions of Capt. Sprye himself, for the purpose of being shewn to Sir T. Reynell as being the letter of Mr. Yonge; and such, I conceive, it certainly was. Capt. Sprye incloses it to Sir T. Reynell in his letter of the 15th of May, merely describing it as "a note from my legal friend." Let us see, then, how and under what circumstances it was written. Capt. Sprye, in his first answer, says, that having obtained a copy of the will of H. Reynell, he, on the 9th of May, had a conference with Mr. Yonge thereon, and on the proposed arrangement for remuneration; whereupon Yonge said he would consider the matter and write his opinion to Capt. Sprye, in order that he might submit it to Sir T. Reynell, and the letter of the 12th of May was accordingly written. If this had been a full and fair representation of the whole which had passed between Capt. Sprye and Mr. Yonge, I do not think that Sir T. Reynell would have anything to complain of so far as relates to this part of the case; but it appears from Capt. Sprye's second answer, when he had been further pressed on the subject, that what he had stated in his first answer by no means fairly represents the truth of the case. The fair inference from the first answer is, that the letter of the 12th of May was the genuine unprompted production of Yonge, whereas from the subsequent answer it is apparent

that what Mr. Yonge then wrote had been, in truth, suggested by Capt. Sprye himself. He denies, indeed, in answer to the charge in the amended bill, that he dictated or settled the draft of the letter of the 12th of May, but he admits that he communicated to Yonge an outline or sketch of the letter that he should write. It is enough to say that a letter so written is a very different thing from a letter containing the spontaneous suggestions of the writer's own mind; the latter might well create impressions which the former would fail to produce; and when Capt. Sprye forwarded Mr. Yonge's letter under circumstances which necessarily implied that it had originated with Yonge himself, he was misleading Sir T. Reynell in an important particular. It had the same effect as if he had said, "do not trust to me, you see in what light Yonge views the matter, act upon that." We have thus a negotiation opened between Capt. Sprye and Sir T. Reynell, founded on what I consider to have been misrepresentation, necessarily leading Sir T. Reynell to believe that the basis on which Capt. Sprye proposed to conduct the litigation for the benefit of Sir T. Reynell, was fair and usual, and that in the ordinary intercourse between Capt. Sprye and his solicitor, the latter had so treated and was ready to act on it. Putting, then, this construction on what had passed between the parties, I am of opinion that the original negotiation was founded on what must be treated in this court as a fraudulent misrepresentation; and that for however long a time the negotiation afterwards continued, and into whatever ramifications it afterwards extended, the original vice continued to taint it, and that Capt. Sprye can never claim the benefit of any deed or instrument founded on it.

In these remarks I have proceeded on the assumption, that the impeached deed was, in fact, founded on the previous letters to which I have adverted. It is, I think, impossible to come to any other conclusion. I am aware that the terms of the conveyance, as it was eventually executed, differ in several material particulars from those originally contemplated, but the circumstances of the case satisfy me that Sir T. Reynell, though probably not unaware, to some extent, of the change made in the form of the deeds, yet

executed them in the full belief that he was substantially carrying into effect the proposal originally made to him. I do not pursue this part of the case, which my learned Brother has so fully investigated. This, then, being my opinion; being, as I am, satisfied that Sir T. Reynell was induced to execute the impeached deed on the representation that the proposal to divide the produce of the litigation was one emanating from Yonge, and on which he had been ready and had offered to act, it would perhaps be enough for me to leave the case here; for where a party has induced another to act on the faith of several representations made to him, any one of which he has made fraudulently, he cannot set up the transaction by shewing that every other representation was truly and honestly made. But I felt it my duty to follow this inquiry further, lest I may have taken too strong an impression from the single point to which I have yet adverted.—[His Lordship then read copious extracts from Sprye's answers, giving his version of the transaction and many of the letters in the correspondence, and which his Lordship stated that he disbelieved.]—I assume, that at the same time when the negotiation was opened and for several weeks afterwards, Capt. Sprye fully believed that Sir T. Reynell would take no interest himself, unless he survived the tenant for life; it was, therefore, no fraud in him to represent to Sir T. Reynell that the nature and extent of his interest were such as he supposed them to be. But having made such a representation, and knowing that Sir T. Reynell was negotiating on the footing of his interest being such as it had been represented to him, Capt. Sprye was, on the most obvious principles of justice and fair dealing, bound, as soon as he discovered his mistake, as soon as he found that the interest of Sir T. Reynell was much more valuable than he had described it, to explain the mistake to Sir T. Reynell, so as to enable him, if he should think fit, to put an end to the pending treaty. That this was not done is, I think, apparent from all the circumstances of the case. Mr. Stinton's opinion, which was obtained on the 15th of June, stated, as of course it must state, that Sir T. Reynell had a vested remainder in fee expectant on the life estate

of Mrs. Williams Reynell, and subject to certain contingent estates known by all parties to be interests which might practically be disregarded as being of no value whatever. I may say, that I have disregarded the circumstances of the supposed life estate of the husband of Mrs. Williams Reynell, that would only remove the title one step further, but the truth is, as it turned out, there was no such title. I have treated it as if that never came in question. Capt. Sprye says, in his first answer, that this opinion was communicated to him on the 16th of June, and that he was then for the first time informed what the interest of Sir T. Reynell in the estate was. In his second answer, he says, a copy of the opinion was sent to him, unaccompanied by any note or other memorandum, and he denies that he then fully understood the nature of Sir T. Reynell's rights. This denial, it will be observed, is made in very guarded terms; he only says that he did not then fully understand what Sir T. Reynell's rights were, but in his former answer he had said that he was then first informed of what the interest of Sir T. Reynell was.

Now, taking the two answers together, the fair and reasonable inference appears to me to be, that Captain Sprye at this time, by means of the opinion of Mr. Stinton, had at least ascertained that the interest of Sir T. Reynell was far more valuable than it had been originally supposed to be, and so that he had led Sir T. Reynell into a treaty on an erroneous view as to his rights. Under these circumstances, it was the bounden duty of Capt. Sprye immediately to put Sir T. Reynell on his guard, to explain to him that he had up to that time unintentionally misled him as to his rights, that consequently he was free to disregard all that had been done up to that time as having been founded in error. Did he do this? Nothing of the sort. On the contrary, I find that on the 16th of June, after he had got the copy of Mr. Stinton's opinion, he wrote a long letter dated on that day at 10 o'clock p.m. to Sir T. Reynell, in which he does not even state that the opinion had been obtained; he says, indeed, that he has had on his desk for some time the case which had been submitted to counsel, hoping that he, Sir T. Reynell, would look in and see it. But

this could hardly have been the case with the opinion, for what had been sent to him was, as he states, merely a copy of the opinion. At all events, though he writes a long letter, many passages in which satisfy me that he had then seen the opinion, and, to a great extent, understood its import, yet he does not give any hint to Sir T. Reynell as to how much more beneficial an interest he possessed according to the opinion than had been originally represented by Capt. Sprye in the letter of the 29th of April. I cannot but consider the omission, immediately and at once to call Sir T. Reynell's attention to the effect of the opinion, as affording very cogent evidence that he never intended to set him right as to the real nature of his interests. If he did not at once put him on his guard when he wrote to him at great length as soon as he got the opinion, what reason is there for supposing he would do so afterwards? I can discover none. There is no evidence of his having done so. The probability, as he did not do so at first is, that he would not do so afterwards, and I think that in the subsequent correspondence I discover satisfactory, I might say irresistible, proof that no such communication ever was made to him.—[His Lordship then referred to the proceedings in Chancery and Sprye's letters relating to them, and then read such other parts as related to the alleged difficulties in the case, and the effect on Sir T. Reynell's mind as shewn in the letter of the 11th of May 1844.]

Let us here pause and consider what is the necessary inference from these letters. The problem to be solved is this:—Did Capt. Sprye before he obtained the conveyance of the 15th of July 1843, explain to Sir T. Reynell that in his former letter he had made to him an erroneous representation as to his rights; had represented that to be contingent and precarious which he had since discovered to be vested and certain—had led him to suppose that the benefits possibly to accrue to him, could only be recovered through the means of expensive legal proceedings of doubtful result; whereas, in fact, he would, on the death, without issue, of Mrs. Williams Reynell, succeed entirely and without any law proceedings at all to the whole of the property? This I say is the question to be

solved—and surely there can be no doubt as to the answer. The letter of the 11th of May, which I have just read, is absolutely irreconcilable with the notion that Sir T. Reynell was aware of the real nature of his rights. There is no meaning in the passage about his being ready to withdraw when Capt. Sprye should find there was no further hope of success, if we are to believe that he knew the property would regularly, without any litigation or controversy, devolve on him when Mrs. W. Reynell should die. The letter is well consistent with the hypothesis that Capt. Sprye allowed Sir T. Reynell to proceed all along on the notion that his rights were such as he, Capt. Sprye, had originally represented them—it is irreconcilable with the supposition that he had at any time explained to him the real nature of these rights. It only remains to add, that on receiving this last letter, Capt. Sprye still keeps up the same delusion which he had previously created. Instead of saying, as he was bound to do, "What do you mean by hope of success? There is no doubt or difficulty on the subject—it is quite certain that when Mrs. Williams Reynell dies, we shall succeed to the estate, that is to say, you to one half and I to the other." Instead of saying this, or to this effect, he keeps up the delusion, treats the offer made by Sir T. Reynell to drop the proceedings, as a friendly proposal, but to which he could not listen, not because it was (as in truth it was) absurd and founded on ignorance of the real nature of his interests, but because he, Capt. Sprye, "was not of a turn or temper of mind accustomed to yield to difficulties!" On these grounds then I come to the conclusion, that some time before the execution of the conveyance, probably on the 16th of June, Capt. Sprye ascertained that Sir T. Reynell had an absolute indefeasible interest in the property in question, to recover which, no legal proceedings whatever would be necessary, and that he nevertheless kept Sir T. Reynell in ignorance of what he had so found out, and allowed him to proceed on the erroneous notion of his rights, as they had been originally represented by the letter of the 29th of April, and those which immediately followed. I have thus arrived at the conviction, that in three distinct respects,

Capt. Sprye misled Sir T. Reynell in the treaty which ultimately led to the execution of the deed of conveyance of the 15th of July 1843: first, by representing to him that the proposal to share the property was one usual among men of character, and one on which Mr. Yonge had proposed to act; secondly, by leading him to believe that the benefits to be obtained for him or his heir, could only be so obtained, if at all, through the medium of a doubtful and costly litigation; and, thirdly, by not explaining to him, after Mr. Stinton's opinion had been obtained, that his interest was not contingent as he had originally described it, but an absolute indefeasible interest subject only to the chance of Mrs. Williams Reynell leaving issue.

Every one of these considerations would be material ingredients towards enabling Sir T. Reynell to form his judgment as to whether he should or should not accede to the proposal of Capt. Sprye. If he had not received what was equivalent to an assurance that Mr. Yonge considered the proposed division of the property as the usual course of conducting business on such occasions, and if he had not been led to suppose that his interest was contingent, depending on the chance of his surviving Mrs. Williams Reynell, and then only to be recovered by expensive and doubtful litigation, it may well be that he would not have acted as he did;—perhaps he might, perhaps he might not. But this is a matter on which I do not feel called upon or indeed at liberty to speculate. Once make out that there has been anything like deception, intentional deception, and no contract resting in any degree on that foundation can stand. It is impossible so to analyse the operations of the human mind as to be able to say how far any particular representation may have led to the formation of any particular resolution or the adoption of any particular line of conduct. No one can really do this with certainty, even as to himself, still less as to another. Where certain statements have been made, all in their nature capable, more or less, of leading the party to whom they are addressed, to adopt a particular line of conduct, it is impossible to say of any one such representation so made, that even if it had not been made, the same resolution would have

been taken or the same conduct followed. Where, therefore, in a negotiation between two parties, one of them induces the other to contract on the faith of the representations made to him, any one of which has been untrue and known to the party so to be, the whole contract is in this court considered as having been obtained fraudulently. Who can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed? The case is not at all varied by the circumstance that the untrue representation, or any of the untrue representations, may, in the first instance, have been the result of innocent error. If after the error has been discovered, the party who has innocently made the incorrect representation, suffers the other party to continue in error and act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in the contemplation of this Court, a fraudulent misrepresentation even though it was not so originally.

These are all principles of such obvious justice as to require neither argument nor authority to illustrate or enforce them, and they need but to be stated, in order to command immediate assent. The only question can be in each particular case, how far the facts bring it within the principle? I have already pointed out several particulars in which I think these principles apply to the present case; and, therefore, without inquiring whether there are or are not other instances of misrepresentation fatal to the case of Capt. Sprye, I feel bound to say, that I concur with Sir James Wigram in his conclusion, that the conveyance of the 15th of July was obtained by fraud, and so must be set aside.

It would not be right that I should leave unnoticed an argument much pressed at the bar, and which carries with it a semblance of justice, but to which I have not felt it possible to yield my assent. It was said that during the whole of the negotiations Capt. Sprye not only left Sir Thomas Reynell at perfect liberty to consult his friends and professional advisers, but even on several occasions recommended him to do so. To a great extent this certainly was the case: and if the relief sought in this suit had rested on mere mistake, if Capt.

Sprye had not by misrepresentations of facts, which I cannot treat as unintentional, led Sir T. Reynell to believe that his rights were different from what in truth they were, it may be that the argument to which I am now adverting would have prevailed. In such a case, perhaps, this Court might have considered that it was the folly of Sir T. Reynell to have acted without advice, and might have refused to assist any person who was so singularly little alive to his own rights. *Qui vult decipi*, it is said, *decipiatur*. But no such question can arise in a case like the present, where one contracting party has intentionally misled the other, by describing his rights as being different from what he knew them really to be. In such a case it is no answer to the charge of imputed fraud to say, that the party alleged to be guilty of it recommended the other to take advice, or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defence to the other. For no man can complain that another has too implicitly relied on the truth of what he has himself stated. This principle was fully recognized in the case of *Dobell v. Stevens* (14), referred to by my learned Brother in the course of the argument.

The reasoning by which I have satisfied myself of the plaintiff's right to set aside the conveyance, also disposes of that part of the bill of Sir T. Reynell, in which he seeks to have the contract for the purchase of the other moiety delivered up and cancelled, and also of the cross suit. For, independently of all other objections to that contract, it is clear Capt. Sprye having, by what I must consider as fraud, put Sir T. Reynell in the position of being the owner of a moiety instead of the entirety, could never deal for the purchase of that moiety. Such dealing is, in truth, but a continuation of the original fraud; and on that short ground I am clearly of opinion that the contract of the 14th of May 1844 must be considered as having been obtained by fraud, and must be delivered up to be cancelled, and that the cross bill filed for the purpose of enforcing a specific per-

(14) 3 B. & C. 625; s. c. 3 Law J. Rep. K.B. 89.

formance of that contract was properly dismissed, with costs. My learned Brother has pointed out some trifling additions which ought to be made in the decree, but this does not go to the substance of the case; and we both, therefore, concur in the opinion that the costs of this rehearing must be borne by Capt. Sprye.

The decree was then added to by ordering an injunction against Sprye from bringing any action or proceedings at law against Lady Elizabeth as executrix or devisee of Sir Thomas, upon or in respect of the two instruments declared by the decree to be void, and the counsel for Lady Elizabeth gave for her an undertaking that she would abide by any order the Court might make concerning the deed of indemnity.

LOORD JUSTICEA. }

1852. }

March 25, 26. }

SPRYE v. REYNELL.

Costs—Stay of Proceedings—Waiver—Supplemental Bill in the nature of a Bill of Review.

*A party was ordered to pay the general costs of certain suits. Pending an appeal, he moved for leave to file a supplemental bill in the nature of a bill of review, and obtained leave to do so on depositing 50*l.* with the Registrar, and he was ordered to pay the costs of the motion. He paid the 50*l.*, but not the costs of the motion, and filed a supplemental bill; but the Court held that the payment of the costs of the motion was a condition annexed to the order giving leave to file the supplemental bill, and that therefore all proceedings in the supplemental suit must be stayed until payment of them.*

Where a party is ordered to pay the general costs of a suit, and also the costs of a particular motion, and then files a bill against the party entitled to all those costs, if the latter moves to stay all proceedings in the new suit until the costs of the particular motion are paid, that is a waiver of any right he may have to stay proceedings until the general costs of the suit are paid, and the Court will only stay the proceedings until payment of the costs of the particular motion.

By a decree, dated the 6th of November 1849, in the causes of *Reynell v. Sprye* and *Sprye v. Reynell* (1), the defendant in the first and the plaintiff in the second suit, Richard Samuel Mare Sprye, was ordered to pay the costs of Lady Elizabeth Reynell, one of the parties to those suits. This decree was appealed from, and before the hearing of it, Mr. Sprye moved, on the 20th of November 1851, against that lady and her solicitors, Messrs. Walker & Grant, for the production of documents, and for leave to file a supplemental bill in the nature of a bill of review; whereupon it was ordered that the motion for production be refused with costs, but leave was given to file the bill upon Mr. Sprye depositing 50*l.* with the Registrar, to answer costs, in case the Court should think fit to award costs in respect of the proceedings had since the decree, and Mr. Sprye was ordered to pay the costs of the application, and the hearing of the appeal was stayed. The decree was ultimately affirmed, the appeal being dismissed with costs. On the 15th of January 1852, Mr. Sprye having deposited the 50*l.*, filed his supplemental bill in the nature of a bill of review, against Lady Elizabeth Reynell, Mr. Lawrence Walker, Mr. Arthur Walker, (two of the firm of solicitors of Walker, Grant & Co.) and Mr. Charles Wilson, and appearances were entered on the 19th of the same month. The costs ordered to be paid by the decree of the 6th of November 1849 not having been paid, an attachment was issued against Mr. Sprye, and a similar proceeding was taken against him for non-payment of the costs given by the order of the 20th of November 1851. An application was made on the 1st of March 1852 to the Master, in the supplemental suit, on behalf of Lady Elizabeth and Mr. Lawrence Walker, and Mr. Arthur Walker, that the time for their answering might be enlarged for six weeks after Mr. Sprye should have paid the costs directed by the order of the 20th of November 1851. On the following day, a motion was made on behalf of the same parties before

(1) These causes are reported on minor points, 16 Law J. Rep. (N.S.) Chanc. 117, 286, and *ante*, p. 13. The case upon appeal will be found, *ante*, p. 633.

Vice Chancellor Parker, that all proceedings against them for want of answer might be stayed until four weeks after the plaintiff, Mr. Sprye, should have paid to them the costs directed to be paid by him by the order of the 20th of November 1851, giving him leave to file the new bill, and for non-payment of which he was then in contempt, or in case the Court should not think fit so to order, then that the said defendants might have four weeks further time to answer. The Vice Chancellor made an order, giving the four weeks' further time, without prejudice to an application to stay the proceedings in the suit. On the 8th of March, a motion was made before Vice Chancellor Parker in the same suit, and on behalf of the said parties, that all proceedings in that cause against the defendants, Lady Elizabeth Reynell, and Lawrence Walker, and Arthur Walker, for want of their answers, might be stayed until three weeks after Mr. Sprye should have paid to the three defendants the costs directed to be paid by him by the order in the suits of *Reynell v. Sprye* and *Sprye v. Reynell*, dated the 20th of November 1851, and should have cleared his contempt; and that all proceedings in this cause against Lady Elizabeth Reynell for want of an answer might be stayed until three weeks after the said plaintiff should have paid not only the said costs, but also other costs in the said suits of *Reynell v. Sprye* and *Sprye v. Reynell*, for non-payment of which to the said Lady Elizabeth Reynell he was then in contempt, and should have cleared his contempt. The Vice Chancellor held that as the Court had given Mr. Sprye, by the order of the 20th of November 1851, liberty to file the new bill, on a condition which he had fulfilled, namely, the payment of the 50*l.* to the Registrar, the motion must be refused with costs. His Honour stated his opinion to be, that the payment of the costs was not made a condition precedent, to be performed before the filing of the bill. From this order Lady Elizabeth Reynell, Mr. Lawrence Walker, and Mr. Arthur Walker appealed.

Mr. Lloyd, Mr. Malins, and Mr. Shapter, for the appeal.—The only rational construction, having regard to the uniform practice of the Court, of the order of the

20th of November 1851, by which leave was given to Mr. Sprye to file his supplemental bill in the nature of a bill of review, is, that he was required to pay the costs before he should file that bill. That was a condition precedent, imposed by the Court as the term of such indulgence being granted. He has not performed that condition; and the case of *Partridge v. Usborne* (2) is explicit to shew that, unless under very special circumstances, which do not occur here, a party will not be allowed to prosecute a supplemental bill in the nature of a bill of review unless he performs at the proper time all that the decree commands him to do. In that case the time for the payment of money had not arrived, but here it has; and there Lord Lyndhurst said that if the money were not paid when the period should arrive, or if it turned out upon inquiry that a period had arrived, and an application were made founded on the default, that would lead him to a different conclusion from that which he had arrived at. The rule is laid down very clearly in the third and fourth of *Lord Bacon's Orders* (3). In *Wilson v. Bates* (4), before Lord Cottenham, the practice that proceedings will be stayed until costs are paid is fully recognized, and more especially in *Price v. Dalton*, cited in page 204 of the same reports, where it is stated "Upon a motion by the defendant that all proceedings for want of answer might be stayed until the plaintiff had paid certain costs, the Court gave the defendant three weeks time to answer, after the costs should have been paid." In a much more recent case, decided by one of your Lordships when Vice Chancellor, and sitting

(2) 5 Russ. 195; s. c. 7 Law J. Rep. Chanc. 49.

(3) Beames's Orders, 3:—"No bill of review shall be admitted, or any other new bill, to change matter decreed, except the decree be first obeyed and performed; as, if it be for land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone. But if any act be decreed to be done, which extinguisheth the party's right at the common law—as making of assurance or release, acknowledging satisfaction, cancelling of bonds or evidences, and the like,—those parts of the decree are to be spared until the bill of review be determined; but such sparing is to be warranted by public order made in court."

(4) 3 Myl. & Cr. 197; s. c. 7 Law J. Rep. (N.S.) Chanc. 131.

for Sir James Wigram, *Bradbury v. Shawe* (5), and in which *Wilson v. Bates* was cited, an order was made staying all proceedings until the plaintiff should have cleared his contempt by the payment of the costs.

[LORD JUSTICE KNIGHT BRUCE.—From the report, it is plain that I made the order with great reluctance, under pressure, as it were, of *Wilson v. Bates*. The order was made, also, very near August.]

Mr. Bethell and *Mr. Terrell*, for Captain Sprye, argued that there was no sufficient reason stated why proceedings should be stayed. Besides the doubt entertained by one of their Lordships, as stated in *Bradbury v. Shawe*, of the soundness of *Wilson v. Bates*, the late Sir Lancelot Shadwell in *Bickford v. Skewes* (6) refused a motion that a trial should be postponed until a defendant should have cleared his contempt of the non-payment of costs. There *Wilson v. Bates* and *Price v. Dalton* were both cited, and his Honour said that, although the cases cited afforded some countenance for the application, he could not think they warranted it; and he should therefore refuse the motion with costs. The case of *King v. Bryant* (7) was also cited.

LORD JUSTICE KNIGHT BRUCE. — This motion divides itself into two parts, namely, the general costs of the two suits of *Reynell v. Sprye* and *Sprye v. Reynell*, in which a decree has been made, and the costs of the motion in the month of November last. As to the costs of the motion in the month of November last, my original impression was against Lady Elizabeth Reynell and Messrs. Walker, Grant & Co. or at least against the latter; but the progress of the argument has changed that impression. The motion was made in a cause in which Lady Elizabeth Reynell was a party, and it relates to the subject-matter of that cause. It desired the production of certain documents for the purpose of an application for a rehearing, pending an appeal in that cause. It, moreover, asked leave to file after the decree a supplemental bill, and it made parties to that motion four gentlemen, de-

scribing them by the names of Messrs. Walker, Grant & Co. The Court on that occasion adjudicated without any consent, I believe, as to that part of it, that Captain Sprye, who made the motion, should pay the costs of it, that is, the costs of Lady Elizabeth Reynell and of these gentlemen, and that direction formed part of an order which gave leave to him to file the present bill. The consequence is, that these costs not being paid, the condition annexed to that order has not been fulfilled. The order which gave leave to file a supplemental bill in the nature of a bill of review, although it also asks in the alternative, or otherwise, to set aside the decree upon the ground of alleged fraud, not being complied with, my learned Brother and myself are of opinion that, as the subjects are so intimately connected together by the means which I have mentioned, there is a right on the part of Lady Elizabeth Reynell, and on the part of two of the solicitors whom I have mentioned, who have been made parties to the present bill to stay the proceedings under the present bill until those particular costs have been paid; namely, the costs given to Lady Elizabeth Reynell and to Messrs. Walker, Grant & Co. by the order of the 20th of November 1851. Nothing has taken place to waive the right to the payment of those costs, for they have been claimed on every occasion. As I understand, they were claimed before the Master, and they were claimed by the application made to the Vice Chancellor Sir James Parker for the order; I mean that the costs were claimed by the motion under which Sir James Parker made the order now appealed from, and the right to which is reserved by that order. With respect, however, to the general costs of the suits *Reynell v. Sprye* and *Sprye v. Reynell*, in which the decree was made, it is arguable whether a case of waiver has been established or not, and therefore as to that fact the Court would hear a reply.

LORD JUSTICE LORD CRANWORTH. — What my learned Brother has said represents precisely the view I take of this matter.

Mr. Lloyd replied upon the question of waiver, and contended that although the original application did not in express terms add the costs of the suit, still it must

(5) 14 Jurist, 1042.

(6) 10 Sim. 193.

(7) 3 Myl. & Cr. 191; s. c. 7 Law J. Rep. (N.S.) Chanc. 167.

be considered, that so far as they were concerned, the appellants relied on the well-known practice of the Court, so as to exclude the notion of a waiver of any part of their rights.

LORD JUSTICE LORD CRANWORTH.—My learned Brother and myself are both of opinion that with respect to these costs, that is, the general costs of the suit, excluding the costs of the order of the 20th of November last, there has been that which amounts to a waiver on the part of Mr. Lloyd's clients; and for this reason, which may be reduced to a very simple form: suppose the application for time had been an application having no reservation at all: suppose it to have been not four weeks after any particular act to be done, but simply four weeks' further time to answer, that would have been a waiver of any right to stay the proceedings: that is not disputed. Now, what is applied for is four weeks after the particular act is done; that is not an absolute waiver, it is no waiver on that particular act being done; but that particular act being done, the application is the same as if it had been an application for time, there being no restriction. That is the view we take of it, and therefore the motion will be refused so far; that is, we think that the motion ought to be granted with reference to the costs of the motion of the 20th of November last, and refused as to the more extended application. The appeal will be partly granted and partly refused. The proper course will be that the order should be made without any costs in the court below, and no costs now. All proceedings against Lady Elizabeth Reynell and the Messrs. Walker will be stayed until three weeks after the plaintiff shall have paid the costs given by the order of the 20th of November last; and let the order of the Vice Chancellor be varied accordingly.

LORD JUSTICE KNIGHT BRUCE.—On the ground of waiver we decline to stop the proceedings in this suit in the nature of a supplemental suit, until the costs in the other suits mentioned in the order of the 20th of November are paid. No costs on either side.

KINDERSLEY, V.C.	} MILES v. DURNFORD. DURNFORD v. WOOD.
March 22.	
LORDS JUSTICES.	
July 2.	

Mortgage—Executor—Parties.

An executor borrowed money upon a representation that it was wanted for the purposes of his testator's estate. The money was lent upon the personal security of the executor, who afterwards mortgaged part of the testator's property as a security for the money antecedently advanced:—Held, by the Vice Chancellor, that the onus of proof lay on the person who advanced the money, to shew that it was applied for executorship purposes: but

Held, on appeal, that there was no evidence to shew that the advances were not made for executorship purposes; and the bill was dismissed.

The plaintiff was the representative not only of the executor, who had borrowed the money, but also of the original testator, and in the latter character he sought to impeach the mortgage:—Held, by the Vice Chancellor, that the plaintiff, although he was executor of the original testator, in which character he might sue, could not repudiate the character of representative to the executor, who could not sue: but

• *Held, contra, on appeal.*

The bill stated, that John Punter, the elder, was possessed, amongst other property, of three leasehold houses in Earl Street, Lisson Grove. That by his will, dated in January 1846, he gave all his property, including these three houses, to his son John Punter on trust to pay his debts and also a mortgage on the three houses in Lisson Grove, if it should be still subsisting at his death; and subject to the payment of debts, &c., the property was to be equally divided between John Punter, his son, and his brothers and sisters.

The testator appointed his son sole executor of his will, but declared that if he should die in the lifetime of the plaintiff John Miles, then, after the decease of his said son, the testator appointed the plaintiff his sole executor. Upon the death of the testator, in May 1846, his will was proved by John Punter, the son, who died in September 1849 intestate, and there-

upon probate of the testator's will was granted to the plaintiff, who also took out letters of administration to the son. The bill stated that the residuary personal estate of the testator possessed and received by his son John Punter was far more than sufficient to pay his funeral and testamentary expenses, including the mortgage debt on the three houses in Earl Street, Lisson Grove.

The plaintiff then alleged that the said three houses of the testator in Lisson Grove were advertised for sale at the instance of the defendant Elizabeth Durnford, who claimed to be entitled thereto as the mortgagee thereof, under a mortgage with a power of sale, executed to her by the said John Punter, the son, and purporting to bear date the 14th of April 1849. That in such mortgage it was recited, that upon the application and request of the said John Punter, the son, the said defendant Elizabeth Durnford had, at divers times between the month of October 1846 and February 1848, advanced and lent to the said John Punter, the son, several sums of money, amounting together to the sum of 600*l.*, and that the sum of 350*l.*, part of the said sum of 600*l.*, was so advanced and lent to the said John Punter, the son, for the purpose of enabling him as such executor as aforesaid to pay off and discharge a certain mortgage debt of 250*l.* and interest, to Henry Smart, charged upon the said three houses in Lisson Grove, and also to pay certain charges which the said John Punter, the son, had incurred as such executor, in and about the said testator's estate, and that the said Elizabeth Durnford had taken other security for the remainder of the said sum of 600*l.*, and that there was then due from the said J. Punter, the son, as such executor, to the said Elizabeth Durnford, in respect of the said sum of 350*l.* and the interest thereon, the sum of 370*l.* And that the said J. Punter, the son, not being able to pay the said sum of 370*l.*, had proposed and agreed to execute to the defendant a mortgage of the said three houses, for securing repayment of the said sum of 370*l.* with interest thereon in manner hereinafter mentioned.

The bill then set forth the mortgage made in pursuance of this recital, which contained, amongst other usual clauses, a

power of sale given to the defendant upon her giving three calendar months' notice of her intention to the said J. Punter, the son, or the executor for the time being of the testator. The bill alleged that the defendant did not give to the said J. Punter, the son, and had not given to the plaintiff the notice required by the mortgage deed; that the debts due and owing by the testator J. Punter at his decease were very few and trifling, but that at the time of the execution of the said mortgage there was a large sum of money due and owing from J. Punter, the son, to the estate of his father, and that J. Punter, the son, borrowed the whole of the sum of 600*l.* mentioned in the mortgage from the defendant to answer his own occasions, and not for the purpose of discharging any debts of the testator, or of paying any charges incurred in and about the estate of the testator, and that at the time the said J. Punter, the son, executed the said mortgage to the defendant, she well knew, or had good reason to suspect, that he had borrowed the whole of the said sum of 600*l.* for his own occasions, and not for the purpose of paying any debts of the testator, or any charges incurred by J. Punter, the son, in and about the estate of the testator.

The bill charged that the said sum of 600*l.* was lent by the defendant to J. Punter, the son, in six different sums, and at different times, upon his personal security, and that at the respective times of such loans being made, the said defendant did not know, and had not any reason to believe or suspect that the said J. Punter, the son, was the executor of his father, and that the said several sums of money were lent and advanced by the defendant upon the belief that they were lent for his own purposes, and she treated such several sums as his private debts. That under these circumstances the defendant was bound to inquire and ascertain whether any part of the said sum of 600*l.* had been required or expended by the said J. Punter, the son, for or in paying any charge incurred by him as the executor of his father.

The bill further alleged that shortly after the several advances were made by the defendant to John Punter, and on the 30th of October 1848, the said J. Punter deposited some of the deeds relating to the

testator's estate with the defendant by way of security for the sums so advanced, and that this equitable mortgage was made for the whole sum of 600*l.*, and the defendant had filed a bill in this court against the said J. Punter for the purpose of compelling payment of the money, or a sale of the property. The bill prayed an injunction to restrain the sale of the three houses, and that it might be declared that the before-mentioned mortgage executed by J. Punter, the son, was not a valid mortgage, and that such mortgage did not in any manner affect the estate of the testator, or any part thereof, or the said three houses in Lisson Grove, and that the defendant might be ordered to deliver up the mortgage to be cancelled.

There was a cross-bill filed by Mrs. Durnford, praying that a subsequent mortgage to a Mr. Wood might be declared fraudulent and void, or, at all events, postponed to her mortgage, and that the mortgage to Mrs. Durnford might be redeemed.

During the progress of this suit a motion for an injunction was made, which was submitted to.

Mr. Stuart and *Mr. Nalder* appeared for the plaintiff, and contended that there was nothing to shew that the money had been advanced for executorship purposes. It was advanced in small sums to the executor J. Punter, without any security being taken. After the last advance, an equitable mortgage by deposit of deeds was created; but it was not until the defendant attempted to enforce payment of the money that the mortgage now set up by the defendant was made. There were, at any rate, circumstances of suspicion sufficient to entitle the plaintiff to an inquiry whether any of the advances were made to J. Punter in his character of executor.

M'Leod v. Drummond, 14 Ves. 353.

Keane v. Robarts, 4 Madd. 332, were cited.

Mr. Willcock and *Mr. Giffard*, for the defendant submitted that it was to be presumed the executor obtained the money for the purpose of his testator's estate, as alleged upon the mortgage, unless the contrary could be shewn. The plaintiff was bound by the recitals in the mortgage deed.

The defendant had no means of knowing that the executor was not dealing honestly, and there was no allegation that she was in the position of a party colluding with the executor when she took the mortgage. It was requisite that the executor should go forth to the world as a person accredited by the testator. If an inference could be drawn from all the circumstances, that the money was lent for the executor's personal use, then, no doubt, it would be impossible to enforce the mortgage; but there was no rule whatever that the money was to be considered as advanced for personal use, merely because it was lent before any security was given. It was held, upon all the authorities, that a person lending money to an executor was not bound to see to the application of it—*Watkins v. Cheek* (1), *Eland v. Eland* (2) and *Griffith v. Vanheythuysen* (3). There was another objection in this case, that the plaintiff had no power to sue. He was, no doubt, the representative of the original testator, J. Punter the father, but he was also the representative of John Punter the younger, the person who had executed this deed, and in the latter character the plaintiff could not sue to set aside the mortgage.

Mr. Stuart, in reply, said, the plaintiff could not be precluded from protecting the estate of the original testator from his merely happening to fill the character also of representative of the person who had committed the fault. The plaintiff was suing exclusively in his character of executor to the original testator, and not as administrator to the son, and this course he was bound to take for the protection of the estate.

KINDERSLEY, V.C.—The testator died in May 1846, and his son, John Punter the younger, was appointed executor and proved the will. At different periods between the 14th of October 1846 and February 1848, John Punter borrowed from Mrs. Durnford sums of money, generally 100*l.* at a time, representing that he wanted them for executorship pur-

(1) 2 Sim. & S. 199.

(2) 1 Beav. 235; s.c. 4 Myl. & Cr. 420; 8 Law J. Rep. (N.S.) Chanc. 289.

(3) 9 Hare, 85; s.c. 20 Law J. Rep. (N.S.) Chanc. 337.

poses, and she lent him those sums up to 600*l.*, the last advance being in February 1848. It appears that the testator owed to a person named Smart the sum of 250*l.*, and he wanting payment, a sum of 50*l.* was paid in 1847, and the rest of the money was paid on the 2nd of February 1848, which was after the 200*l.* was borrowed from Mrs. Durnford by Punter. It does not appear that at the time these advances were made to Punter there was any agreement to give security for them. The effect of the advances when made was this, that they were advanced on private security of Punter himself, and not giving any lien on the testator's property; and any remedy which Mrs. Durnford might have sought to enforce was only against Punter individually and not as executor. They were made to him alone, though they might have been for executorship purposes, and if all had been paid for the benefit of the testator's estate, still the loan to him was personal, there being no agreement as to any mortgage or security on the testator's assets, at the time the advances were made. On the 30th of October 1848, which was after the last advance was made, Punter deposited the deeds of the leasehold property of the testator with Mrs. Durnford, by way of securing the money advanced to him, and that equitable mortgage seemed to have been as a security for the whole. I see no reason for supposing that the mortgage was for less than the whole amount of the advances. That equitable mortgage having been given in 1848, in February 1849 Mrs. Durnford attempted to enforce payment of the security, and a common equitable mortgagee's bill was filed. The transaction is there treated as the private transaction of Punter. There was nothing said about its being to Punter, in the character of executor to his father. On the other hand, I do not see that there was any necessity for that, as between Mrs. Durnford and Punter, as for the purpose of a mortgage or sale it was not necessary to make such a case on that bill. The bill treated it as a private transaction; but in consequence of that bill, shortly afterwards in April 1849, Punter executed an actual mortgage deed to Mrs. Durnford for securing, not the whole 600*l.* but only 370*l.*, and the recitals were in this shape:—It was

stated that on the application and request of J. Punter, the defendant, Mrs. Durnford, at divers periods, from October 1846 to February 1848, advanced and lent to the said J. Punter several sums of money amounting together to 600*l.*, and that the sum of 350*l.* part of the 600*l.* was so advanced and lent to Punter to enable him as such executor to pay off and discharge a mortgage debt of 250*l.* and interest to Smart, charged upon the three houses, and also to pay certain charges which Punter had incurred as such executor, and in and about the testator's estate, and that the said defendant had taken other security for the remainder of the 600*l.* Then it proceeds to state as to the 350*l.*, that there was something due for interest, making altogether 370*l.*; and the mortgage was made for that sum.

Now it is clear that the equitable mortgage of October 1848 having been made for the 600*l.* was itself apparently a security given, partly for what was alleged to have been advanced to Punter as executor, and partly for what was not alleged to have been advanced to him as executor. Then the mortgage deed recites, in the statement of the parties to that deed, that the 350*l.* had been advanced to him in his character of executor. Now, the principle on which the Court acts is this:—An executor taking on himself to deal with the assets in his hands as executor, it is considered important to preserve in the executor, the unfettered controul over them, and the Court gives him *prima facie* an unfettered right of dealing with the assets, for raising money wanted for the estate, and the onus is not thrown on the party advancing the money on security of the assets, to shew that it is wanted for the testamentary purposes. It is true, that in the case of a private banker of the executor to whom he owes a private debt, if the banker takes as security for his private debt, property which he knows to be the assets of the testator, there he is a party to what is a *devastavit* or improper application of the testator's estate. And so in this case. If it were not for the statement of Mrs. Durnford and Punter, made after the money was advanced, there would be nothing to shew that the 600*l.* was advanced for any other than private purposes.

While the Court is careful to look to the way in which an executor deals with the assets, that does not apply to cases in which he only gives security for the antecedent advances, long after they have been made. The advances were made, not even upon an undertaking to give security upon the assets, though wanted for executorship purposes, and the subsequently giving a security, was not for raising money for the purposes of the estate, but giving a security for antecedent advances, and without any legal necessity to give that security. I think, therefore, that where a party having advanced money for the purpose apparently of the estate, but on the personal security of the executor without taking a security, and if that party takes for these antecedent advances a subsequent security on the assets of the testator, that cannot be considered to come within the rule, but the party is then bound to see that the money was applied for the purpose of the executorship. The principle on which the cases have been decided involve this as a necessary consequence.

If there were no other difficulty in this case, I should refer it to the Master to ascertain what sums of money were applied for the purpose of the administration of the testator's estate; but I confess I think I am precluded from making such a decree as attempts to invalidate the mortgage, owing to this, that the party asking to invalidate it, is himself the representative of the person who is a party to it. It is true the bill is filed by Miles, in his character of executor to John Punter the testator, wishing to throw off another character which he assumes, which is that of the representative of J. Punter the younger. It appears that after having proved the will of John Punter, the father, he takes out letters of administration in 1849, and takes upon himself to represent the position of John Punter, the son, and I cannot hear the plaintiff say, "Although I assume the two characters, in one of which I cannot impugn the transaction, yet I wish to shut out my character in which I cannot impeach the transaction, but retain the character in which I can." It is clear if J. Punter the younger were living, and Miles had joined with him in

impeaching the transaction, that would have been bad, and if Punter alone had filed the bill, it is clear he could not have been heard to say this. It appears to me that the present plaintiff, although not personally mixed up with these transactions, as he has taken upon himself to sustain the character of the representative of the person who could not impeach them, cannot be allowed to separate the two characters, and sue only in one of them. For these reasons, I cannot make a decree as to the original bill which seeks to impeach the mortgage.

As to the other bill of Mrs. Durnford, which charges Mr. Wood, the subsequent mortgagee, with fraud, it is admitted that there is no ground for maintaining the allegation of fraud; therefore, I must also dismiss so much of that bill as charges the fraud. That bill seeks to impeach the security, and that it may be declared to be fraudulent and void. As to so much as does that, it must be dismissed, with costs; and as to the rest, I must make the common decree for redemption and foreclosure.

The case subsequently came before the Lords Justices, on appeal by the plaintiff, when

Mr. Alder contended that the bill was properly filed in point of form, and cited, in addition to the cases referred to on the original hearing, *Lambert v. Hutchinson* (4).

Mr. Willcock and *Mr. Giffard* were heard for the respondent.

LORD JUSTICE KNIGHT BRUCE.—The case is this:—One of two executors, by being acting executor, committed, it is alleged, a breach of trust with respect to the general personal estate, and having done so, he died, and the surviving executor of the testator, innocent of participation in the breach of trust, makes himself an administrator of the executor who committed the breach of trust. I am of opinion it is competent for him to file a

(4) 1 Beav. 277; s.c. 8 Law J. Rep. (N.S.) Chanc. 196.

bill to make good the breach of trust, submitting all in a proper mode to this Court.

LORD JUSTICE LORD CRANWORTH concurred.

Mr. Nalder was then heard on the second point, and contended that although the money was advanced by Mrs. Durnford to Mr. Punter, jun. before he gave her the security, it did not become necessary for the plaintiff on that account to shew that the act done by Punter, jun. as executor was a proper act, and, further, that in the absence of proof to the contrary, the loan must be taken as having been properly obtained for the purposes of the executorship. He cited the following additional cases:—

Scott v. Tyler, 2 Dickens, 725.

Hill v. Simpson, 7 Ves. 152.

Mr. Willcock and *Mr. Giffard* were not called on.

LORD JUSTICE KNIGHT BRUCE.—On the evidence, the security is not impeached,—not touched. Assuming, then, that all the evidence that can be, has been adduced, the question is, whether this creates such a case of suspicion as that further inquiry should be directed or allowed. I am of opinion that that proposition cannot be warranted. The only evidence is, then, that the advances were originally made without security, and that the security was afterwards added. That is a circumstance deserving of attention, but it does not go a long way; it is not inconsistent with the probability that the advances were made for the purpose for which he might properly borrow as executor. But that being the case, all is clear; and, in my opinion, the presumption is in favour of that view of the case, and that the plaintiff wholly fails.

LORD JUSTICE LORD CRANWORTH.—We both concur with the Vice Chancellor that the bill ought to be dismissed, but we arrive at that conclusion on different grounds.

PARKER, V.C. } *In the matter of TINKLER'S*
July 10. } TRUSTS.

Annuity—Charge on the Corpus—Compulsory Sale.

A testator devised real estate to B, charged with an annuity to A. for her life, with powers of distress and entry. The rents fell short of the annuity, and an arrear became due to A. A sum of money (less than the arrear) was paid into court by a railway company in respect of a part of the estate which had been taken by them:—Held, that A. was entitled to this sum in respect of her arrears.

R. Tinkler, by his will dated in January 1840, devised all his real estates to the uses therein mentioned, charged with an annuity of 100*l.* a-year to his wife for her life, with powers of distress and entry, and died soon after the date of his will.

The rents of the devised estates fell short of the annuity, and an arrear of upwards of 300*l.* became due to Mrs. Tinkler.

The Great Northern Railway Company took some land, part of the devised estates, and paid into court the sum of 262*l.* in respect of the purchase-money.

This was the petition of Mrs. Tinkler, praying for the payment to her of the 262*l.*

Mr. C. J. Simpson, for the petition, contended that, although the sum in question formed in fact a part of the corpus of the estates, Mrs. Tinkler was entitled to it in respect of the arrears due to her, and cited *Greathed v. Elliot* (1).

Mr. Hislop Clarke, for the devisees, contended, that she was entitled only to the income of the fund in question.

PARKER, V.C. said, that the Court would not sell the estate for the purpose of paying off the arrears, but, as by means of the powers of distress and entry, the devisees could not touch a shilling of the rents until the arrears were discharged, the annuity was, in a sense, charged on the corpus. As there had been here a compulsory sale, he thought that the money thus produced was available for the arrears, and the order would, therefore, be for payment of the fund to Mrs. Tinkler.

(1) 15 Jur. 986.

PARKER, V.C. }
June 26, 28. } *In re KING'S ESTATE.*

*Will—Construction—Legal Estate—
Mortgage—Securities for Money.*

A testator, a mortgagee in fee of real estate, gave and bequeathed to A. all his monies, securities for money, and all his goods, chattels, personal estate and effects whatsoever and wheresoever, to hold to A, his executors, administrators and assigns, he paying thereout all his debts:—Held, that the legal estate in the mortgaged property passed to A.

Mr. Sudbury, a mortgagee in fee of real estate, made his will, dated the 27th of April 1848, which was as follows:—"I give and bequeath unto my wife, Frances Sudbury, all my monies, securities for money, and all my goods, chattels, personal estate and effects, whatsoever and wheresoever, to hold to Frances Sudbury, her executors, administrators and assigns absolutely; she or they paying thereout all my just debts and testamentary expenses." The testator appointed his wife sole executrix.

The testator died in June 1848, leaving an infant heir; and his will was proved by his widow.

This was a petition under the Trustee Act 1850, praying for an order vesting the mortgaged estate in the executrix.

The question discussed on this petition was, whether the legal estate in the mortgaged property had passed, under the will, to the testator's widow, or whether it had descended on the heir.

Mr. F. W. Clarke, for the petition, contended that the legal estate had not passed by the will, and cited *Galliers v. Moss* (1).

PARKER, V.C.—I have looked into the cases on this subject, and I have no doubt that the words "securities for money" in this will pass the legal estate. The words "securities for money" are sufficient to pass the legal estate, unless there be something in the will to induce the Court to come to a different conclusion. It is said that, in this case, the words "securities for money" are found among words relat-

ing exclusively to personal estate. This is, however, where you would naturally expect to find them, the mortgage money with which it is associated being personal estate. The object of the will is to give the executrix complete dominion over the mortgage money, and to enable her to receive it; and the Court is not to put a construction on the will which would defeat that object. Then, it is said that the words of limitation apply only to personal estate. This argument appears to me to proceed on a confusion between the authorities applicable to this case and those relating to a gift, in which there are words such as "estate," which may or may not relate to real estate, and where the collocation of the words and the words of limitation are important. Here you have the words "securities for money," very aptly expressing the legal estate, and their effect is not taken away because you have the words "executors and administrators" following as words of limitation.

If we look at the authorities we find that in *Silberschildt v. Schiott* (2), Sir William Grant says, "There is no doubt a gift of the money would have carried his interest in the land upon which it was secured." Again, in *Renvoize v. Cooper* (3), Sir John Leach says, "I am of opinion that the mortgaged fee will pass to the wife by the subsequent gift of mortgages and other securities for money, though coupled with personal property. In substance, money secured by a mortgage in fee is personal property, and a gift of a mortgage security for money is a gift of all the testator's interest in the money and security, and will therefore pass the fee." On the other side, there is the case of *Galliers v. Moss*, which Mr. Clarke referred to. That case must, however, I think, be considered as overruled by subsequent decisions. In *Ex parte Barber*, (4), the Vice Chancellor of England held that the words "securities for money" would pass the legal estate; and, in a case of *Mather v. Thomas* (5) the point came before him again, and he intimated his opinion that they would pass the legal

(2) 3 Ves. & B. 49.

(3) 6 Madd. 371.

(4) 5 Sim. 451.

(5) 6 Ibid. 115.

(1) 9 B. & C. 267; s. c. 7 Law J. Rep. K.B. 109.

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estate, notwithstanding the case of *Galliers v. Moss*, but sent a case for the opinion of the Court of Common Pleas, which held (6) that the words in question did pass the legal estate. It is true that, in that case, the word "heirs" occurred as the word of limitation; but, on examining the will, it appears that there was a gift of "messuages or dwelling-houses buildings, chattels real, ready money, securities for money, and debts to become due and owing," to trustees, their heirs, executors, administrators and assigns. The word "heirs" there, *reddendo singula singulis*, is properly referable to the real estate, and not to the words "securities for money." At all events, it appears to me to be putting too narrow a construction on the words to hold that the occurrence of the word "heirs" makes a material difference. There is a recent case which appears to me to be precisely in point. In *Doe d. Guest v. Bennett* (7) the words were, "I leave my wife to receive all monies upon mortgages." The Court of Exchequer, after going through the authorities, came to the conclusion that the wife took the legal estate. I think that I should be throwing the law on this subject backwards, and departing from what seems a very convenient rule of construction—a rule which obviously effects the testator's intention—if I held that the legal estate did not pass; and therefore I think that I can make no order on this petition.

PARKER, V.C. } *In the matter of WALKER'S*
July 17, 31. } ESTATE.

*Will — Construction — Legal Estate —
Mortgage—Securities for Money.*

A testator, a mortgagee in fee of real estate, gave and bequeathed to A. and B. all and singular his household furniture, goods, plate, linen, and utensils whatsoever, and all and every other his goods and chattels, stock-in-trade, monies, debts, and securities for money, and all and every other his personal estate and effects whatsoever and wheresoever, upon trust to get in his

debts and to sell his personal estate, and hold the money arising therefrom upon the trusts therein mentioned:—Held, that, under these words, the legal estate in the mortgaged property passed to the trustees.

John Walker, a mortgagee in fee of a freehold estate, made his will, dated the 3rd of April, 1832, which was, in part, as follows:—"I give and bequeath unto William Walker, of, &c., John Ollerenshaw, of, &c., and James Jowett, of, &c., all and singular my household furniture, goods, plate, linen and utensils whatsoever, and all and every other my goods and chattels, stock-in-trade, monies, debts, and securities for money, and all and every other my personal estate and effects whatsoever and wheresoever, and of what nature, kind or quality soever the same may be or consist of, whereof I or any person or persons in trust for me or for my use is, or are, or shall, or may hereafter be possessed of, interested in, or entitled unto, upon trust, to collect in my said debts as soon as convenient, and sell and dispose of my said household furniture, stock-in-trade, and other my personal estate and effects, either by public auction or private contract, as they in their discretion may think proper, for the best price and most money that can or may be had or gotten for the same; and the money to arise therefrom, after payment of my debts, funeral, testamentary and other incidental expenses, I do hereby direct shall be laid out and invested in the public funds or upon mortgage of good freehold security, with power to alter and vary the same upon such and the like security as they or he shall think proper, and the interest to arise therefrom to pay in manner hereinafter mentioned."

The testator appointed his trustees his executors. The will did not contain any devise of mortgaged or trust estates.

The testator died in January 1833, and his will was proved by all his executors.

The heir-at-law of the testator afterwards died intestate, leaving an infant heir-at-law, to whom the legal estate in the mortgaged property would have gone if it had been left undisposed of by the will of the testator.

This was a petition of the executors of

(6) 10 Bing. 44; s. c. 2 Law J. Rep. (n.s.) C.P. 234.

(7) 20 Law J. Rep. (n.s.) Exch. 323.

John Walker, under the Trustee Act 1850, praying for an order of the Court that the legal estate in the mortgaged property might be conveyed to them by the infant.

Mr. R. W. Moore, for the petition, contended that the legal estate had been undischarged by the will.

PARKER, V.C. referred to the case of *In re King's Estate*, *supra*, p. 673; and held, that the legal estate had passed by the will to the executors, and therefore that no order was necessary.

PARKER, V.C. } CATO v. IRVING.
Jan. 23, 31. }

Ship—Registry—Mortgage—Freight.

A ship belonged to A. and B. in different shares, and they were registered as the owners of it at the port of Liverpool. In April 1849 the ship sailed from Liverpool for Sydney. In October A. executed a power of attorney authorizing B. to sell his shares. In November A. mortgaged his shares in the ship and freight to C, and the deed of mortgage was registered at Liverpool. In March 1850 B. being at Sydney (acting under the power of attorney as to A.'s shares) sold the ship to D. On this occasion the old certificate of registry was given up, and the ship was registered de novo in D.'s name at Sydney. The ship, with a cargo, was put into the London Docks in February 1851, and both C. and D. took possession of it, by each of them putting a man on board. Upon the question as to the rights of C. and D. in the ship and freight,—Held, that C. was entitled to A.'s shares in the ship and freight.

The ship *Ajax*, of the port of Liverpool, belonged to Mr. Ward and Mr. Adams; Mr. Ward being entitled to forty-eight sixty-fourth parts, and Mr. Adams to the other sixteen sixty-fourth parts. They were registered as the owners, and the certificate of registry was given to them.

In April 1849 the *Ajax*, with Adams as master, sailed from Liverpool for Sydney; Adams taking with him the certificate of registry.

A power of attorney, dated in October 1849, authorizing Adams to sell Ward's shares in the ship, was executed by Ward, and sent out to Sydney to Adams.

The ship arrived at Sydney in March 1850, and was soon after sold by Adams, acting for himself and under the power of attorney, to Mr. Murnin. On this occasion the certificate was given to the collector and comptroller of Customs at Sydney, the ship was registered *de novo* in the name of Murnin, as owner, and a new certificate was granted to him.

After this sale the ship took a cargo of wool and tallow, and proceeded on her home voyage to England.

By a bill of sale, dated the 2nd of November 1849, after the date of the power of attorney, Ward assigned his forty-eight sixty-fourth parts in the ship, with the like proportions of all future freight and earnings to Mr. Cato and two other persons, by way of mortgage. A memorandum of this bill of sale was entered in the registry-book kept at the port of Liverpool, and a note of the entry was indorsed on the bill of sale.

The ship arrived at Gravesend on the 21st of February 1851, and was put into the London Docks on the 28th. On that day the mortgagees put a man on board to take possession of it on their behalf, and the agents of Mr. Murnin also put a man on board to take possession on his behalf.

This was a special case filed under Sir George Turner's Act, and the question submitted to the Court on these facts was, what sum, if any, ought to be paid to the plaintiffs, the mortgagees, on account of their demand, as such mortgagees, against the ship and the freight.

Mr. Crompton and Mr. Selwyn, for the plaintiffs, referred to the 8 & 9 Vict. c. 89. ss. 11, 34, 37. and 38, and *Dixon v. Ewart* (1).

Mr. Wigram and Mr. Goldsmid, for the defendants, cited—

Davenport v. Whitmore, 2 Myl. & Cr. 177; s. c. 6 Law J. Rep. (n.s.) Chanc. 58.

Splidt v. Bowles, 10 East, 279.

(1) 3 Mer. 322.

Stephenson v. Dowson, 3 Beav. 342;
s. c. 10 Law J. Rep. (N.S.) Chanc. 93.
Dean v. M'Ghie, 4 Bing. 45; s. c. 5
Law J. Rep. C.P. 44.
Chinnery v. Blackman, 3 Doug. 394.
Kerswill v. Bishop, 2 Cr. & J. 529;
s. c. 1 Law J. Rep. (N.S.) Exch.
227.
Morrison v. Parsons, 2 Taunt. 407.
Camden v. Anderson, 5 Term Rep. 709.
Rogers v. Humphreys, 4 Ad. & E. 313;
s. c. 5 Law J. Rep. (N.S.) K.B. 65.
Partington v. Woodcock, 6 Ad. & E. 690.

PARKER, V.C. said, that he thought that under the Ship Registration Act the plaintiffs had made out their title to Ward's shares of the ship as mortgagees, and that the reply might be confined to the question of the freight.

Mr. Crompton, in reply, cited *Kemp v. Clark* (2).

PARKER, V.C.—In this case Mr. Ward and Mr. Adams were owners of the ship *Ajax*, Ward being entitled to forty-eight sixty-fourth parts and Adams to the other sixteen sixty-fourth parts. The ship belonged to Liverpool, and proceeded thence on a voyage to Sydney, with Adams, one of the part-owners, as master. After this Ward made a bill of sale of his shares by way of mortgage to the plaintiffs. Afterwards, the ship being at Sydney, Adams, who had a power of attorney from Ward for the sale of his shares, sold the entirety of the ship to Murnin, who purchased in ignorance of the previous mortgage. One question which was raised in the case was as to the interest of the several parties in the ship. I stated my opinion when the case was argued, that the mortgage was good against Murnin to this extent, and, consequently, that he had purchased, and held the ship subject to the rights of the plaintiffs as mortgagees of Ward's shares. Adams's own shares are free from any incumbrance.

The remaining question is as to the rights of the plaintiffs and Murnin in the freight of the ship. As to the freight the statements are in substance as follows:—The ship sailed from Sydney with a cargo of

wool and tallow on the 22nd of September 1850, and arrived at Gravesend on the 21st of February 1851. The plaintiffs, on the 28th of February 1851, before any part of the cargo had been discharged, took possession of the ship and freight in the London Docks by placing a man on board. The defendants, who are agents of Murnin, have since taken possession in a similar manner, and they claim to be entitled to the whole of the freight on his behalf. The plaintiffs have caused notices to be served at the different wharves of their claim to the forty-eight shares. The defendants have received the freight under an arrangement to submit the title of the parties to such freight to the judgment of this Court upon this claim. It is not stated that Murnin had been at the expense of the outfit of the ship and the voyage to England. I suppose, however, that must be so. The rights of the plaintiffs as mortgagees cannot be put higher than the rights of part-owners, and therefore, if Murnin did incur the expenses in earning the freight, the plaintiffs cannot claim without making an allowance to him for his expenses so incurred. I am of opinion that, subject to any deduction to which Murnin may be entitled on that account, the plaintiffs have made out their right as mortgagees to forty-eight shares of the freight in this case.

The cases which were cited establish that mortgagees of a ship who take possession before the conclusion of a voyage are entitled to the freight then accruing. It was contended that the present case did not come within this rule, because the plaintiffs did not take possession until the conclusion of the voyage. I consider that a mortgagee who takes possession before the cargo is delivered comes within the rule. The right to the freight does not accrue until the goods are delivered. Parties so taking possession must be as much within the reason of the rule where the ship is in dock as where she is only on the way to the docks. For these reasons, if the mortgagees had been mortgagees of the whole of the freight, I consider that, under these circumstances, they would have been entitled to the whole. Being mortgagees of a certain number of shares only, they could not take possession to the exclusion of Murnin or his agents. I think that

(2) 12 Q.B. Rep. 647; s. c. 17 Law J. Rep. (N.S.) Q.B. 305.

this circumstance does not vary the rights of the parties, though it may alter the principle on which their rights depend. Until the mortgagee takes possession, or does some equivalent act, the owner is entitled to the freight, and is not accountable to the mortgagee for what he receives. When the mortgage is of the entirety, the mortgagee may take exclusive possession; when it is of shares only, he cannot take possession so as to entitle him to prevent the owner taking possession of part. In such cases the mortgagee, without formally taking possession, if he gives notice, and requires payment to himself of his shares, that entitles him to receive his share of the freight then accruing and not actually due. To hold otherwise would render it impossible for the mortgagee to make a title to his share at all. If the ship had been real estate in the possession of Murnin, and had been let by him to another person at a certain rent for the whole, the plaintiffs by giving notice to Murnin requiring payment of a portion of the rents, would have been entitled to a share of the rents as against Murnin. The declaration must be, that the plaintiffs are entitled to forty-eight sixty-fourth parts of the ship and forty-eight sixty-fourth parts of the net freight (after allowing to Murnin his expenses) to an amount not exceeding the sum due to them for principal, interest, and costs.

KINDERSLEY, V.C. } *Ex parte* THE VICAR
May 28. } OF EAST DEREHAM.

Railway Act—Disqualified Persons—Investment—Reference to the Master.

Land belonging to a vicarage was taken by a railway company, and the purchase-money paid into court to the account of the vicar. On a petition by the vicar, stating an agreement to purchase land particularly mentioned in the agreement, and that the title had been approved of by a barrister, and that the title deeds had been examined and found correct; and praying for a conveyance and payment of the money out of court, without a reference to the Master—the Court made the order.

The Norfolk Railway Company took, for the purposes of one of their acts, a piece of land, part of the glebe belonging to the vicarage of East Dereham in Norfolk, and, in respect of this purchase, the sum of 606*l.* 3*l.* per cent. consols was carried over to the account of the vicar of East Dereham.

This was a petition of the vicar.

The petition stated an agreement whereby he, the vicar, had agreed to purchase of W. C. Wollaston some land particularly mentioned in the agreement, in consideration of the stock standing to the above-mentioned account. The petition then contained the following statement:—"That the abstract of the title of the said W. C. Wollaston to the said hereditaments has been submitted by your petitioner to F. J. Turner, Esq., barrister-at-law, who has approved of the title thereby shewn, and the several deeds, evidences and documents therein abstracted and referred to have severally been examined and found correct." The petition prayed for a sale of the stock and the application of the money in the proposed purchase, and a conveyance to the vicar of the land, to be held by him in the same manner as the lands taken by the company had been held.

The petition was supported by proper affidavits.

Mr. W. M. James, for the petition, asked for the order in the form proposed, in order to dispense with a reference to the Master.

Mr. B. L. Chapman, for the company.

KINDERSLEY, V.C. made the order.

PARKER, V.C. } *Ex parte* THE VICAR OF
July 3. } CREECH ST. MICHAEL.

Costs—Railway Act—Purchase of Lands for a Rectory with the Consent of the Ordinary of a Diocese.

By a railway act a company was empowered to take lands belonging to a vicarage, and it was declared that the purchase-money should be paid into court, and, that, on a petition by the vicar and patron, and with the consent of the Ordinary of the diocese,

it might be laid out in the purchase of other lands. A purchase was made accordingly:—Held, that the Bishop was entitled to be paid by the company, not only the costs of his attendance in the Master's office, but also of his appearances on the petitions to the Court for a reference and confirmation of the Master's report.

By the Bristol and Exeter Railway Act (6 Will. 4. c. xxxvi. s. 9.) it was declared that the company might take for the purposes of their act the vicarage-house of Creech St. Michael and the grounds belonging to it; but that they should not be allowed to take a part only, and that the compensation payable for such house and grounds should, "on petition to the Court of Exchequer by the vicar and patron for the time being of the vicarage, and with the consent of the Ordinary for the time being of the diocese," be laid out in the purchase of other lands to be settled to the same uses.

The vicarage-house and grounds were taken by the company, and the purchase-money was paid into court. A petition was afterwards presented for the investment of this money in the purchase of certain specified lands, and the usual reference was made to the Master, who, by his report, approved of the purchase and title. A petition was now presented for a confirmation of the Master's report and a conveyance.

The Bishop of Bath and Wells was the Ordinary of the diocese. The Bishop had appeared in all the proceedings relating to the investment.

The only question, on the hearing of this petition, was as to the Bishop's costs.

Mr. H. Prendergast, for the petition.

Mr. Fooks, for the Bishop of Bath and Wells, asked for the costs of his appearances in the above matters.

Mr. Osborne, for the company.—The duties of the Bishop under this act were confined to an attendance in the Master's office to see that the purchase was proper and the title good. He had no right to appear at the hearing of either of the petitions, and was not entitled to the costs of such appearances. The order, then, ought to be that the costs should be so confined.

PARKER, V.C. said, that he thought that the Bishop had a right to be present at all the proceedings, and was entitled to the costs asked for by counsel.

PARKER, V.C. }
July 13. } MEYER v. SIMONSON.

Will—Construction—Tenant for Life—Residue.

*A testator, by his will, bequeathed all the residue of his real and personal estate to his executors, upon trust to pay his wife the income and profits thereof, so long as she should continue his widow. A part of the personal estate of the testator, at his death, consisted of a debt of 12,000*l.* payable by annual instalments of 1,500*l.*, with interest at 5*l.* per cent. from the death on the debt or such part as for the time being should remain unpaid:—Held, that the tenant for life was entitled to 4*l.* per cent. on the debt or such part as should remain unpaid, and that the other 1*l.* per cent. ought to be invested for the benefit of the tenant for life and those entitled in remainder.*

This was a special case under Sir George Turner's Act.

Solomon Meyer, by his will, dated the 19th of February 1849, after certain legacies, made the following residuary devise and bequest:—"I give, devise, and bequeath all the rest, residue, and remainder of my real and personal estate and effects, whatsoever and wheresoever, unto my said wife, and to any person or persons who may be executor or executors, trustee or trustees of this my will, and their heirs, executors and administrators, for and during the term of her natural life, if she shall so long continue my widow, upon trust to pay to or permit her, my said wife, to receive the income and profits thereof for her use and benefit, so long as she shall continue my widow, and from and after her decease," &c.

The testator appointed his wife to be his sole executrix, and died in August 1850, and his widow proved his will.

A part of the testator's personal estate consisted of a debt payable by instalments, under the following circumstances:—Ar-

ticles of partnership, dated the 4th of January 1850, were made between Solomon Meyer of the one part, and Meyer Meyer of the other part, to the effect that if either of the partners should die during the partnership, the share of the partner so dying should be transferred to the surviving partner, and that the surviving partner should give a judgment to the personal representatives of the deceased partner for the payment of a sum of money, to be ascertained as therein mentioned, and interest thereon at 5*l.* per cent. from the death of the deceased partner; the principal sum to be paid by annual instalments of 1,500*l.* each, the first instalment to be paid at the expiration of one year after the death of the deceased partner.

It was agreed between Mrs. Meyer, as executrix, and Meyer Meyer, as surviving partner, that Meyer Meyer should pay 12,000*l.* to the estate of the testator by the instalments mentioned in the articles.

On the 22nd of January 1851, Meyer Meyer gave a warrant of attorney, authorizing the attornies therein mentioned to suffer judgment to be entered against him for 24,000*l.*, with a defeazance annexed on payment of 12,000*l.*, and interest at 5*l.* per cent., by the instalments mentioned in the articles, with a power, however, of enforcing immediate payment in default of payment of principal or interest; and judgment was entered up accordingly.

The opinion of the Court was required whether Mrs. Meyer was entitled to the whole of the interest payable by Meyer Meyer, and, if not, what part should be considered interest and what part capital.

Mr. Waley, for Mrs. Meyer, contended that she was entitled to all the interest.

Mr. Goldsmid, for the persons entitled in remainder.

Mr. Waley replied.

PARKER, V.C.—The question in this case, how a residue is to be dealt with as between a tenant for life and those entitled in remainder, where the will contains no direction to convert the property, is familiar to the Court. The principle is contained in the judgment in *Howe v. Lord Dartmouth* (1), and the only difficulty is in

applying it to particular instances. The personal estate of a testator for this purpose may be considered as divided into three different classes. First, property which is found at the testator's death invested in such securities as the Court can adopt, as money in the funds or on real securities. The tenant for life is entitled to the whole income of this. Secondly, property which can be converted into money without sacrificing anything by a forced sale. As to this, the rule is clear,—it must be converted,—and the produce must be invested in securities which the Court allows, and the tenant for life is entitled to the income of such investment. Thirdly, property which, according to a reasonable administration, is not capable of an immediate conversion into money, and which cannot be sold immediately without involving a sacrifice of both principal and interest. In this case the rule is to take the value of the testator's interest, and to give the tenant for life the income of that present value.

In this particular case part of the personal estate consists of money invested on personal security, and payable by instalments. It is contended that the tenant for life is entitled to the whole interest. The contract might have been that the money was to remain out for longer periods, and that a larger rate of interest, as 10*l.* per cent., should be paid. The result of *Mr. Waley's* argument would be, that the tenant for life would be entitled to the whole of the income so produced during that period. The case cannot be stated more beneficially for the tenant for life than by assuming that the debt is well secured, and will certainly be repaid without any loss of capital. Supposing this to be so, I do not think that the tenant for life can be allowed to have the whole interest of 5*l.* per cent. payable upon that debt. This would clearly be giving her more than a life interest in the present value of the property. In *Gibson v. Bott* (2) and *Caldecott v. Caldecott* (3) it was held, that the tenant for life should have 4*l.* per cent. upon the present value. I think that the proper conclusion to come to is, that the tenant for life should have 4*l.* per cent. upon the principal sum

(2) 7 Ves. 89.

(3) 1 You. & C. C.C. 312; s. c. 11 Law J. Rep. (N.S.) Chanc. 158.

(1) 7 Ves. 137.

secured, from the death of the testator, and that the additional 1*l.* per cent. should be invested from time to time, and she should have the income of that investment. The principal sum, as it comes in, must also be invested, and the tenant for life is entitled to the income produced by that investment. I do not think it necessary, in this case to have any present value put on this debt.

PARKER, V.C. }
July 23. } GOODMAN v. DRURY.

Will—Construction—Vesting Legacies charged on Land.

*A testator devised real estate to A. in fee, charged with an annuity to B. for life, and directed that after the death of B, the estate should be charged with the payment of 100*l.* a-piece to X, Y, and Z, and that the same should be paid to them respectively within six calendar months after the death of B, or such of them as should be then living. X. died in the lifetime of B:—Held, that the legacy to X. had not vested, and was not payable to his representatives.*

Henry Bates, by his will, dated the 2nd of February 1827, devised his real estates therein mentioned to John Goodman, for his life, "charged and chargeable as hereinafter mentioned," and, after his death, to William Goodman, his heirs and assigns. He then charged the devised estates with an annuity of 50*l.* to his wife, and, after her death, with an annuity of 15*l.* for his niece Mary Freeman, for her life. The will then proceeded as follows:—"And, from and after the decease of my said niece, I do hereby further direct that the said hereditaments and premises shall stand and be further charged, and I do hereby onerate and charge the same with the payment of the sum of 100*l.* a-piece to Richard, Mary, and Louisa Freeman, the children of my said niece Mary Freeman; and which said several sums of 100*l.* I do hereby give and bequeath to each and every of them accordingly, and do direct the same to be paid and payable to them respectively, within six calendar months next after the decease of my said niece Mary Freeman, or to such of them as shall be then living."

The testator died in 1835, and his widow in 1836.

Mary Freeman, the daughter, married Mr. Drury, and died in the lifetime of Mary Freeman, her mother, the annuitant, who died in 1851.

This was a special case under Sir George Turner's Act. The question was, whether the legacy of 100*l.* had absolutely vested in Mrs. Drury, so as to entitle her husband, who had taken out administration to her, to receive it.

Mr. Russell and Mr. Pryor, for the devisee of the estate, cited Howes v. Herring (1).

Mr. Malins and Mr. Shapter, for Mr. Drury, cited

Farmer v. Francis, 2 Sim. & S. 505; s. c. 4 Law J. Rep. Chanc. 154; and *In re Bartholomew's Trust*, 1 Hall & Tw. 565; s. c. 1 Mac. & G. 354; 19 Law J. Rep. (N.S.) Chanc. 237.

PARKER, V.C.—Where there is a gift of personal estate to a legatee, the postponement of the payment to a future period does not prevent the legacy from vesting. This, however, is not the case where there is a gift of money charged on real estate. Whatever may be the terms of a gift of money charged on land, if the payment is postponed, the legacy will not vest until the time of payment. There is an exception to this rule (which does not apply here) where the postponement of the payment might appear to have reference to the situation or convenience of the estate. Here the direction is, that the estate "shall be charged with the payment of 100*l.* to each of three children of Mary Freeman, and which sum I do hereby give and bequeath to them accordingly." Had the will stopped there, they would have had vested interests. It goes on, however, to say, "I direct the same to be paid to them within six months after the death of Mary Freeman or to such of them as shall be then living." This contingency attached to the time of payment, and made, I think, the legacy contingent on the legatee surviving Mary Freeman.

(1) M'Cle. & Y. 295.

L.C. }
Jan. 13. } *In re DALTON'S SETTLEMENT.*

Settlement — Construction — Estate for Life to Parents, upon Condition of maintaining their Children — Petition under the Trustees Relief Act.

By a post-nuptial settlement, 4,000*l.* was vested in trustees, upon trust to invest, and to pay the income to the husband and wife for their joint lives, and then to the survivor for life; and, after the death of either, to stand possessed of one moiety of the trust fund for the survivor absolutely, and of the other moiety for the children of the marriage, as the parents should jointly appoint; and, in default of such appointment, for the children in equal shares, with powers of advancement; and it was thereby declared that the income of the trust monies was made payable to the parents and the survivor of them, upon the condition only, that they and the survivor of them should, during the minority of the children, provide them with suitable diet, clothing, maintenance, and support, in proportion to the circumstances and condition in life of the parents, and the expectancies of such child or children; but that, in case of an advance to any of the children, the parents or the survivor should be released from the condition. In 1844 the husband petitioned the Court of Bankruptcy, and, under the 5 & 6 Vict. c. 116, a conditional order was made for his protection upon payment of a yearly sum. In 1845 the husband and wife assigned by way of mortgage all their interest in the income and capital of the trust fund. The fund was then transferred into court, under the Trustees Relief Act. On petition by the six infant children, stating that their parents were in embarrassed circumstances, and had for some time past omitted to provide them with suitable diet, &c., (following the words of the deed) and that no advance had been made to them or any of them; and it appearing that the parents were in a respectable station in life, and in no business, the Court ordered the whole income to be applied for the maintenance of the petitioners.

Quære—the effect of a conditional order for protection under the 5 & 6 Vict. c. 116, as to vesting the assets of the insolvent in the official assignee.

NEW SERIES, XXI.—CHANC.

In 1839, W. A. Dalton, the father of the petitioners, sold certain real estate for 6,500*l.*; and Harriet Dalton, his wife and the mother of the petitioners, joined in the conveyance and released her dower, on the express agreement that 4,000*l.*, part of the purchase-money, should be settled upon the trusts after mentioned. By a settlement of the 29th of July 1839, and made between W. A. Dalton of the first part, Harriet Dalton of the second part, and two trustees of the third part, it was declared that the 4,000*l.* should be held by the trustees upon trust to invest the same in their names in the public funds, or upon real securities, with power to vary the same; and, upon further trust, to pay the income to W. A. Dalton and his wife during their joint lives; and after the decease of either of them, to the survivor for his or her life, without power of anticipation; and subject thereto, it was declared that, upon the death of either of them, the trustees should be possessed of one moiety of the trust monies, for the survivor of them absolutely, and of the other moiety for such of the children of W. A. Dalton and Harriet his wife as they should jointly appoint; and in default of appointment, for all the children equally, with power of advancement, with the consent of the husband and wife, or the survivor. And it was thereby agreed and declared "to be the true intent and meaning of this indenture that the dividends, &c. of the said trust monies are hereby reserved and secured to the said W. A. Dalton and Harriet his wife, and the survivor of them, upon condition only that they and the survivor of them shall from time to time, and at all times during the minorities or minority of all and every their child or children, find and provide such child or children with suitable diet, clothing, and general maintenance and support, in proportion to the circumstances and condition of life of them the said W. A. Dalton and Harriet his wife, and to the expectancy or expectancies of such child or children, respectively, notwithstanding the portion or portions of such child or children should not have become vested or payable"; and it was provided "that from and after any advance or

advances should have been so made as aforesaid in the lifetime of the said W. A. Dalton and Harriet his wife, or the survivor of them, to such child or children, amounting to one-third part of their presumptive shares respectively, then and in such case the said W. A. Dalton and Harriet his wife, and each of them, shall be wholly released and discharged from the said condition or obligation to provide such child or children with diet, clothing, or maintenance, as aforesaid."

The 4,000*l.* was invested by the trustees in the purchase of 4,232*l.* 16*s.* consols. In August 1844 Mrs. Dalton was taken in execution for 67*l.*, in an action upon a promissory note, she not having pleaded her coverture. On petition to the Court of Bankruptcy she obtained protection, upon condition of satisfying the claim by the yearly payment of 40*l.* out of the income of the trust fund. In November 1844, W. A. Dalton petitioned the Court of Bankruptcy for protection; and in 1845 an order was made by the Commissioner for his protection, and it was thereby directed that W. A. Dalton should pay to the official assignee the sum of 30*l.* in each year, until his debts were discharged; and that if default were made therein for one month, the order was to be void. In 1849, the trust fund was, under the 10 & 11 Vict. c. 96. (the Trustees Relief Act), transferred into court in the matter of the trusts of the settlement, and the same, together with the amount of dividends since accrued, was standing in the Accountant General's name, at the time of presenting the present petition. In December 1845, W. A. Dalton and Harriet his wife assigned to Obbard, by way of mortgage, for securing the sum of 500*l.*, all the income of the trust funds to which they were entitled during their lives, and also one moiety of the capital to which W. A. Dalton would be entitled, in the event of his surviving his wife, and all his contingent interest in the other moiety.

The present petition was presented by the six infant children of Mr. and Mrs. Dalton, which, after setting out the above facts, stated, that W. A. Dalton and Harriet his wife had, for some time past, omitted to provide the petitioners with suitable diet,

&c., in proportion to the circumstances and condition in life of the said W. A. Dalton and Harriet his wife, and the expectations of the petitioners; that no advancement had been made to any of the petitioners, and that the dividends of the trust fund would not be more than sufficient for that purpose; and the petition prayed that the dividends might be applied accordingly, and be paid for that purpose to such person as the Court might in that behalf appoint.

The petition came on to be heard before the Vice Chancellor Knight Bruce, whereupon an order was made, that, after providing thereout for the costs of the trustees and the petitioners, the residue of the dividends in court and the accruing dividends should be paid to G. E. Evans, a solicitor of the court, during the minority of the infant petitioners, or until further order, he undertaking to see the same applied in their maintenance and support; and that the costs of Obbard, of and incident to this application, should be added to his mortgage security. Obbard presented a petition of appeal against that order, so far as it affected his mortgage security; and prayed that one moiety of the income of the trust fund to accrue during the lives of Mr. and Mrs. Dalton and the life of the survivor might be paid to him as such mortgagee.

Mr. Malins and *Mr. Daniel* having opened the case for the appellant,—

Mr. L. Wigram and *Mr. C. Hall*, for the infant petitioners, objected that the mortgagee had no title; as, previously to his mortgage, both Mr. and Mrs. Dalton had taken the benefit of the Insolvent Debtors Acts.

Mr. Malins and *Mr. Daniel* contended that the property did not vest absolutely in the official assignee, except in cases where a final order was made; that here a mere order for protection was made upon the proposal of the insolvent, which was adopted by the Commissioner, under the 4th section of the 5 & 6 Vict. c. 116, which was a proposal to pay a yearly sum out of the specific property. They contended further, that there was no instance in which the Court, under the Trustee

Act, had dealt adversely against a party upon petition; and they referred to the difficulties expressed by Lord Cottenham, in *In re Bloye's Trust* (1). Upon the merits they contended that the order was wrong in giving the whole income to the children, and that at the utmost they were only entitled to a moiety.

Mr. J. V. Prior, for the official assignee, claimed the 30*l.* a year, under the order of the Commissioner.

Mr. L. Wigram and *Mr. C. Hall*, in support of the order.—The Court will not willingly entertain an objection to the jurisdiction which was not raised in the court below — *Upton Warren Case* (2). But the objection is really only to the discretion of the Court, and therefore clearly inadmissible upon appeal. The appellant has no *locus standi*; for the property vested in the official assignee upon his appointment; and the only provision in the act 7 & 8 Vict. c. 96. for revesting the property in the insolvent is under the 10th section, namely, where the petition is dismissed. The condition in the deed of settlement clearly creates a trust in favour of the children.

Mr. Barber, for the trustees of the settlement.

Mr. Malins replied.

The LORD CHANCELLOR (TRURO).—Upon the best consideration I can give this case I am of opinion that there is no just objection to the order. The first point raised was, whether the question involved in the petition is a fit question to be decided upon petition, or whether some other course ought to have been adopted. As far as the question of law is concerned, the Court is in quite as good a position to decide it as if the matter were brought before it by bill. But it is said there is a conflict of evidence with respect to the present state of the family; but that fact does not appear to me to be essential to the decision; and, according to the view I take of the case, I am quite disposed to decide it upon affidavits. The affidavits amount to this: that, at the time of the advance of the

500*l.*, the parents were in a distressed condition, having neither house nor furniture, and that the 500*l.* was raised with a view to improve the condition of the parents and the family generally. What the case might have been if the money had been raised for the express purpose of benefiting the children it is immaterial to consider.

With respect to the other question, how far the interest of *Mr. Dalton* became vested in the assignee of the Court of Bankruptcy, I express no opinion. The construction of the act may be attended with some difficulties; but I think the case may be decided upon the merits, independently of that construction.

The supposed hardship of the case, at the present moment, cannot affect the construction of a written instrument. You must always have regard to the circumstances of the parties at the time the instrument is executed, with a view to construing that instrument. In the present case there is no material before the Court as to the *status* of the parties but this: that *Mr. Dalton* was possessed of a considerable estate in Yorkshire, subject to dower; and that *Mrs. Dalton* released her dower upon the terms contained in this instrument; the plain object of which was, to secure a provision for the children. The settlement is prepared with a reasonable anticipation that the parents would be in a situation to provide for their children; and then it contemplates a reverse of circumstances, that they would not be able to do that; and with reference to that view, let us see what is the meaning of the terms used in the deed. It is admitted that the terms of the deed amount to a condition or trust, regulating the application of the interest of the money invested: the deed provides that the interest shall be applied in a particular way, upon this express condition. What does this mean? That if the condition is not performed, the right of the parents ceases. Whether the condition be in favour of children or any stranger, it seems to me it would make no difference. If this creates a trust, what was the obligation of the trustees in the event of the parents making default? Would it not have been the duty of the trustees, or of the Court, to put the children in the con-

(1) 2 Hall & Tw. 140; s. c. 1 Mac. & Gor. 488; 19 Law J. Rep. (n.s.) Chanc. 89.

(2) 1 Myl. & K. 410.

dition that they would have been in if the parents had performed the condition, and to apply the whole fund for that purpose, if no less than the whole fund would do? The children are entitled to maintenance and support out of the fund, in proportion to the circumstances and condition in life of the parents, and the expectancies of the children. What is meant by those words? It appears Mr. Dalton did not follow any particular occupation. The expectations of the children are not limited to their parents; but extend to the circumstances of their relations and friends. If the parents happen to be in poverty at a particular time, it does not follow that the children are to receive their education at a charity school. Without doubt the words meant that they should receive such an education as would fit them for the position in life in which Mr. Dalton then moved. I cannot read these words in the restricted sense which the arguments for the appellant suppose. It appears to me that 120*l.* a year is not too much for this purpose, considering there are four boys and two girls. But it is said "What, then, are the parents to do?" With that I have nothing to do; my duty is, to give to the children what the parents by deed have provided for them. The object of the deed was to secure the children in the first instance; and the parents are only entitled to what remains after they are provided for. But it is said the mortgagee advanced his money under legal advice; he did it, I am ready to believe, from benevolent motives; but still he did it with ample means of information as to the rights of the children. I think, therefore, that the order of the Court below is quite consistent with the power the Court has over this settlement. The right of the mortgagee is the right of Dalton himself; and neither one nor the other has a right to anything, except what may remain after providing for the children; and, in this case, I think the application of the whole income is not more than sufficient. The petition of appeal must be dismissed, with costs.

L.C.
March 1, 2, 10. } LETTS v. THE LONDON
CORN EXCHANGE COM-
PANY.

Tithes—37 Hen. 8. c. 12.—*Composition.*

A rector of a parish in the city of London received for some years, without objection, a fixed sum by way of tithes of particular premises, and then filed his bill for an account :—Held, that the receipt of such fixed sum, though less than the annual value, did not necessarily imply a composition; and that much stronger evidence would be required to establish such a payment as a composition than in the ordinary case of a money payment in lieu of tithes in kind.

Quære—whether the rule requiring six months' notice for determining an ordinary composition for tithes in kind is applicable to the case of a composition for a money payment in lieu of tithes.

Form of reference to the Master to take an account of tithes due under the 37 Hen. 8. c. 12, where the rent or annual value of the buildings and premises is increased by means of implements or fittings not titheable let or used therewith.

This was an appeal, by the plaintiff, from a decree of the Vice Chancellor Knight Bruce, dated the 2nd day of July 1851, dismissing the bill, without costs.

The plaintiff, who was the rector of the parish of St. Olave, Hart Street, in the city of London, in July 1848, filed his bill against the London Corn Exchange Company, incorporated by the 7 Geo. 4. c. 1*v.*, intituled "An Act for erecting and providing a new Corn Exchange at or near Mark Lane in the city of London," and W. W. Wren, the clerk and solicitor of the company, praying that it might be declared that the plaintiff and his successors, rectors of the parish, were entitled to receive from the London Corn Exchange Company, in respect of the Corn Exchange and premises erected and built by them in pursuance of their act, tithes, after the rate of 2*s.* 9*d.* in the pound upon the annual value of the said Corn Exchange and premises; and that it might be referred to the Master to inquire and state the true annual value of the same, and to take an account of what was due to the plaintiff for arrears of the tithes thereof from Michaelmas 1847, and

for payment to the plaintiff; the plaintiff waiving all right to penalties in respect thereof.

The London Corn Exchange Company was built upon a site previously occupied by dwelling-houses; and the premises of the company consisted of two large areas, used as seed and corn markets, and of a coffee-room or tavern, and cellars, which last were let respectively at rents of 300*l.* and 200*l.* The principal revenue of the company was derived from the letting of stalls or tables, placed in and around the areas, to factors and others connected with the trade. The gross revenue of the company was upwards of 3,000*l.*, and the outgoings about 600*l.*

It appeared that Dr. Owen, the immediate predecessor of the plaintiff, as rector of the parish, had agreed to accept, and from the time of the erection of the Corn Exchange up to his death, in 1837, had received, from the company a sum of 90*l.* a year in lieu of and as a composition for the tithe; and that this amount was fixed upon as the yearly value of 2*s.* 9*d.* in the pound upon the estimated rental of the houses previously standing upon the site of the Corn Exchange. After the death of Dr. Owen, the same sum of 90*l.* was received by the plaintiff, his successor, without any objection being made, down to Michaelmas 1847. Subsequently, a long correspondence took place between the plaintiff and the defendants as to their respective rights and liabilities; and ultimately the present bill was filed in July 1848. The defendants by their answer insisted, among other things, that the plaintiff had adopted the composition made with Dr. Owen, and that he was bound to have given six months' formal notice to determine it; and upon this objection the Vice Chancellor dismissed the bill at the hearing, but without prejudice to the filing of a new bill.

The other question raised by the pleadings was, the manner in which the premises of the company were to be assessed for tithe. On this latter point the following sections of the 37 Hen. 8. c. 12. were referred to.

"2. That the citizens and inhabitants of the said city of London and liberties of the same for the time being, shall yearly, with-

out fraud or covin, for ever pay their tithes to the parsons, vicars, and curates of the said city and their successors for the time being, after the rate hereafter following: that is, to wit, of every 10*s.* rent by the year of all and every house and houses, shops, warehouses, cellars, stables, and every of them within the said city and liberties of the same, sixteen pence half-penny; and of every 20*s.* rent by the year of all and every such house and houses, shops, warehouses, cellars, and stables, and every of them within the said city and liberties 2*s.* 9*d.*; and so above the rent of 20*s.* by the year, ascending from 10*s.* to 20*s.* according to the rate aforesaid."

"4. Item, that every owner or owners, inheritor or inheritors, of any dwelling-house or houses, shops, warehouses, cellars, or stables, or any of them, within the said city and liberties, inhabiting or occupying the same himself or themselves, shall pay after such rate or tithes as is abovesaid, after the quantity of such yearly rent as the same was last letten for, without fraud or covin."

"8. Item, if any dwelling-house, within eight years last past, was or hereafter shall be converted into a warehouse, storehouse, or such like, or if a warehouse, storehouse, or such like, within the said eight years, was, or hereafter shall be, converted into a dwelling-house; that then the occupiers thereof shall pay tithes for the same after the rate above declared of mansion-house rents."

"9. Item, that where any person shall demise any dyehouse or brewhouse, with implements convenient and necessary for dyeing or brewing, reserving a rent upon the same, as well in respect of such implements as in respect of such dyehouse or brewhouse, that then the tenant shall pay his tithes after such rate as is abovesaid, the third penny abated."

Mr. Bethell, Mr. Hugh Hill, and Mr. Speed, for the plaintiff.

Sir W. P. Wood, Mr. Willes, and Mr. Humphry appeared for the defendants, and, at the suggestion of the Lord Chancellor, also for the holders of stalls, who were not made parties to the bill.—They insisted that the annual payments of 90*l.* were made and received as a composition;

and that such composition had been adopted by the plaintiff, and had never been legally determined. As to the mode of rating, they contended that the holders of stalls could not be considered as tenants, but that the letting was more in the nature of a licence or easement; as in the case of a box at the opera, &c.; and if so, then the company were both occupiers and owners, and the tithe would be payable upon "such yearly rent as the same was last letten for,"—that is to say, the rent of the houses pulled down; and lastly, that if the tithes were to be assessed, having regard to the profits of the stalls, there must be an abatement, as in the case of the dyehouse and brewhouse mentioned in the statute. The following cases were cited—

Worrall v. Nicholls, 4 Gwil. 1302.

Fell v. Wilson, 12 East, 83.

Goode v. Howells, 4 Mee. & W. 198;

s. c. 7 Law J. Rep. (N.S.) Exch. 312.

Gray v. Cook, 8 East, 336.

Surman v. Darley, 14 Mee. & W. 181;

s. c. 14 Law J. Rep. (N.S.) M.C. 145.

Wood v. Leadbitter, 13 Mee. & W. 838;

s. c. 14 Law J. Rep. (N.S.) Exch. 161.

Mr. Bethell replied.

March 10.—The LORD CHANCELLOR.—The course which has been taken at the bar in regard to this case has relieved the Court of considerable difficulty; and the only question necessary for me to decide is, whether the plaintiff can maintain his suit; that question depending upon the fact of whether there was such a composition as bound him, and as required a regular notice to put an end to it. There is a distinction between this case and the ordinary case of a composition for tithes. Where a money payment is made upon the annual value, it requires strong evidence to maintain that it is a composition, and you cannot infer that it is so from the receipt of an annual sum below the annual value. The party may not be able to ascertain what the annual value is; and it is not like the case of a money payment in lieu of tithes in kind. A case of this kind must stand upon its peculiar circumstances. I will assume that the composition, if such it is, began with Dr. Owen, though that is a question of considerable difficulty.

The next point is, whether that composition was adopted by Mr. Letts. He undoubtedly accepted the same payment as was made to Dr. Owen, but there was no direct dealing between Mr. Letts and the owners of the property in respect to the acceptance of less than the actual value; and he, finding payments made with reference to the value of the original houses, might very naturally be led to accept the sum received by the former incumbent from ignorance of the real value or from not wishing to disturb the existing arrangements; but this would not amount to a composition. Assuming it to be a composition on the part of Dr. Owen, Mr. Letts might have received it without notice that it was a composition, or less in amount than 2s. 9d. on the actual value. I think it very doubtful upon the whole case, whether there was an adoption of the previous composition which was binding on Mr. Letts. I will assume, however, that it was so; and then the question arises, whether that composition was put an end to.

I am not aware of any authority which decides that, in a case like the present, you must give the same notice as would be requisite in the case of a payment in lieu of a common render of tithes. But clearly the effect of the correspondence is, that there is an assertion by Mr. Letts that he is receiving less than the value, and an acquiescence on the part of the Corn Exchange Company in the alteration and revision of the annual payments then payable to him. They do not say to him, "Whatever may be the case for the future, as to the past he is bound to accept this sum, because he had adopted in a formal manner the composition paid to his predecessor." But the correspondence shews clearly that the plaintiff would be taken by surprise if I were to allow this objection. The parties have come here with reference to the operation of the act of parliament, and not upon the question whether Mr. Letts had precluded himself, by adoption of the composition, from that to which he would otherwise have been by law entitled. It being, then, a question of fact, I am of opinion that the plaintiff can maintain his bill; and there will be nothing left but to direct the common account. With regard to the period from which the account shall

commence, I am not disposed to carry it back further than the time of filing the bill.

The form of the decree was arranged as follows:—Reversing the order of the Vice Chancellor, and inserting the defendants', the company's, submission to be bound by the decree in respect of their tenants' liability, declare that the plaintiff is entitled to tithes after the rate of 2s. 9d. in the pound on the annual value of the London Corn Exchange and premises, to be ascertained in manner hereinafter directed, from the time of filing the bill; refer it to the Master to inquire into and ascertain the annual value of the London Corn Exchange and premises in each year from that date, having regard to the annual rents received by the company in respect of such parts as are let at annual rents, and deducting therefrom such parts of such rents as are payable in respect of matters or things included in the lettings as are not by law chargeable with tithes. Liberty to state special circumstances.

PARKER, V.C. } *In the matter of REES'*
July 3. } DEVEISEES.

Trustee Act 1850—Railway Company—Costs.

A petition, under the Trustee Act 1850, stated that A. had mortgaged lands to B. in fee; that B. had died, having by his will devised the lands to infants, and appointed C. his executor; that a contract had been entered into by C. with a railway company for the sale of a part of the lands at a certain price, and that, for the purpose of carrying out the contract, it was necessary to get in the legal estate. The petition prayed that the legal estate might be vested in C, and that the railway company might pay the costs of the petition. The railway company appeared at the hearing, but objected to pay the costs:—Held, that the Court had no jurisdiction to make any order either in favour of, or against, the company.

This was a petition under the Trustee Act, 1850. The petition stated that Mr.

Biddulph had mortgaged lands to Mr. Rees in fee, with a power of sale, that Mr. Rees had died, having by his will appointed an executor, and devised the mortgaged estate to infants. The petition then stated a contract between the company and the executor for the purchase of a part of this land, and that, with a view to this contract, it had been desired that the legal estate in the property should be vested in the executor. The petition then prayed that the estate might be conveyed by the children to the executor, and that the railway company might pay the costs of the petition.

The company were served with the petition.

The petition was not headed in the matter of the Lands Clauses Consolidation Act or the particular railway act.

Mr. Metcalfe, for the petition, contended that, as the petition in this case had been rendered necessary by the contract with the company, it was one of the items of costs which the company were bound to pay. There was, perhaps, a defect in not having the petition headed in the matter of the railway act and the Lands Clauses Consolidation Act, but the Court would probably give leave to have the petition amended in this respect. He referred to the 82nd section of the Lands Clauses Consolidation Act.

Mr. Bovill, for the company, objected to the question of costs being considered on this petition.

PARKER, V.C. said that, on the petition before him, he had not jurisdiction to make any order on the company. The vendors must make out their bill of costs, and send it to the company, and the taxing Master would have to judge of any items which might be disputed. He had no objection, if both parties wished to submit the question to him as to these costs, to act as arbitrator in the matter. In the absence of such submission, he should make no order as to the costs.

Mr. Bovill, for the company, declined to give such submission, and asked for the costs of the appearance of the company on the petition.

PARKER, V.C. said that he had not jurisdiction on the petition to make any order for, or against, the railway company, and declined to give costs.

L.C. 1851.
Dec. 8, 15, 19.
1852.
Feb. 26.

}

In re THE BOROUGH OF ST. MARY - LE - BONE JOINT-STOCK BANKING COMPANY, *ex parte* BUSK.

This was an appeal, from an order of Knight Bruce, V.C., reported 19 *Law J. Rep.* (N.S.) Chanc. 391.

Feb. 26. — The LORD CHANCELLOR (TRURO) affirmed the decision of the Court below, without giving his reasons.

L.C.
March 10, 17.

}

In re THE VALE OF NEATH AND SOUTH WALES BREWERY JOINT-STOCK COMPANY, *ex parte* LAWES.

Company — Contributory — Irregular Transfer—Deed of Settlement.

By the deed of settlement of a joint-stock company, the directors were specifically authorized to purchase shares of members under certain circumstances; but the deed contained no express prohibition restricting the directors from buying up shares generally. The company, becoming embarrassed, summoned an extraordinary general meeting, at which a resolution was passed, authorizing the directors to purchase and take a transfer of the shares of any member who would lend the company a sum of money equal to the purchase-money of his shares. The notice calling the meeting did not state, as required by the deed, the specific object for which the meeting was called. At a subsequent general meeting, at which the resolution was read, the directors were authorized to give further time to the members who had not yet complied with the terms of the resolution. W. L. then sold his shares to a trustee for the company upon the terms stated in the resolution, and died before the transfer was effected; and the directors, at

the instance of his executor, completed the requisite formalities of the transfer:—Held, that the resolution of the extraordinary meeting was invalid for want of due notice; and that the subsequent ratification of the same was inoperative, as in excess of the powers of a general meeting; and that the executor of W. L. was properly retained on the list of contributories without qualification.

Observations on the difficulty of applying the doctrine of acquiescence to joint-stock companies.

Where partnerships, as in the case of joint-stock companies, consist of a great number of individuals, the Court will hold them in their transactions strictly to the terms of the partnership contract.

This was an appeal from an order of Knight Bruce, V.C., reported 20 *Law J. Rep.* (N.S.) Chanc. 295, refusing to remove the name of Mr. J. Lawes as the executor of Mr. W. Lawes, deceased, from the list of contributories of the above-named company.

The 22nd and 23rd clauses of the deed of settlement, and the resolutions passed at an extraordinary general meeting of the company, are set out in the report of *Morgan's case* (1).

The 35th clause provided that "the respective persons in whose names the shares in the capital of the company shall from time to time be held and stand in the share register of the company shall, for all the purposes of these presents, and by and between all the present and future shareholders of and in the said capital, be declared the true and absolute owners and proprietors of such shares respectively," &c.

The 40th clause, providing for the keeping of a share register book, is set out in the report of the original hearing.

The 42nd clause provided "that in case any husband of a female proprietor, or any executor who shall not obtain the approbation of the directors to be admitted a proprietor of the company, &c. shall not be able within six calendar months from the time of his becoming such executor to sell or dispose of the share or shares belonging

(1) 1 Hall & Tw. 324; s. c. 1 Mac. & Gor. 225; 18 *Law J. Rep.* (N.S.) Chanc. 265.

to or claimed by him in such character or right as aforesaid, to some other person or persons to be approved of by the directors, it shall be lawful for the directors in all such cases, and they are hereby required, on the application of the person holding or entitled to, or claiming such share or shares as aforesaid, to purchase the same from him or her at the current or market price thereof, or for such other price as the directors shall deem fair or reasonable; and the share or shares so purchased shall, under the order of the directors, be transferred to one of the trustees for the time being, in trust for and for the benefit of himself and the other proprietors of the company."

Clause 44. "Whenever any share or shares in the capital of the company shall become actually forfeited, or shall be duly and effectually vested in any new proprietor, and such entry or alteration in regard to such share or shares shall have been made in the share register-book as hereinbefore stated, then, and not before, the responsibility of a previous owner, as a proprietor in the company, with respect to the same share or shares, shall, from and after the completion of such entry and certificate granted as aforesaid, and the payment of all instalments on such shares previously called for, cease and determine, as to the same share or shares; and such previous owner shall thenceforth be exonerated and released from all subsequent claims, demands, and obligations in regard to the same share or shares, and from all future observance and performance of the covenants, conditions, and stipulations contained in or referred to by this indenture, or in or by any deed or deeds relating thereto; and the certificate to be given by the directors as hereinbefore required of such entry, erasure, or alteration, shall at all times be evidence of such acquittance and discharge as aforesaid in respect of such share or shares: and the person in whom any share or shares shall or may become vested, and whose name shall be entered as the approved proprietor thereof in the share register-book as hereinbefore mentioned, shall immediately thereupon, but not before, have and be subject to all the same privileges, advantages and future liabilities in respect of such share or shares as the person originally owning such share or shares."

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The 47th clause, providing for the transaction of business at annual general meetings, proceeded as follows:—"And such other business shall be transacted relating to the company, and such rules and regulations made for the better government and carrying into effect the objects of the company as may not involve a breach of, or be inconsistent with, the existing rules or regulations of the company." The 50th clause provided that the notice convening extraordinary general meetings should specify, amongst other things, the specific object or objects of the meeting.

Mr. R. Palmer and Mr. Lewin, in support of the appeal.—The decision in *Morgan's case* does not apply to the present case, for Morgan's shares were never transferred in the share register-book to the name of the new proprietor; if it does apply, then it ought to be re-considered. The deed of settlement contains no prohibition of purchasing shares on behalf of the company. The purchase of Lawes's shares was not made until after the ordinary general meeting, which meeting adopted and ratified the resolutions passed at the previous extraordinary general meeting—*Taylor v. Hughes* (1). Again, this purchase was completed by the executor, and is, therefore, valid under the 42nd clause. Even if the transaction were irregular, the Court would refuse relief on the ground of acquiescence.

Graham v. the Birkenhead, Lancashire and Cheshire Junction Railway Company, 2 Hall & Tw. 450; s. c. 2 Mac. & Gor. 146; 20 Law J. Rep. (N.S.) Chanc. 445.

Ex parte Bagge, in re the Northern Coal Mining Company, 13 Beav. 162; s. c. 20 Law J. Rep. (N.S.) Chanc. 229.

Mr. James Russell and Mr. Terrell, contra.—*Morgan's case* was decided upon the broad ground, that it was not competent to the directors to enter into any such contract. The directors had authority to buy in two cases only: namely, where they refused the executor or his nominee, and in the event of their having a surplus fund—*Ex parte Richmond's Executors* (2) and

(1) 2 Jo. & Lat. 24.

(2) 3 De Gex & S. 96.

Bosanquet v. Shortridge (3). The directors had no authority to diminish the capital of the company, except in the cases provided by the deed. The doctrine of acquiescence cannot apply, because there are members of the company who are not *sui juris*.

March 17.—The LORD CHANCELLOR.—The question whether this gentleman was or was not properly put on the list of contributories depends upon the validity of the transfer of the shares to Buckland. This company was strictly a trading partnership, though consisting of a great number of persons; and I am very far from saying that such rules as were laid down in *Const v. Harris* (4) would not still govern cases of that description. But in a joint-stock company consisting of a great number of partners, it becomes especially necessary to hold the parties strictly to the terms of their deed; because otherwise, when the property is dealt with in pursuance of resolutions passed at ordinary or extraordinary general meetings, which a great proportion of the members will never attend, a partner may find himself bound, or affected to be bound, by transactions wholly at variance with the terms of his original contract.

Now, this partnership, the profits of which at first it was thought could not be estimated too high, was at the time of the transaction in question wholly insolvent. And the deed of settlement provides, that if there be a surplus fund to the extent of 10,000*l.*, the directors may purchase shares on behalf of the company; that is, they may buy up the interest of partners who may wish to retire, increasing by that means the interest of the remaining partners. At the time when the company was greatly in want of funds to relieve them from their embarrassments, an extraordinary general meeting is called. Now, the deed says expressly that the notice convening an extraordinary general meeting shall state the object or objects of the meeting. It is, however, perfectly clear that the circular letter of the 10th of April did not state the specific object of the meeting; and, I think, it is equally clear from the

wording of that letter that the directors did not intend thereby to disclose fully to the shareholders the scheme which they had to propound at the meeting. By a resolution passed at that meeting, authority was given to the directors to buy the shares of any shareholder wishing to retire, at a certain depreciated price, that is, below its nominal value; and upon the shareholder lending a sum of money equal to the amount of the purchase-money, a loan note was to be given for the aggregate amount, payable in five years, with interest. This was a singular transaction, for it was a mode of increasing the difficulties of the company by pledging them to more debt than was necessary, and withdrawing a portion of the capital from the trade, and thus increasing the liabilities of the remaining partners. The notice calling the meeting certainly gave no intimation that any such proposal was to be advanced. Mr. Lawes did not within the time limited avail himself of the privilege given by that resolution to tender his shares for purchase by the directors; but afterwards there was a general meeting at which a resolution was passed enlarging the time, and declaring that the shares of those who should continue defaulters after the expiration of the enlarged time should be forfeited. Now, the question argued before me was, whether that general meeting had such power or not. In my opinion they had not the power, for their powers are expressly confined to such things as are not inconsistent with the existing rules and regulations of the company. Now, the resolution of the general meeting was directly in opposition to the deed, and, therefore, must depend for its validity on the powers of the extraordinary meeting. If the notice had expressly stated the specific object of that meeting, I do not say that the resolution would have been *extra vires*; but I am clearly of opinion that it did not fall within the powers of the general meeting; and if it did, that it was confined to the liability of the parties to contribute their loans, and did not extend to the power which had expired by lapse of time of purchasing the shares of partners who were desirous of withdrawing from the concern. From the terms of the resolution, I can hardly doubt that it was so; for it speaks of defaulters and of for-

(3) 4 Exch. Rep. 699; s. c. 20 Law J. Rep. (N.S.) Exch. 57.

(4) Turn. & R. 496.

feiture of shares, things involving liabilities, but is altogether silent as to the privilege of selling their shares to the company, and thus withdrawing themselves from a concern which was at that time confessedly in a state of insolvency.

Now, it was contended, that this was a concluded and perfect transaction, accompanied with all the formalities prescribed by the deed. That is nothing to the question, for though in form it was a transfer to a third person, yet it was confessedly in substance an immediate dealing with the directors, the seller being cognizant of the fact that no substituted shareholder was thereby introduced into the company. But it was said that this case might be distinguished from *Morgan's case* by this, that *Morgan's case* depended solely on the extraordinary meeting, this upon the general meeting as well; that there the transfer was imperfect, here perfect. From what I have said before, neither of those circumstances can influence the judgment I am about to pronounce. In *Morgan's case* the Vice Chancellor proceeded upon the ground of knowledge and acquiescence by all parties; but Lord Cottenham did not think that ground a solid one, and he reversed the decision. Now, it is impossible not to feel that the doctrine of acquiescence, as applied to these cases, must lead to enormous difficulty, because individual members of this one partnership may be bound or precluded by particular acts *quâ* partners, by which the general body would not be bound or precluded. However, I am not embarrassed with this difficulty in the present case, because I am of opinion that the notice calling the extraordinary general meeting did not sufficiently specify the object, so as to make the resolution valid; and that the general meeting, not having the power to pass such a resolution, could not give any such confirmation as was supposed to the resolution of the previous meeting; and, further, that the resolution passed at the general meeting did not extend to this case. Upon the merits of the case, I am of opinion that it is a transaction that ought not to prevail.

I make no imputation upon the gentleman who, unfortunately, is still to continue a contributory. I have no doubt that in his view it was a *bona fide* transaction, un-

tainted with fraud or contrivance; but it was an improper transaction. The effect of it was to allow a certain number of persons who had the command of money to escape from further liability at the expense of their co-partners, and contrary to the express provision of the deed. I therefore think the Vice Chancellor came to a right conclusion upon this case, which I hold not to be distinguishable from *Morgan's case*; and, therefore, I must dismiss this appeal, with costs.

PARKER, V.C. } *In re* BATEMAN'S ESTATE.
July 31.

Railway Company—Persons under Disability—Money paid into Court—Surplus.

*Where money has been paid into court in respect of lands taken by a company from persons under disability, and, with the exception of a small surplus, has been afterwards laid out in the purchase of lands to be settled to the same uses, if such surplus is under 20*l.*, the Court will allow it to be paid to the tenant for life, but not otherwise.*

A railway company took, for the purposes of their act, some settled lands, and the purchase-money was paid into court. This purchase-money, with the exception of 52*l.*, was laid out in the purchase of other lands. On the petition brought for completing the purchase under the sanction of the Court, the tenant for life asked that the sum of 52*l.* might be paid to him, he undertaking to lay it out in lasting improvements.

Mr. G. L. Russell, for the petition, cited *Ex parte Barrett* (1).

PARKER, V.C. said, that the rule which he laid down was not to allow sums exceeding 20*l.* to be paid out under the circumstances stated in the petition.

(1) 19 Law J. Rep. (N.S.) Chanc. 415.

LORDS JUSTICES, }
 1852. } BARNETT v. SHEFFIELD.
 Feb. 28. }

*Will—Bequest of Annuity to Trustee—
 Appropriation of Fund to meet Annuity—
 Lien on Annuity for Breach of Trust of
 Trustee, the Annuitant.*

*A testator directed three trustees to raise
 a fund sufficient to pay an annuity to one of
 them, and gave power to resort to the residue
 if the fund should become deficient. The
 three trustees invested more than enough on
 mortgage, and paid the annuity out of it.
 On the mortgage being paid off, the annuitant
 (a trustee) received the money, and mis-
 applied it. The annuity had been assigned,
 and the assignment recited the appropriation.
 The purchaser filed a bill against all the
 trustees, to compel them to pay the money
 misapplied, or for a resort to the residue to
 make good the same:—Held, that there had
 been an appropriation, that the recital was
 binding on the purchaser as to appropriation,
 and that the purchaser had no claim upon
 the residue, the fund not having become de-
 ficient within the meaning of the will.*

The testator in the cause, Hugh Herni-
 shaw, by his will, dated the 14th of De-
 cember 1829, directed his three trustees,
 Sheffield, William Webb, and Hernishaw,
 to raise a sum of money, the clear yearly
 dividends, interest, and produce of which,
 when invested upon government or real
 securities, would produce a clear annual
 sum of 100*l.*, clear of all deductions, and
 pay the same to William Webb (one of
 the trustees) and his assigns for his life;
 and he directed that, if at any time the
 dividends, interest, and annual produce of
 the trust fund should, from any cause or
 circumstance whatsoever, be insufficient
 to answer the annuity, the deficiency
 should be raised out of the dividends of
 the residue; and he declared that the
 trustees should stand possessed of the
 residue, and of the stocks, funds, and
 securities so appropriated for the said
 annuity and the dividends, interest, and
 annual produce thereof, (but subject and
 charged with the said annuity), upon certain
 trusts thereby declared. The testator died
 in January 1830, and his will was proved by
 the three trustees, who were also the exe-

cutors. The three trustees invested 3,500*l.*,
 part of the personal estate, on a mortgage
 of freehold property, at 4 per cent. interest,
 and the same was conveyed to them in fee
 simple by deeds of the 30th and 31st of
 October 1831. The three trustees paid
 William Webb his annuity down to No-
 vember 1831, when Hernishaw, the trustee,
 died, and then the two surviving trustees
 paid the annuity until the 2nd of January
 1832. In that month Webb sold his an-
 nuity to Mr. Barnett for 900*l.* Before any
 assignment was executed, Matthew Webb
 was appointed a new trustee, and the mort-
 gage was vested in him, William Webb, and
 Sheffield, upon the trusts of the will. The
 assignment of the annuity was made by a
 deed, dated the 28th of June 1832, between
 William Webb of the one part, and Mr.
 Barnett of the other part, which untruly
 recited that William Webb and Sheffield
 were the only trustees of the will, and
 recited that in pursuance of the trusts of
 the will, and for the purpose of securing
 the annuity, the 3,500*l.* had been in-
 vested on the mortgage, and then assigned
 the annuity, and directed the "trustees or
 trustee for the time being of the will to
 pay the annuity to Barnett, his execu-
 cutors, administrators, or assigns." William
 Webb received the interest on the mort-
 gage debt and other estate of the testator,
 and with the privity of his co-trustees,
 Sheffield and Matthew Webb, paid the an-
 nuity to Mr. Barnett down to the 2nd of
 June 1846.

In 1846 the mortgagor paid off the
 3,500*l.*; and William Webb and Sheffield
 received the money, gave a receipt, and
 conveyed, or professed to convey, the
 estate, there being no mention of the con-
 veyance to the old and new trustees in
 1832. The 3,500*l.* was taken possession
 of, with the permission of Sheffield, by
 William Webb, and misapplied by him.
 Mr. B. Barnett then filed a bill against
 Sheffield, Matthew Webb, and William
 Webb, praying a declaration that they
 were personally liable to make good the
 3,500*l.* and interest, for an account of the
 trust estate, and a declaration that the
 plaintiff was entitled to have the 3,500*l.*,
 or any deficiency, made good out of the
 residue. By a decree, made by the late
 Vice Chancellor of England, in 1850,

was declared that Matthew Webb was personally liable to make good the 3,500*l.*, and that sum was ordered to be paid into court, and a reference was directed to the Master as to the outstanding personal estate, and what real estate remained unsold. From this decree, so far as it related to Mr. Matthew Webb, he appealed, and from the remainder, the other defendants appealed.

Mr. Bacon, Mr. Malins, Mr. Metcalfe, and Mr. Terrell, for the appellants.

Mr. Bethell, Mr. Rolt, and Mr. Speed, for Mr. Barnett, the respondent, contended that there was no sufficient appropriation of the mortgage money to the purposes of paying the annuity; for, among other reasons, that the money secured afforded a greater amount of interest than was enough to keep down the annuity, and even if there were an appropriation, the annuitant had power given him by the will to resort to the residue for any deficiency. The purchaser had done all he could to protect himself by giving notice to Mr. W. Webb's co-trustee; and if the co-trustees permitted Mr. W. Webb to misapply the fund, as both Mr. Sheffield and Mr. Matthew Webb had done, they were bound to make good the misapplication, and could not rely upon the annuity as a security to them for any sums due to the testator's estate from Mr. William Webb. The learned counsel concluded by citing, observing on, and distinguishing this case from that of *Morris v. Livie* (1), and referred to *Priddy v. Rose* (2) and *May v. Bennett* (3).

LORD JUSTICE LORD CRANWORTH.—The decree appears to be wrong. The plaintiff claims as assignee of an annuity. This claim is resisted on several grounds: the first being, that the annuity was satisfied by the appropriation of a fund to meet it. In answer to this, it is said, that there was not, strictly speaking, any appropriation, because the debt of 3,500*l.*, invested upon real securities, produced, not 100*l.*, but 140*l.* per annum. It appears to us that this was perfectly immaterial. The trustees

had power to invest the produce of the fund upon real security; and it is not often easy to find real security producing exactly a prescribed income, because a mortgagor does not in general wish to split the sum which he requires into different mortgages. From that circumstance it may be inferred that where, according to the terms of the trust, the fund to be provided to secure an annuity may be invested on real security, the security will not be an improper one because it produces rather more than the actual annuity required. Therefore, if there is nothing upon the will in the present case to denote a contrary intention, this appropriation may be inferred to have been proper. Now the will confirms that inference, for it provides that the trustees shall stand possessed of the appropriated fund, "subject and charged with the payment of the said annuity," upon the trust which it proceeds to declare. I do not build much on this expression, but it seems to shew that the testator did contemplate the possibility of the fund being more than sufficient for keeping down the annuity. This, therefore, appears to me an appropriation quite within the meaning of the will, if the executors intended it to be such an appropriation. Was it then so intended? That admits of no doubt. It was invested within a year and a half after the testator's death; and seems to have been invested for the sole purpose of answering the annuity. And it must at all events be so taken as regards the plaintiff, because in the assignment of the annuity to him there is an express recital that this appropriation had been made, and, therefore, a recognition of it to him. But in the next place it is said, that although there may have been an appropriation, that circumstance does not exclude the right to resort to the residue, because, independently of the general question, there is in the will an express provision enabling the plaintiff to resort to the residue, in case the fund from any cause or circumstance whatsoever should prove insufficient. I think, however, this clause contemplates an original deficiency in the funds only to answer the annuity. The rate of interest on money in the funds had been reduced shortly before the date of the will, and this circumstance

(1) 1 You. & Coll. C.C. 388; s. c. 11 Law J. Rep. (N.S.) Chanc. 172.

(2) 3 Mer. 86.

(3) 1 Russ. 370.

might have led to the introduction of the provision. It is said that, as the trustees misapplied the trust money, the contingency arose which the testator contemplated. My opinion clearly is, that the contingency has not arisen. The fund has, it is true, been lost; but it was ample, and the produce of it was never insufficient to answer the annuity. I think, therefore, first, that there was an appropriation; and, secondly, that there was no falling off in the produce of the fund, so as to render it insufficient within the meaning of the will. But I also think that if all this were otherwise, still the case of *Morris v. Livie* governs the present. Mr. Barnett, when he took his assignment, took it, subject to the liability to the *cestuis que trust* under the will. He has got all that he stipulated for. He bought an annuity, subject to a liability; and he cannot retain the benefit, and transfer the liability to others.

LORD JUSTICE KNIGHT BRUCE.—I think that, consistently with the will, it was competent to the trustees and executors to appropriate for the annuity a fund producing an annual income more than sufficient to keep down the annuity, paying of course the surplus, from time to time, as long as there should be a surplus, to the persons entitled to the residue. That being the effect of the will, as to the power of the trustees, I am satisfied by the evidence that in fact a mortgage for 3,500*l.* at 4*l.* per cent. on which a portion of the estate to that amount was invested, was effectually appropriated under the will to the purpose of satisfying the annuity; and I am of opinion that thereupon the general residue became discharged, subject only to this observation, that it was possible that, by reduction of the rate of interest or variation of the security, the income of the 3,500*l.* might be reduced below 100*l.*, in which case there might be a title to resort to the residue to supply the deficiency. The loss in this case has been occasioned by no such circumstance. The whole was called in by the trustees, and has been spent and misapplied by them, or some or one of them. I am of opinion that such an event is not a case contemplated by the will,—is not one to which the language of the testator, properly interpreted, was

intended to apply, or on which the provision was intended to come into operation. But if it were otherwise, still there would remain the liability of the annuitant, who was also a trustee, to account; and I am of opinion that it was incompetent to him, either for his own benefit, or for the benefit of a purchaser from him, to deliver the annuity from its liability as a guarantee for a full account on his part as to all the transactions in which he, as a trustee, should be engaged in respect of the trust.

LORDS JUSTICES. 1851. Nov. 11, 12, 14, 16, 17, 22, 24. 1852. Jan. 23, 24.	}	THE ATTORNEY GENERAL <i>v.</i> MURDOCH.
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Clergy—English Presbyterians—Scotch Church—Free Church—Chapel—Costs—Stay of Execution of Decree pending Appeal to the House of Lords.

A chapel was founded in England, and was used, and the services therein were performed according to the mode of worship in the Established Church of Scotland. The Court below held, that no person could enjoy the office of minister who was disqualified to be a minister of the Established Church of Scotland; and it being proved that the minister had become so disqualified, he was ordered to be removed, and the trustees who co-operated with him were also removed, and he and they were ordered to pay the costs of the suit. He and they appealed from the decree, but the same was wholly affirmed; Lord Chief Justice Cranworth dissenting from part of the decree by which the Court below declared that "no minister or other person is qualified for, or is competent to exercise, the office of minister or pastor without being a licentiate and recognized minister of the Established Church of Scotland, and in full connexion therewith."

An application was subsequently made to suspend the execution of the decree of the Court below, pending an intended appeal to the House of Lords; but the Court refused the motion, with costs.

The facts of this case are fully reported in 19 *Law Journal Reports* (N.S.) *Chanc.* p. 3, before Vice Chancellor Sir James Wigram.

The appellants were Mr. Murdoch, the minister, and Mr. Smith and Mr. Wilson, two other adverse defendants, who were trustees of the meeting-house.

The Solicitor General, Mr. Little and Mr. T. Deere Salmon appeared in support of the decree below.

Mr. Lewin, for the defendants in the same interest as the relators.

Mr. Rolt, Mr. Malins and Mr. Selwyn, for the appellants (1).

The following cases, books, and authorities were cited:—

The Attorney General v. Murdoch, 7 Hare, 445.

Milligan v. Mitchell, 1 Myl. & K. 446; s. c. 3 Myl. & Cr. 72; 7 Law J. Rep. (N.S.) *Chanc.* 37.

Broom v. Summers, 11 Sim. 353; s. c. 10 Law J. Rep. (N.S.) *Chanc.* 71.

The Attorney General v. Pearson, 3 Mer. 409.

The Attorney General v. Munro, 2 De Gex & S. 122.

The Attorney General v. Welsh, 4 Hare, 572.

The Attorney General v. Parker, 3 Atk. 576.

Craigdallie v. Aikman, 1 Dow, 1; s. c. 2 Bligh, 529.

The Attorney General v. Shore (Lady Hewley's case), 11 Sim. 592; s. c. 9 Cl. & F. 355.

The Presbytery of Auchterarder v. the Earl of Kinnoull, 6 Cl. & F. 646.

The Attorney General v. Drummond, 1 D. & War. 353; affirmed by the House of Lords, 14 Jur. 137.

Buchanan v. Rucker, 1 Camp. 63; s. c. 9 East, 192.

Ferguson v. Mahon, 11 Ad. & E. 179.

(1) The arguments in the above case extended to seven days, and the judgment, a transcript of which was upwards of 250 folios in length, occupied three hours in delivery. The judgment of the Lord Chief Justice consisted of an elaborate statement of the facts, but they are not repeated in this report. The arguments are most of them sufficiently noticed in the judgment of his Lordship.

Statutes 1 W. & M. c. 18; 10 Ann. c. 12; 7 & 8 Vict. c. 45; 6 & 7 Vict. c. 61.

Cooke's Law of the Church of Scotland. Calamy's Lives of the Ejected Ministers, p. 500.

Hallam's Constitutional History, 234.

Calamy's Life of Baxter, vol. I. p. 447, vol. II. p. 805.

Calamy's Life and Times.

Scobell's Collections.

Dr. Doddridge's Diary.

Johnstone's History of Berwick.

Hill's Practice of the Church of Scotland.

LORD JUSTICE KNIGHT BRUCE.—The controversy in this suit (a cause by information and bill) concerns the trusts upon which a small landed property at Berwick-upon-Tweed, on part of which stands a building called the Low Meeting-house, or now as it seems, more generally, Hyde Hill Chapel, is held. It is and has for many years been a place of worship for Protestant Dissenters; that is, as the relators and plaintiffs say, for Protestant Dissenters of a particular class and description, not Protestant Dissenters generally—a limitation of the term, which, as I understand, the counsel for the appellants, who are three of the defendants in the cause, do not concede or admit. But, that it has always been, and ought to continue to be used as a place of worship for Protestant Dissenters in some sense; and that of this place of worship and its congregation there ought to be a settled minister having the right, while duly retaining that office, and willing and able for the purpose, to perform its functions, are propositions common to the disputants, and to be taken for granted; as, likewise, is the proposition that the term "Protestant Dissenters" must in the cause be understood as a term used in England concerning the congregation of a place of worship situate in England. The main, or perhaps substantially, the sole, question is, as to the fitness and qualification for the particular ministerial office that has been mentioned of the gentleman who at the time of the commencement of this suit filled it, namely, the appellant, Mr. Murdoch; and as to the fitness of the two other appellants, who are two of the trustees of the property

for the purposes to which it is applicable, to continue in the trusteeship. But there is substantially, I think, no difference between the cases of the appellants. For if Mr. Murdoch ought not to continue to be the minister, it seems to me plain enough that, entertaining the same views, and associated and acting together as to everything material in this litigation, the three ought alike to be removed or retire; and if Mr. Murdoch ought to be allowed to continue as the minister, there is no case against either of the other appellants.

The chief or sole contention of the relators and plaintiffs (the principal respondents in this appeal) may, with sufficient accuracy for every present purpose, be stated thus:—They may be considered as insisting, first, that it is absolutely necessary to a due administration of the trusts by which the property is bound, that the minister on the foundation should be, when appointed, and should, while its minister, continue to be, in communion with the Established Church of Scotland; should, when appointed, be or have been a licentiate of the Established Church of Scotland; and should, while the minister on the foundation, be and continue a minister of the Established Church of Scotland. They insist, in the second place, that Mr. Murdoch (with whom the other appellants make common cause) though when he became the minister on the foundation, and for some years afterwards, he had those qualifications, did subsequently, and before the institution of this suit, avow and pursue opinions and a line of conduct disqualifying him as a minister of the Established Church of Scotland, and cease not alone to be a minister of that church, but also to be in communion with her. Each of these propositions is combated by the appellants, who insist that Mr. Murdoch is a proper and fit person to be and continue the minister upon this foundation; that he was so when first elected and placed upon it; and that he has ever since continued to be so. Such is the main or sole issue, or such the main or sole issues, before us for determination; and that determination must depend (for the controversy, if not merely of fact, is more of fact than of law) on the evidence, the admissible evidence, before the Court; especially as it has been stated by the

counsel on each side, that they believe the case as it stands to contain all the evidence capable of being usefully brought forward.

Now, though it will, I think, be convenient to deal with the second proposition of the relators and plaintiffs first, it may be as well previously to notice the earliest entry in one of the two only books belonging or relating to this meeting-house which have, so far as I am aware, been produced,—a book, namely, in the nature of a Kirk session record, or Kirk session book. That entry shews the manner in which Mr. Murdoch's election and appointment took place.—[Here his Lordship read a voluminous entry.]—These documents lead, by themselves, perhaps, necessarily to the inference that it was in the character of a person in communion and in connexion with the Established Church of Scotland, in the character of a person qualified by doctrine, opinions and conduct to be one of her ministers, that Mr. Murdoch was elected to be the minister upon this foundation, and that he became so in the character of an actual minister of the Established Church of Scotland. He seems to have continued, outwardly and apparently, at least, and perhaps sincerely, to be in the same communion and connexion, and at peace and in harmony with the Established Church of Scotland, and to all intents one of her recognized ministers, until the schism and disruption to which I must now refer,—stating preliminarily, though perhaps superfluously, that in every instance in which I have mentioned or shall mention the Established Church of Scotland, I mean, of course, that church in a Presbyterian state; and that whenever I shall use the word "Presbyterianism" or the word "Presbyterian," their sense with me is to be taken as Trinitarian, and not Socinian.—[His Lordship here referred to the secession that took place in 1843 from the Established Church of Scotland; the enactment of the General Assembly of that year; the meeting of the Synod of the Presbyterian Church in England, held in this chapel in April 1844, and the overtures there carried unanimously, Mr. Murdoch being present. Then, after reading the overtures at length, or the greater part of them, the learned Judge proceeded to read long extracts from the

answers of the appellants, and among them the following as that of Mr. Murdoch.]—"And this defendant, A. Murdoch, for himself says, and the other defendants say, they believe it to be true that this defendant A. Murdoch has expressed his opinion that the expression Protestant Dissenters, used in the deeds relating to the said Low Meeting-house, comprised dissenters and dissenting ministers of every denomination tolerated by law, and that the deeds did not even restrict the trusts expressed in the deeds for the benefit of Presbyterians; and that this defendant, A. Murdoch, also stated, that so far as the expression Protestant Dissenters was concerned, the congregation and their minister might be anything but Episcopalians, who are not Dissenters,—Papists, who are not Protestants,—or Puseyites, who are a composition of both; and that in expressing such opinion this defendant, Alexander Murdoch, stated that he had referred simply to the term Protestant Dissenters used in the deeds."—[The answer then entered elaborately and argumentatively into the question of the jurisdiction of the Church of Scotland, and then proceeded as follows.] "Say that, under the circumstances and for the reasons herein mentioned, this defendant, A. Murdoch, does altogether deny all ecclesiastical obedience to the said Church of Scotland, and that he does insist that the said Presbytery of Berwick and the said Synod are alone his superiors in matters of church discipline, and these defendants make out the same as herein appears."

In the evidence, whether documentary or parol evidence, there is not anything that I have been able to discover leading or tending to a conclusion different, as concerning this part of the case, from that to which, in my opinion, the documents and circumstances that I have stated tend and lead, a conclusion, namely, against the appellants. It must necessarily, I think, on the materials before the Court, be taken that, before and at the time of the institution of this suit, which was commenced in the year 1846, Mr. Murdoch had ceased to be and no longer was a minister of the Established Church of Scotland,—had ceased to be and no longer was qualified to be a minister of that church,—

had ceased to be and no longer was in communion with her.

Then comes the proposition of the materiality of that state of things, the proposition affirmed by the relators and plaintiffs, and denied by the appellants, that by ceasing to be a minister of the Established Church of Scotland, by ceasing to be in connexion with that church, by ceasing to be in communion with her, Mr. Murdoch became disqualified and unfit to continue or be the minister upon the foundation in question. This point, depending on the evidence in the suit, considered with due regard to the nature of the pleadings, is certainly, I think, not concluded by the deeds of 1717, 1719, 1734 and 1766, or any one or more of them, or any later deed; for I am clearly of opinion that neither the appellants' contention nor the respondents' contention is inconsistent with the language of any one of those instruments. The litigants on each side say that the congregation in question is a congregation of "Protestant Dissenters," and so has always been; and assert, therefore, that Master John Turner's congregation was a congregation of Protestant Dissenters. The appellants and respondents differ, it may be, as to the meaning of the term. But that difference does not necessarily involve, does not necessarily imply, a contradiction of any one of the deeds on either side. The affirmation or the denial that the minister on this foundation must needs be in connexion or communion with the Established Church of Scotland, or must needs be a minister of that church, may well be maintained by persons submitting to be bound by every word of each of the deeds.—[His Lordship then said it might be right to refer to some portions of the doctrine stated by Lord Eldon in *The Attorney General v. Pearson*, and then proceeded to read long extracts from the case as reported in the third volume of Mr. Merivale's Reports (2).]—It is to be observed, that (subject possibly to the question, if it is a question, whether

(2) To the reader who may wish to refer to the exact part of Lord Eldon's judgment, it may be useful to say, that the extracts commenced with the words—"But there is another view in which the case should be considered," and ended "and liable to be removed in the same manner as he was called upon to officiate."

Erastianism, or an opinion favourable to Erastianism, or analogous to Erastian views, is an opinion belonging to religious belief or religious doctrine, the dispute before us is not one that concerns religious belief or religious doctrine, or, except as to the qualification of the pastor or minister, the form or manner of conducting divine worship. But it cannot, I think, be considered that the manner of conducting divine worship is not at all touched by the question to what church, in point of discipline, the minister belongs ; or the question whether, through his own conduct and proceedings, he has ceased to be a member of that church of which, when chosen, he professed, and must, by the electors, have been thought to be, a member. Nor, if the manner of conducting divine worship is not so touched, does it seem to me that Lord Eldon's doctrine is inapplicable to the mere qualification of the minister in other respects than those points of opinion upon which the plaintiffs and the defendants here are agreed. Now, it appears to me to be a just inference from the pleadings and evidence, and to be a fact established, that the congregation in question was, at the time of its original foundation in the latter half of the 17th century, and has thenceforth to the present day continually been, in theory, opinion, views, and profession, Presbyterian. Indeed, in a very early part of the appellants' first answer, they state their belief "that the doctrines, government and discipline" of this "congregation, from the time of their first assembly down to the time of putting in that answer, have always been such as were held and maintained by the Presbyterian Church in England" in the year 1685, and such as are contained in the standards called in the same answer "The Westminster Standards," and which standards (it states) "are always the standards of the Church of Scotland as formerly and as now established." It appears to me proved also that, during fifty years, at least, next before the election of Mr. Murdoch, and during sixty years, at least, next before the commencement of this suit, the uniform course, usage and practice of the congregation in question, and its trustees—the uniform plan and system upon which the property in question has been

administered by the persons claiming for the time being under the conveyance of 1734—were, as concerning the choice, appointment, ordination, and settling of the pastor or minister, in accordance and conformity with the course pursued, as already mentioned, when Mr. Murdoch was elected, appointed, ordained and settled ; and therefore support (I do not say conclusively establish) the contention of the relators and plaintiffs in this respect.

It must, upon the evidence, be taken that for full fifty years next before Mr. Murdoch's election, for full sixty years next before the institution of this suit, during which period more than five pastors or ministers have been chosen and appointed, each one of them who preceded Mr. Murdoch was, when chosen, a licentiate of the Established Church of Scotland, or an ordained minister of that church ; was, when first settled in the office, an ordained and a recognized minister of that church, and so continued while in connexion with this foundation. Then, with regard to the period, more than fifty years before Mr. Murdoch's election, and more than sixty years before the commencement of this suit, Mr. Ogle (an Englishman, I believe, who held the living of Berwick at the time of the death of Oliver Cromwell, and was, upon or soon after the Restoration, ejected from it) seems to have been the founder and first pastor or minister, or at least the first pastor or minister, of this congregation, which may safely, I think, be taken to have had its origin and commencement between the Restoration and the Revolution. He died in the year 1696, I believe, and seems to have been immediately or otherwise succeeded in the office of its minister by Mr. John Turner, whose name is mentioned in the conveyance of 1766, probably an Englishman also. He died, I think, in 1760, and was succeeded immediately or otherwise by Mr. Gardner, who died, I believe, between 1777 and 1781, and whose immediate successor was Mr. Aitcheson, who was or had been a licentiate certainly of the Established Church of Scotland, and seems to have held the office of pastor or minister on this foundation for a period of fifteen years and upwards, commencing from the year 1781, or earlier. Of these gentlemen there is not, I think, the least reason to believe

that any one was an Episcopalian, or not a Protestant Dissenter, or not in theory, not in opinion, not in profession, or not, so far as possible, in practice a Presbyterian.

The question, then, appears to be, whether it was originally, or had, before the election of Mr. Murdoch, become, in an effectual manner, a private law, or governing and binding regulation of this congregation, of this religious institution and foundation, that its minister or pastor at all times should be in communion with the Established Church of Scotland—should be, or have been, a licentiate of the Established Church of Scotland, and should be a minister of that church. I understand, however, the appellants to contend, in effect, not only that there was no such private law, no such governing regulation, but, moreover, that none such could effectually have been made, unless before, or contemporaneously with, the original formation of the congregation in the seventeenth century, or, at least, before or contemporaneously with the acquisition of the meeting-house, or its site, for the purposes of the congregation. To this I do not agree. It appears to me to be competent to a congregation of Dissenters, acting unanimously, and with the concurrence, where they have trustees, of those trustees, to introduce effectually into their system and constitution new regulations from time to time—regulations, at least, not in contravention of any deed of trust or of foundation—not subversive of the original system or constitution—not opposed in principle to it. Whether the unanimous votes of an entire congregation, and their trustees, could be of such force as to convert a Trinitarian into a Socinian foundation, a Protestant into a Popish, a Presbyterian into an Episcopalian, institution, is not a point before us. The congregation and foundation to which this suit relates were originally, are, and have ever been, Presbyterian; nor is anything sought by the information and bill, or done by the decree, not consistent with Presbyterianism, or not within Presbyterian limits. My opinion is, that upon the assumption (for the purpose of the argument) that before the year 1720, or before the year 1767, it was not necessary that the pastor or minister of this congregation should be, or have

been, a licentiate of the Established Church of Scotland, should be a minister of the Established Church of Scotland, or should be in a state of communion with that church, it was competent to the entire congregation for the time being, acting unanimously, and with the concurrence of their trustee or trustees, if any, for the time being, to resolve and agree effectually (I am not saying irrevocably), that every future minister or pastor should be a person in communion with the Established Church of Scotland, should be, or have been, a licentiate of the Established Church of Scotland, and should be a minister of that church. Such a resolution, such an agreement, was not, nor would be, to extend or change though it was, or might be, to restrict the class from which the minister or pastor of the congregation was to be chosen. Nor could such a restriction, whether likely or unlikely to be approved by all rational and pious Presbyterians, be in the unquestionable circumstances of the case considered absurd or necessarily mischievous, necessarily inexpedient, or necessarily unprincipled. I think it to be a just and correct inference from the whole of the admissible evidence, that long before the vacancy caused by the death of Mr. Murdoch's immediate predecessor upon this foundation, Mr. Crambe, because before Mr. Crambe's appointment or election, it was determined by the congregation—the whole of the congregation for the time being—approved by the trustee or trustees of the property for the time being, and agreed effectually so as to bind the property (I do not say irrevocably), that the minister for the time being on the foundation should always be, or have been, a licentiate of the Established Church of Scotland, should always be an ordained minister of the Established Church of Scotland, and should, therefore, necessarily be a person in full communion with that church. I use the term "ordained minister," not as meaning of necessity a person having previously had a parish, or, if the phrase may be allowed, a cure of any kind, or any charge or office. The effect which, whether by way of evidence or presumption, or otherwise, a continued and unbroken usage during a considerable number of consecutive years has in this country on rights of

property, or questions concerning property in various instances is well known, and the present is a controversy about property. Whether it is affected by the statute 3 & 4 Will. 4. c. 27, or by the principles on which the case of *Lord Cholmondeley v. Lord Clinton* (3), (as decided by Sir Thomas Plumer and the House of Lords), or *Stocker v. Berny* (4), *The Mayor of Hull v. Horner* (5), *Beckford v. Wade* (6), *Gibson v. Clark* (7), *Chalmer v. Bradley* (8), *Doe d. Harding v. Cooke* (9), *Doe d. Draper v. Lawley* (10), and *Doe d. Davidson v. Barnard* (11), or any other case belonging to either of the same classes was decided, I do not express an opinion further than I have done, nor is it necessary that I should. But, certainly, I view the observations of Lord Eldon, in *The Attorney General v. Pearson*, as not without bearing on the present cause. That the appellants are defendants, is not, I think, a circumstance either in their favour or against them, with respect to the manner in which the dispute between them and the respondents ought to be dealt with. All the parties to the cause seem to be alike *de facto* in possession of the subject in controversy. I do not except even the Attorney General, considering the interest of which he stands as the representative of the suit. The appellants say that Mr. Murdoch is entitled to continue to officiate in the meeting-house as the minister of its congregation. But if he is so, that right, that title, is probably one capable of assertion effectually in a court of equity only, if anywhere. Supposing that to be so, I apprehend that the rules applicable to the case of a man who, if he has a title, has one capable of effectual assertion at law, do not necessarily apply to Mr. Murdoch's case. It has been suggested that the proximity of Berwick to Scotland, and the legal state and social condition in which as to religion, during the latter half of the seventeenth century and the whole of the eighteenth, Scotland

and England respectively from time to time were, ought to be considered sufficient to account for the constant practice, during the sixty years next preceding the suit, of having as ministers or pastors upon this foundation such persons as during that period were so, on the appellants' theory, as distinguished from that of the relators' and plaintiffs'. To this view or argument, however, I find myself unable to accede, considering especially the support which the same facts may be reasonably argued to afford to the case of the relators and plaintiffs. It may be true, that if we suppose a case of an office requiring to be filled by a man of learning, which during sixty consecutive years and more has been uniformly filled by a graduate, for example, of the University of Oxford, it might be unsafe, therefore, to hold that only a graduate of Oxford could be appointed, and other such examples or cases might easily be suggested. But the circumstances of the particular occasion or instance must always be attended to. Long practice or usage as to one subject may be of more or less force than long practice or usage as to another. The person having judicially to decide on the fact, on the weight of circumstantial evidence, on the inference to be drawn from a series of events, must form the best estimate judicially that he can of the mass of materials before him, and all its particulars, and come to a conclusion accordingly. On the whole, the pleadings and evidence now before this Court leave me in no state of uncertainty what are the trusts to which the property in dispute is subject, so far at least as the disqualification of Mr. Murdoch is concerned,—leave me in no state of doubt whether a breach of trust has been committed by the appellants.

Upon this my deliberate view of the pleadings, this my deliberate estimate of the evidence, I am bound to act; and it not being possible, I think, to deal with the cause otherwise than in one of these five ways: namely, to declare the office of minister or pastor vacant, and do substantially no more; or to direct an inquiry as to the true nature of the trusts to which the property is subject; or to direct a scheme for its management and administration; or, fourthly, to dismiss the information and bill; or, fifthly, to affirm

(3) Turn. & R. 107; a. c. 4 Bligh, 1.

(4) Ld. Raym. 741.

(5) Cowp. 102.

(6) 17 Ves. 87.

(7) 1 Jac. & W. 159.

(8) Ibid. 57.

(9) 7 Bing. 346; a. c. 9 Law J. Rep. C.P. 118.

(10) 3 Nev. & M. 331.

(11) 1 Esp. 11.

the Vice Chancellor's decree, or make one not importantly different from it,—I must conclude this: as to the first, it would probably leave the litigants in scarcely a better state on either side than when the dispute began, and would be, I conceive, to do justice defectively; as to the second, considering the small amount of property in dispute, considering the exertions already made to procure evidence, considering the quantity of testimony, oral and documentary, now before us, and considering the heat, eagerness, and animosity generally produced by conflicting endeavours at a perfect state of Christian discipline (a condition from which the present controversy seems to form no exception), I am of opinion that the due administration of justice does not require that any further investigation should take place. Thirdly, upon the same grounds, I am of opinion that a scheme should not be directed. In the fourth place, I am not of opinion that the information or bill can with propriety be dismissed wholly or partially.

There remains, then, but the course of affirming the Vice Chancellor's decree, or varying it only in a manner not important. I think it better and right to affirm it wholly, for I do not accede to the observations so ably made by the appellants' counsel upon the subject of costs, whether as to the Dumfries question or otherwise. With regard, however, to the form and language of the decree, it contains some expressions which, if it had been my province originally to make it, I should, perhaps, not have used without some change or qualification or explanation. I refer to the phrase "The model of the Established Church of Scotland," and the phrase "licentiate and recognized minister of the Established Church of Scotland, and in full connexion with that church." Still, I am not sufficiently persuaded that either phrase is inaccurate, or needs either any qualification not contained in the decree, or any explanation not afforded by the decree, to render it incumbent on me or proper for me, as I think, to say that the decree in either of these respects ought to be varied, considering the decree, as I do, to be certainly correct in all others. I should add that, with regard to the two phrases which I have just been quoting, I read and understand the former as meaning "The

model of the Established Church of Scotland, so far as possible consistently with the fact of Berwick-upon Tweed being in England;" and the latter thus: a person may, I think, be a licentiate of the Church of Scotland within the meaning of the decree, although having ceased to be a licentiate of that church in the sense and by reason merely of having become one of her regularly ordained ministers. I conceive that the word "recognized" as used in the decree, means "ordained," that is to say, "regularly ordained." And when I say "regularly ordained," I mean, of course, "duly ordained" according to the rules and course of the Established Church of Scotland. I think, moreover, that the phrase imports that the character or authority conferred by the ordination must not have been taken away, or ceased to exist. I am of opinion that a man may be a "recognized minister of the Established Church of Scotland," within the meaning of the decree, whether duly ordained according to the rules and course of that church before and independently of his appointment or election to the foundation in question, or so ordained only upon the occasion of, and with reference to, that appointment or election. And I read and understand, lastly, the word "connexion" as used in the decree to mean neither more nor less than "communion."

The petition of appeal will, therefore, under the statute constituting our office, stand dismissed. The costs of the appeal, however, will depend on my learned Brother's view of the matter; for, though I am disposed to give them against the appellants, I apprehend that unless he shall concur in doing so they cannot be given. I have not hitherto mentioned a statute to which reference was made during the argument, the act of the 7 & 8 Vict. c. 45, for my opinion upon this appeal has not been guided or affected by it. I may say, however, that the case of the appellants is clearly, in my judgment, not assisted by that statute; but is, perhaps, one against which the statute opposes an insuperable bar.

LORD JUSTICE LORD CRANWORTH.—The principal question in this case is one of fact rather than of law. What were the purposes for which the founders of the Low

Meeting-house, in 1719, subscribed their money? For, as the rights of the parties are not, so far as I can discover, touched by the statute 7 & 8 Vict. c. 45, the meeting-house must, according to my view of this case, continue to be used for the same purposes at the present day. Where the trusts on which a chapel has been founded have, at or about the time of the foundation, been declared in writing, there is not, in general, much difficulty in carrying them into execution. But where no such writing exists, where the Court is left to find out, from mere subsequent usage, what were the original purposes of the foundation, what was the doctrine which the founders considered essential to be preached, what the discipline which they considered essential to be followed, the task often becomes one of great difficulty. There will, indeed, in general be some prominent and leading points as to which no doubt will exist. If, for instance, in a particular chapel the doctrine preached has, as far back as living memory can go, been uniformly consistent with what has been called orthodox dissent, that is to say, has been based on the doctrine, amongst others, of the Trinity, there can be no difficulty in coming now to the conclusion, as a matter of fact, that the maintenance of that doctrine formed an essential part of the objects for which the chapel was founded,—that to preach Socinianism, or modern Unitarianism, would be in contravention of those objects, and so a use of the chapel which this Court would not permit. This would, I think, be a legitimate and reasonable inference, independently of the consideration that the Toleration Act did not extend to those who denied the doctrine of the Trinity. The ground on which such an inference rests would be just as applicable to a chapel which (there being no declaration of trust), having been always, so far back as evidence could go, used by a congregation of Baptists, should now fall into the hands of those who should preach and maintain the lawfulness and expediency of infant baptism. In all such cases the first inference is, that the same doctrines which, *ex hypothesi*, have been maintained in the chapel as far back as evidence can go had been always those maintained from the time of the foundation:—and, secondly, consider-

ing the vast importance which the founders must have attached to those doctrines, that the preaching of them must have been the objects, or one of the objects, for which the chapel was intended. No difficulty exists so long as we have to deal with these great primary objects of such a foundation. But it is obvious that the same reasoning will not apply where we have to draw inferences on minor matters. To put, for instance, an extreme case the other way. Suppose the hours of divine service at any particular chapel had always been at ten o'clock in the forenoon and two o'clock in the afternoon; but that a majority of the congregation should now desire to have this altered, and that the service should now be an hour later than heretofore. It would surely be a very strained inference to draw from the fact of the service having been always performed at a particular hour that this was one of the original purposes of the foundation, and so that it would be a breach of trust to permit the chapel to be used at a different hour. In such a case there would be no difficulty in saying that the circumstance of the service having always been performed at a particular hour was a mere accident, not in the contemplation of the founders; and so that it would be no breach of trust to permit the hours of divine service to be altered. I have thus pointed out two extreme cases: in the first, inference from usage would, from the important nature of its subject-matter, be irresistible, that what had been uniformly done constituted an essential part of the original purposes of the foundation. In the other, the unimportant nature of the usage would prevent any such inference from arising. In such extreme cases there is little or no difficulty. But there are many intermediate cases, in which the application of the principles resulting from usage is by no means easy; cases in which it is hard to say, whether what has been uniformly done has been so done because it constituted part of the original objects of the founders, or merely because it has been thought, from time to time, the most convenient mode of carrying those objects into effect.

I confess that some grave difficulties of this nature have presented themselves to my mind in considering what ought to

be taken as the purposes for which this chapel was founded, and consequently as to what are the trusts on which the building is now held by the trustees. The nature of these difficulties I shall best explain by considering the precise terms of the material parts of the decree which was made in the Court below. The decree begins by declaring that the property comprised in the indenture of the 22nd of May 1719, and the chapel at Berwick-upon-Tweed, called the Low Meeting-house, erected on part thereof, in the pleadings mentioned, are subject to the trusts, as to such meeting-house, for the appropriation of the same, as a church or place of public religious worship, on the model of the Established Church of Scotland; and as to the residue of the said property, for the benefit of the congregation of the said meeting-house.

Now, to this part of the decree I entirely accede, understanding as I do the words, "on the model of the Established Church of Scotland," to mean only in the same mode in which worship is conducted by that church. It was, indeed, argued, on the part of the defendants, that there was nothing to shew any original intention of confining the use of the chapel to any particular class of Dissenters. Several books were referred to, written by eminent dissenting divines, for the purpose of shewing that, however strong the differences might at a previous time have been among the numerous bodies of Protestant Dissenters, yet the effect of common suffering and persecution, previously to the foundation of this chapel in 1719, had been to smooth down all those asperities and to induce the several sects to look at one another rather as members of one vast united body of Protestant Dissenters, than as distinct bodies of different denominations; and so to lead them to disregard the varieties of doctrine separating them among themselves. And from these considerations it was argued, that the fair presumption of fact ought to be, that the chapel was originally built, not for any one particular class, as, for instance, Presbyterians, but for Protestant Dissenters generally; and it was said, that this view of the case is confirmed by the circumstance that, in the conveyance to new trustees by the deed of 1734, the property conveyed is described as a burgage and garden, on

part whereof had lately been erected a house, then used as a meeting-house for a congregation of Protestant Dissenters, not designating Dissenters of any particular denomination, but speaking generally of Protestant Dissenters. But I cannot say I feel at all affected by this argument. The property was aptly and sufficiently described, in the deeds of 1734, as a house then used as a meeting-house for a congregation of Protestant Dissenters. The only reason for describing it at all was to identify the property intended to be conveyed. For that purpose the description adopted was quite sufficient, and it was neither necessary nor probable that such a deed should contain any statement as to the nature of the doctrine preached or the discipline followed within the walls of the building conveyed. And, with respect to the suggestion, that at the time of the foundation of the chapel, Protestant Dissenters were generally inclined to overlook the differences among themselves, and to consider it a sufficient bond of union that they were opposed to the Established Church, I adopt the view taken by Vice Chancellor Wigram. However those principles might have prevailed in the case of a mere charitable gift, in a trust, for instance, to distribute money among indigent dissenting ministers or indigent dissenting poor, it never could have prevailed in the case of persons founding a chapel. In such a case the inference is almost irresistible, that the founders must have contemplated the erection of a building, in which they would intend that principles of religious belief should be expounded and religious practice be enforced in the mode considered by them most consistent with true and genuine Christianity, and to which they had themselves been accustomed.

I consider it, therefore, perfectly clear that the object of the foundation was the erection of a building in which religious services should be conducted according to some definite form of worship. The question, then, is, according to what form? This also appears to me to be free from all doubt,—according to the Presbyterian form. All the evidence shews that this has been the mode in which the worship has been conducted as far back as there are any means of inquiry; and I am perfectly satisfied that this has been the case from the very date

of the foundation, and long before that date by the congregation by whom the chapel was built. I entertain no doubt but that the worship has been always conducted in conformity with "The directory for the public worship of God," by which the mode of worship in the Church of Scotland now is, and ever since the year 1690 has been, regulated. I am satisfied further, that the conducting of the services according to that mode must have been the main, if not the only, object of the founders. On such a point I cannot suppose them to have been indifferent; and therefore I think the declaration in the decree, to which I have already referred, and which appropriates the chapel in question as a church or place of religious worship on the model of the Established Church of Scotland is perfectly right, assuming that these latter words mean no more than according to the directory for public worship used in the Established Church of Scotland.

But the decree, after this, goes on to declare that no minister or other person is qualified for, or is competent to exercise the office of, minister or pastor of the Low Meeting-house without being a licentiate and recognized minister of the Established Church of Scotland and in full connexion therewith. To this declaration I confess I cannot accede. I do not think that the evidence justifies it. It imposes, as I think, a restriction on the future choice of ministers, for which I can discover no warrant. In the first place, I must remark, with reference to the particular language used in this part of this decree, that I do not clearly understand its precise import. It requires every minister of the Low Meeting-house to be not only a licentiate but also a "recognized" minister of the Church of Scotland. I nowhere find any explanation of what is meant by a "recognized" minister of the Church of Scotland. But as no one can be a minister of the Church of Scotland who has not been ordained by that church, I presume that a recognized minister must mean one who has been ordained by that body, and who still continues to sustain the character of minister derived from such ordination. Whether, however, I rightly interpret these words is not material; for, as I do not think it is made out that the minister of the chapel must, of necessity,

be a licentiate of the Scotch Church, I certainly do not and cannot think he must be a licentiate and recognized minister of it, whatever be the correct meaning of those latter words. In order to sustain this part of the decree, the relators must, according to the view I take of this case, make out, first, that, in fact, all the ministers of the Low Meeting-house have, since its foundation, been licentiates and recognized ministers of the Church of Scotland (making due allowance for any occasional deviations from this general practice which can fairly be attributed to accident or oversight); and, secondly, if the fact is made out, then that the reasonable inference is, that this connexion with the Church of Scotland was one of the objects of the founders, to permit a departure from which would be a breach of trust.

Now, as to the fact, it appears that Mr. Smith, who became minister of the Low Meeting-house in 1797, and the six ministers who have, from time to time, succeeded him, were all ordained to this particular congregation by some Scotch Presbytery. Most of them, perhaps all, had previously been licentiates of the Scotch Church, though, as to some of them, that is by no means clear. James Aitcheson, who was the immediate predecessor of Smith, and who became minister in or about 1780, and was removed for misconduct in 1797, was certainly a Scotch licentiate, having been licensed by the Presbytery of Selkirk in 1775; but I do not find any evidence to shew that he was ordained to the Low Meeting-house by any Scotch Presbytery. With respect to the three ministers who preceded Aitcheson, namely, Turner, who was minister at the date of the foundation in 1719, Campbell, who succeeded him, and Gardner, who succeeded Campbell, and was the immediate predecessor of Aitcheson, the evidence clearly shews Campbell to have been a Scotch licentiate; but I cannot say that it at all satisfies me as to either Turner or Gardner. I am not satisfied, as a matter of fact, that either of those persons were connected with the Scotch Church, either as licentiates or ordained ministers. But let it be assumed, for the purpose of argument, that they were; then arises the question, whether the connexion of all the ministers with the Scotch Church is to be deemed an essential

part of the objects originally contemplated by the founders, or is it to be attributed to accident or some other cause?

I think that, even if all the ministers be shewn to have been licensed by the Church of Scotland, still it will not be reasonable to infer that it was in the contemplation of the founders that this connexion must always, and under all circumstances, so continue. I come to this conclusion from considering the history of Presbyterianism, as connected both with England and Scotland, and the condition in which the founders of the meeting-house and those who have since, from time to time, formed its congregation, have stood with reference to their religious wants. When I speak of the history of Presbyterianism I will, as far as possible, confine myself to that which may be collected without liability to error, from the law, or what for a time had the force of law, in this country, and from the laws of Scotland. It appears from Scobell's Collection of Acts and Ordinances, passed from the commencement of the Civil War up nearly to the death of Cromwell, that on the 12th of June 1643 the Lords and Commons, then in fact exercising the functions of government independently of and in hostility to King Charles the First, passed an ordinance, convening an assembly of divines, to meet at Westminster, in order to take into consideration the liturgy, government and discipline of the church, with a view to its amendment. That assembly accordingly met, and we know, not merely as matter of history but also from acts of the General Assembly of Scotland, that Commissioners from that country attended and formed part of the body of divines which so met at Westminster. One of the results of their deliberations was the forming of a new directory for public worship, to supersede the Book of Common Prayer then used in England; and by an ordinance of the Lords and Commons, passed in January 1644, o.s., it was ordained that the new directory should be henceforth used throughout England and Wales, instead of the Book of Common Prayer; and this was again enforced by another ordinance, made on the 23rd of May then next. In the following month of February, *i. e.* February 1645, o.s., the same directory was adopted by the

General Assembly of the Church of Scotland and by the Parliament of Scotland, the acts of both these bodies expressly noticing that it had been then already adopted by both Houses of Parliament in England. The same form of worship was thus introduced into both kingdoms, first into England and afterwards into Scotland. The Assembly of Divines at Westminster also framed a system of church government, by means of assemblies, congregational, classical, and synodical, which the General Assembly of Scotland adopted a few days after they had accepted the new directory for public worship, namely, on the 10th of February 1645, o.s., and both the directory and the form of church government, so accepted, have ever since their adoption (except for about twenty-five or thirty years, during which Episcopacy prevailed) continued to be and still are, the authorities regulating the mode of worship and the government of the church in Scotland. Probably it was found that the regulations as to church government, which were sufficient for Scotland, where Presbyterianism had previously been known, were not adapted to England, where it was all new; and accordingly we find that the document thus adopted in Scotland as to the form of church government was not introduced in this country. But on the 26th of August 1648, an ordinance was passed by the Lords and Commons, entitled, "The Form of Church Government to be used in the Churches of England and Ireland." By its terms provision was made for electing elders in every parish or congregation, and for dividing the whole kingdom into presbyteries, and for the general church government of the whole kingdom by assemblies, congregational, classical, provincial, and national, as in Scotland; and also for directing the steps to be followed in the ordination of ministers; on which latter head also there is an entire substantial conformity with the course directed in the form of church government, which, as I have already stated, had been adopted by the Scotch General Assembly. The effect of these enactments and of several others of minor importance was, to establish one uniform system of Presbyterian church government in the two kingdoms. In this state matters stood at the

Restoration, at which time, or soon afterwards, all which had thus been done by the ordinances of the Lords and Commons in England and by the Parliament and General Assembly of Scotland was swept away, and Episcopacy was re-established in both kingdoms. In England, by the Act of Uniformity, 13 & 14 Car. 2. c. 4, all ministers were required, before St. Bartholomew's Day, 1662, to assent and conform to the Book of Common Prayer, as then amended, under pain of forfeiting any benefice they might hold. The consequence of this, as might naturally have been anticipated, was, that a large body of the clergy were ejected from their livings, which they had accepted while Presbyterianism was in the ascendant; and they, with such of their flocks as entered into their views of church government and discipline and doctrine, formed a body of Nonconformist Presbyterian Dissenters, scattered throughout the country, against whom many harsh laws were, from time to time, enacted, though apparently without the result of effectually putting them down. This state of things continued until the Revolution of 1688, when entire practical toleration was conceded to all orthodox Protestant Dissenters in England; and in 1690 Presbyterianism, as it existed before the Restoration, was re-established in Scotland. Of course, the dissenting congregations, which had continued to exist in England under all the difficulties imposed by the laws of Charles the Second, assumed fresh vigour under the new state of things which was consequent on the passing of the Toleration Act. They existed from that time openly and without disguise, under the protection of the law. One of those congregations was the congregation at Berwick, afterwards known as that of Master John Turner, during whose ministry, and for the benefit of whose flock, the Low Meeting-house was founded in 1719. I have already stated my reasons for thinking that this must have been a congregation of Presbyterian Dissenters, *i.e.*, a congregation holding what are called the Westminster standards of faith, as laid down by the Assembly of Divines, whose public worship was conducted according to the directory of public worship adopted in England by the ordinances of January 1644,

o.s., and who approved the Presbyterian form of church government, introduced into Scotland by the Act of Assembly of February 1645, *o.s.*, and enacted in England by the ordinance of August 1648.

The history of the congregation, as it has been stated by the relators and plaintiffs, and which on the evidence may fairly be assumed to be correct, is this:—The information charges, in substance, that Luke Ogle was the minister of Berwick before the Restoration and while Presbyterianism prevailed in England. That he was ejected from that benefice in 1662 by the operation of the Act of Uniformity. That in the year 1685, at a time when, in spite of the then existing law against Nonconformists, the government was inclined to deal leniently with them, he established the congregation in question at Berwick, and continued to act as its minister up to his death in 1696. That he was succeeded by William Foster, the immediate predecessor of Turner. That Foster died in 1713, at or about which time, therefore, Turner must have become minister of the congregation by and for whom the chapel was erected six years afterwards. This being the state of the congregation when the meeting-house was built, the question is, whether it was part of the original intention of the founders that the minister should always be a licentiate of the Church of Scotland. In resolving this problem, the first question which suggests itself is this: why should they have had any such intention? Why should this English congregation have intended voluntarily to prevent those who should come after them from selecting as their pastor a minister, however competent and however pious, and who had been regularly ordained by an English Presbytery, merely because he was not a licentiate of the Scotch Church? Looking at the matter merely in the abstract, I can see no motive for such an intention. That ministers continued to be ordained in England by English Presbyteries is plain from the entry in the books of the Presbytery of Dunse, on occasion of the admission of Laurie as minister of Hutton, of the date of the 19th of December 1693. It is there stated that the said Mr. Laurie had produced an ample testimonial of his ordination at London, A.D. 1686,

and of his good behaviour, and subscribed by several London ministers of good note. If, even under the pressure of the severe laws against Nonconformists as they stood in 1686 (though probably not at that particular epoch likely to be enforced), such ordinations took place in England, there can surely be no difficulty in supposing that the same practice continued in 1719, when the Act of Toleration had been in force for thirty years. Presbyterianism had once been established and once abolished in both countries. It had since been restored in Scotland, and tolerated, but not restored in England. Very likely, this Berwick congregation, looking to their close proximity to Scotland and to the fact that Presbyterianism had there become the national religion, and so that a supply of ministers would be more readily obtained from thence than from England, might contemplate the great probability that their ministers would often be drawn from Scotland. But that does not afford any reason why they should wish voluntarily to tie up their own hands and the hands of those who should come after them by making a Scotch licence and ordination indispensable, even if a minister, perfectly satisfactory in all respects, might be ordained from their own country. The circumstance that the English Presbyterians continued to adhere to their old faith, though not participating in the secular benefits of an establishment, would be likely to induce the belief that they would be more zealous and orthodox than their Scotch brethren, not that they would be less so. There either then was, or thereafter might be, an English Presbytery which would include Berwick in its bounds; and, if so, that Presbytery would be the only perfectly regular authority for ordaining a minister to the Low Meeting-house. For, according to the form of church government prevailing both in England and Scotland under the several acts and ordinances to which I have referred, it is clearly laid down that the Presbytery in which each congregation is situate is the proper body to ordain the minister to that congregation, though, no doubt, where there is a necessity, power is given to any other presbytery to ordain. So that, if and so soon as Berwick should be included in any English Presbytery,

the only regular body to ordain their minister would be that presbytery; and in such a state of things, even though no such presbytery might exist in 1719, when the Low Meeting-house was built, it seems to me very improbable, reasoning *à priori* and without reference to the circumstances of that particular congregation, that the founder could have intended that, under all circumstances, a Scotch licence and ordination should be essential; that if a minister, pious, orthodox, and agreeable to the congregation, should offer himself, they should be bound to reject him if he had been licensed by an English Presbytery, by that of London, for instance, and not in Scotland; and that they should be bound, if a class should ever exist including Berwick in its bounds, to seek ordination, not from the body indicated by the form of church government as being the most proper authority, but from another source.

I am therefore of opinion, looking at the question merely in the abstract, and without reference to the circumstances of this particular congregation, that it was very unlikely that a congregation of Presbyterian Dissenters in England, founding a meeting-house in 1719, when possibly there were some who might recollect the Presbyterian form of worship as having been the established religion of their own country, and when the traditions as to the ascendancy of that mode of worship in this country must have been strong in the minds of all, should intend to make it an essential point that their minister should, under all circumstances, be a minister ordained by the Church of Scotland. And if this be a reasonable conclusion, looking at the question merely in the abstract, I think it derives great additional weight when we look to the particular circumstances under which the congregation of Master John Turner existed. They had been originally founded by Luke Ogle, who had certainly been ordained in England, for he had held what we should call the living or benefice of Berwick previously to the Restoration, and was ejected in 1662 on the re-establishment of Episcopacy and the re-introduction of the Book of Common Prayer. Surely, when he, as stated in the information, came to Berwick and formed this Presbyterian congregation in 1685,

consisting, as it no doubt did, of many of those, and the families of many of those, over whom he had, twenty-three years previously, presided as their regularly English ordained minister, he must have been welcomed by his flock, not from any connexion between him and the Scotch Church, if indeed any such connexion ever existed, but by reason of his having formerly been their English Presbyterian pastor. Indeed, at that time (1685), as was pointed out in the argument, Episcopacy prevailed in Scotland as well as in England, so that there was then no more reason to look for orthodox ministers on one side of the border than on the other.

It seems that during some part of Luke Ogle's ministry, he had as a colleague or assistant Gilbert Laurie, who, in 1693, was then ordained to a Scotch church, but he had, as I have already remarked, been previously ordained in London, and I see nothing to satisfy me that, while he was Luke Ogle's colleague, he was anything but an English ordained minister.

The congregation thus appears, in its origin, to have been English and not Scotch, with reference to its Presbyterianism; and this must probably have so continued, at all events to the death of Luke Ogle in 1696; and it is a very improbable thing that between that date and the foundation of the chapel in 1719, the views and feelings of the congregation should have been so completely altered as that the same ordination which had no doubt recommended Luke Ogle to them, should never thenceforth be admitted as sufficient. I think, therefore, that the history of this congregation makes it particularly unlikely that the founders of the chapel could ever have contemplated what this decree declares to be essential, namely, that the minister of the chapel must be a licentiate and minister of the Church of Scotland.

Is there, then, anything in the subsequent history of the foundation, which ought reasonably to lead to the inference upon which this declaration in the decree is grounded? The circumstance relied on is one always entitled to great weight, namely, long continued usage, *i. e.* the fact that all the ministers, since 1719, have been Scotch licentiates and ministers. I have already stated that in my opinion it is made out

that since the year 1780, or thereabouts, all the ministers of the meeting-house have been either Scotch licentiates or ministers ordained by a Scotch Presbytery, and I shall assume for the present that this has been so for the whole period. But what then? The question still arises, to which I have already adverted, how and why has it happened that this uniform selection of Scotch licentiates and ministers has prevailed? Is this a matter in which we can reasonably infer from the usage, that what has been so uniformly done was part of the trust, as we certainly may reasonably infer that the celebration of divine service according to the Presbyterian model was part of such trust? Where a course of practice has long prevailed on any particular subject, the inference that it has been a just and legal course, is consistent with law and reason, and, therefore, if any one were now to attempt to call in question the right of a Scotch ordained minister to be minister of the Low Meeting-house, on the ground that the original foundation was for English ordained ministers only, the fact that Scotch ministers had always been appointed would be most important, probably conclusive on the subject. The extreme improbability that for above a century such a practice, if illegal or contrary to the trust, should have been allowed to exist, would well nigh countervail any evidence which could be brought to shew that it was contrary to the original intention of the founders.

But that is not here the point in dispute: no one questions the right of a Scotch ordained minister to become the minister of this chapel, if he be duly chosen. The question is not whether he may, but whether he must, be a Scotch licentiate or minister; and on this latter question the usage, though certainly not to be disregarded, as affording no evidence on the point, is yet to be compared with the other circumstances, and to be weighed against them. The usage may have prevailed, because it was the only usage consistent with the trust; it may have prevailed because it was the most convenient usage. And I think the latter is the most reasonable inference from the facts of the case. For I assume, first, that there was an improbability, *à priori*, that any body

of English Presbyterian Dissenters building in 1719 a meeting-house for Presbyterian worship, for their own convenience and edification, should intend to bind themselves, and all those who came after them, never to admit, as their minister, any one not licensed or ordained by a Scotch Presbytery; and, secondly, that this improbability was increased in the case of Master John Turner's congregation by reason of its having evidently originated and existed for ten or eleven years under a minister whose title to its favour and respect must have been his original English ordination, and not any connexion with Scotland. This being so, is it so very improbable that the uniform selection of Scotch ordained ministers should have resulted from anything short of absolute binding necessity arising from the nature of the trust, so as to outweigh the *à priori* improbability that the founders intended to impose on their successors such a necessity? I think not. Though, as appears from the evidence in the cause, there has never been a cessation in England of the practice of ordaining ministers according to the Presbyterian form of ordination, yet the number of ministers so ordained has not, I believe, been very large.

The progress of dissent in this country has gradually tended rather away from Presbyterianism and towards Independency. So that those who for the last half century and upwards wanted to obtain a regular orthodox Presbyterian minister to take charge of a true Presbyterian congregation, might not always have found it easy to get such a pastor from those ordained in England. Nothing, therefore, could be more natural than that a congregation so circumstanced should look to Scotland, where they were always likely to find a full supply of ministers. This would, to some extent, be true to whatever part of the kingdom the congregation might belong; but the observation applies with greatly increased force to a congregation in Berwick, a town originally Scotch, bordering closely on Scotland, and where the intercourse with Scotland must be as constant and uniform as with England. That a congregation thus situate should look to Scotland for its ministers, was so natural, that the mere fact of its having always

done so has very little weight with me as tending to shew that in so doing it was acting in obedience to a positive trust, which left no discretion on the subject. In making these observations I have assumed that all the ministers have been licensed or ordained by the Church of Scotland; but, as I originally intimated, as to the earlier ministers I am not at all satisfied that such was the case. * * *

I am, therefore, of opinion that neither as to Turner, nor those who preceded him, nor as to Gardner, is there any evidence satisfactorily shewing that they were Scotch licentiates or ministers. The point is not, perhaps, very material as to those who preceded Turner, but as to him it is most important; for if he was not a licentiate and recognized minister of the Church of Scotland, it is very difficult indeed to suppose that those who built the chapel during his ministry, and for him, could have intended to impose such a qualification on all future ministers. It may, however, be said that as there is not any proof that Turner was not a Scotch licentiate and minister, it may fairly be assumed that he was so, by reasoning backwards from more modern times, that for more than half a century all the ministers have been Scotch licentiates; therefore, in the absence of proof to the contrary, it is fair to infer that all have been so ever since the foundation. This may be, in some cases, a legitimate mode of reasoning; but it is entitled to little weight when the more modern usage can be explained on grounds inapplicable to the earlier period. Now, here I have already stated that in my opinion the near neighbourhood of Berwick to Scotland, and the constant friendly intercourse between them, together with the probable difficulties which the congregation of the Low Meeting-house might experience in obtaining proper ministers from England, may well explain the reason why in fact they have always been obtained, for a long time back, from Scotland. But the matter does not rest on any general reasoning of this kind. There are circumstances in evidence which seem to me strongly to illustrate the view which I take of this part of the case, and to shew that the choice of Scotch ministers for the last half-century has arisen from

other causes than the positive obligation of the trust. I allude to what took place on occasion of the removal of Mr. Aitcheson in 1797, and to the resolutions of the elders and trustees of the meeting-house in 1809 and afterwards. Mr. Aitcheson was certainly a licentiate of the Scotch Church. By what body he was ordained to the ministry of the Low Meeting-house does not appear by any direct proof, but the great probability is that he was ordained by the Northumberland class, *i. e.* by an English and not by a Scotch presbytery.

Probably in 1809, and at the subsequent elections, those who took an interest in the affairs of this congregation had discovered that the only effectual mode of securing to themselves the benefit of strict orthodox Presbyterian worship was to put themselves (so to say) under the Church of Scotland. This they did by express resolutions on three several occasions. But the question is not, what would now be the best means of securing a succession of strict Presbyterian ministers, but what were the conditions and restrictions contemplated by the founders? Perhaps, if they could in 1717 have foreseen what would happen a hundred or a hundred and twenty years later, they might have framed a trust conformable to the declaration in this decree. Perhaps they might not. But this is mere matter of speculation, in which we have no right to indulge. The question is, not what declaration of trust might have been expedient, but what trust can be inferred as having actually been in the contemplation of the founders? I do not think that any such restriction confining the ministers of the Low Meeting-house to licentiates of the Church of Scotland, as is required by this decree, can be so inferred.

In the foregoing observations, I have proceeded on the principle, that unless the restriction contended for was in the contemplation of the original founders, it could not have been, or at all events, in the present case, was not created subsequently. But I am aware it was argued at the bar, that, even if it was not part of the original trust to require that the minister should be a licentiate and recognized minister of the Church of

Scotland, still such a qualification might at some subsequent time, by resolution of the congregation, have been made essential so as to bind succeeding congregations. And here, it was said, the facts of the case shew, that, if such a qualification was not among those required by the original terms of the foundation, then it must have been in some such mode subsequently established. On this head of argument it is sufficient to say, that the circumstances to which I have already fully adverted relating to the appointment of the several successive ministers, appear to me to negative the proposition that any such resolution ever was come to. I do not think that any minister, previously to 1797, is shewn to have been an ordained minister of the Scotch Church at all. The reasons which led to the ordination of Mr. Smith, in 1797, by a Scotch and not by an English Presbytery, were of a local and temporary character. There could not, as I think, have then been any general resolution intending to bind all future elections. Certainly no such resolution was passed in or since the year 1809; for from that date the minutes of all the proceedings of the Low Meeting-house are in existence, and no such resolution is found upon them. The resolutions passed in 1809, and at the two succeeding elections, seem to me inconsistent with the existence of any previous general resolution requiring, in all cases, a Scotch licentiate and ordination. For, if such general resolution existed, what could have been the use of the resolutions passed previously to the elections in 1809, 1821 and 1823, specially requiring those qualifications on those particular occasions? The facts do not, as I think, exist on which this branch of the relators' argument must rest, and therefore the question does not arise whether any such resolution could, consistently with the doctrines of this Court, bind future congregations so as to warrant this declaration in the decree, under which no one can be a minister who is not a licentiate and recognized minister of the Scotch Church.

For the reasons, therefore, which I have endeavoured to explain in detail, I am of opinion that the decree, so far as it declares that no person is qualified to be a minister or pastor of the Low Meeting-house with-

out being a licentiate and recognized minister of the Established Church of Scotland, and in full connexion therewith, is erroneous, not being warranted by the evidence. I think it is sufficient that he is a Presbyterian minister, regularly ordained to the congregation according to the Presbyterian mode of ordination as practised in England, Scotland and Ireland.

I will now advert to the recent statute of 7 & 8 Vict. c. 45, because an argument was attempted to be built on it. But I think it wholly inapplicable to the present case. As at present advised, I incline to think it does not apply to a case where the question is, whether a minister has or has not been duly ordained according to the original trust; but, even if such a question would be within the power of the enactment, still the statute can have no operation here. The effect of it in this particular case can only be to make the Scotch ordination valid and sufficient, and of the validity of such ordination there can be no doubt. The statute leaves untouched the question whether such ordination is or is not essential.

I have thus gone fully into this part of the decree, because I think it is calculated unduly to fetter the choice of the congregation in their appointment of minister. But it now becomes my duty to state (and that I shall do very shortly) that, so far as the case of the defendant Murdoch is concerned, I am clearly of opinion that the decree is right in declaring that he had ceased to be qualified to exercise the office of minister of the Low Meeting-house, and so in giving the necessary directions for preventing him from using, and the trustees from permitting him to use, the chapel. The grounds on which I come to this conclusion are very short and simple. Mr. Murdoch's ordination was in fact a Scotch ordination. He was ordained by the Presbytery of Kelso. That ordination was certainly sufficient to qualify him to hold the office of minister of the Low Meeting-house. But it was necessary not only that he should be in the first instance duly ordained to the chapel, but, further, that such ordination should remain in force so long as he should continue in the post of minister. It is an essential part of the Presbyterian system that none

but a regularly ordained minister or licentiate should preach or perform divine service. This is the rule laid down in the acts regulating Presbyterian Church government both in England and in Scotland. Now it appears to me perfectly clear on the evidence, that Mr. Murdoch has absolutely ceased to be an ordained minister of the Church of Scotland. In fact, by his answer he repudiates all connexion with that church. Even if he had not done so, I am satisfied as a matter of fact on the evidence that Mr. Murdoch, being a member of the Synod held at Berwick on the 16th of April 1844, did adhere to the resolutions then and there adopted; and that being so, he was brought within the express terms of the act of the General Assembly of the 2nd of June 1845, entitled "An Act anent Presbyterian Churches in England," which enacts and declares that all members of the Synod who so adhered are no longer members of or in communion with the Established Church of Scotland. The effect of that enactment was not directly to remove Mr. Murdoch from his situation as minister of the Low Meeting-house. Neither the General Assembly nor any Scotch Church could affect his civil rights in this country. But it certainly was within the competence of the General Assembly to deprive him of his *status* as an ordained minister of the Scotch Church; and that has been effectually done. He is no longer an ordained minister of that church, and if not of that church, then of no other Presbyterian Church whatever, and therefore not now capable of being minister or pastor of the Low Meeting-house. On this part of the case I have nothing further to add.

The result of my judgment being that the decree is wrong in declaring that the minister of the Low Meeting-house must be a licentiate and recognized minister of the Established Church of Scotland and in full connexion therewith, it necessarily follows that in my judgment the directions consequent on that declaration are also wrong. Had my learned Brother taken the same view as I do on this part of the case, it would have been our duty to point out in what respects those directions must be varied, but as he concurs with Sir James Wigram, no such alterations will be requisite. The decree will stand in its present form; and I feel

that I shall have done all which my duty requires of me in pointing out generally the grounds of the opinion I have formed, without indicating the precise modifications of the decree, which if the same grounds had been taken by my learned Brother, would have been necessary. The decree will of course be affirmed, and the appeal dismissed.

Jan. 24.—*Mr. Rolt* now moved, by leave, that the execution of the decree of Sir James Wigram be suspended, pending an appeal intended to be presented to the House of Lords. He apprehended that if their Lordships were satisfied that the parties could not possibly be placed in their original position, supposing their appeal to the House of Lords should be successful, they would suspend the execution of the decree. He was quite ready to admit that the motion was made to the indulgence of the Court, and if their Lordships took into consideration the fact that the appellants considered the question of far higher moment than of any money value, he believed they would not refuse that indulgence. The Low Meeting-house, if the decree were put in execution, would no longer be the proper place for the worship of God to them, and the congregation would be dispersed. The effect of the dispersion of the congregation would lead to irreparable mischief. The Lord Chancellor, in *Swift v. Grazebrook* (12) observed, that the inference to be drawn from a case there cited, *Walburn v. Ingilby*, was, that if irreparable mischief had been substantiated, the operation of the decree would have been suspended pending the appeal, and if the Court did not accede to the motion, the appeal would be thwarted. On such a ground the Lord Chancellor, Lord Cottenham, in *The Attorney General v. Munro* suspended the execution of the decree, and in the present case the Vice Chancellor Wigram did so pending the appeal to this court. In *Garcias v. Ricardo* (13), an application was made to suspend the execution of a decree, and there the Lord Chancellor, Lord Lyndhurst, said that the defendant might apply

to the House of Lords to advance the appeal, and, if they refused to advance it, he should refuse the motion. He said he would do what Lord Eldon did in *Wood v. Milner*; he would stay the proceedings, if he could apply the remedy, not otherwise. The note to that report was—"The House of Lords, on the application of the defendant, allowed the appeal to be advanced, and the order for staying process in the mean time was accordingly made." The appellants would willingly undertake to make as early an application to the House of Lords as possible for the purpose, and what they asked was the indulgence that for three or four weeks the execution of the decree might be suspended.

[LORD JUSTICE LORD CRANWORTH.—I do not see how the appellants will sustain irreparable injury. If the House of Lords should decide that the decree below was wrong, and our affirmance of it was wrong, the appellants will be entitled to repossess the chapel as before. Two Judges to one have agreed that the appellants are wrong, and I do not see why it is more reasonable that those who up to this time have been decreed to be in the right should forego what they are entitled to, than that those who are held to be wrong should have possession of what at present they are declared not to be entitled to hold. I have already given my opinion that the decree was wrong in saying that the minister must be a licentiate of the Scotch Church, and so on.]

The grievance is this, that supposing Mr. Murdoch not to officiate, his successor must be elected from a class distasteful to the congregation, or rather they would refuse to elect any other minister, being so confined in their choice. The result must be that the congregation must be dispersed, and the chapel abandoned. I ask the Court to grant either what I have asked, or to let Mr. Murdoch do duty tomorrow (Sunday), suspending so much of the decree.

The Solicitor General and *Mr. T. Deere Salmon* appeared to oppose the motion, but were not called on.

LORD JUSTICE LORD CRANWORTH.—I should, speaking for myself alone, have been disposed to grant this motion; but,

(12) 3 Mac. & G. 6.

(13) 1 Phill. 498; a. c. 14 Law J. Rep. (N.S.) Chanc. 333.

this Court having affirmed the decree below, I do not see that those who have been twice pronounced right are to be delayed. As to the dispersion of the congregation, the Court cannot listen to that.

LORD JUSTICE KNIGHT BRUCE.—The effect of the decree as it stands, whether it be erroneous or correct, is to establish or to restore that state of things which, for more than fifty years before the commencement of this litigation, existed quietly and undisturbed; and as every Judge before whom this case has been heard is of opinion that the minister should be displaced, I think that the application is altogether groundless, and must be refused, with costs.

LORDS JUSTICES.

1851.

Dec. 12.

WATTS v. SYMES.

Mortgagor and Mortgagee—Extinguishment of Debt—Redemption—Foreclosure—Reversionary Interest—Practice—Appeal from Part of a Decree.

The owner of a reversion in personally mortgaged it. He then mortgaged the equity of redemption to a second person, and then agreed to sell, subject to the mortgages, to a third party. The first mortgagee required to be paid off. The mortgagor in a memorandum, reciting that the purchaser had paid the first mortgagee in discharge of her debt out of the purchase-money, agreed to execute an assignment to the purchaser, and until it should be executed that the purchaser should stand in the place of the first mortgagee:—Held, reversing the decree below, that the debt of the first mortgagee was not extinguished, and that the purchaser was entitled to the benefit of that security.

The second mortgagee was also mortgagee of other property of the mortgagor:—Held, also, reversing the decree below, that one mortgage could not be redeemed without the other.

When an appeal is from part of a decree, the respondents are entitled, without a cross appeal, to open that part which is not appealed from.

NEW SERIES, XXI.—CHANC.

This was a suit for foreclosure, and the facts were as follows:—Mr. Symes was the owner of a reversion in personal estate vested in trustees, and in 1844 mortgaged it to a Mrs. Severne for securing 1,200*l.* and interest. In 1845, he mortgaged his equity of redemption to Mr. Watts, for securing 400*l.* and interest. Mr. Watts was at this time mortgagee of other property of Mr. Symes for securing 200*l.* and interest. In July 1846, Mr. Symes agreed to sell the reversion to Mr. Tanner for 1,500*l.* Before any assignment could be executed (and no assignment was executed) Mrs. Severne required to be paid off; and a memorandum was signed by Mr. Symes, dated the 30th of July 1846, in which he acknowledged that Mr. Tanner had agreed to buy the reversion for 1,500*l.*, and had at his request paid Mrs. Severne 1,200*l.* "in discharge of her mortgage out of the 1,500*l.*," and he (Symes) agreed to execute an assignment, and declared that until it was executed Mr. Tanner should stand in Mrs. Severne's place, and have the full benefit of her mortgage security.

Mr. Watts, by his bill, prayed a foreclosure against Mr. Symes and Mr. Tanner if they did not pay him the 400*l.* secured on the reversion, and the 200*l.* secured on the other property; and the Vice Chancellor of England decided that Mr. Tanner was not entitled to Mrs. Severne's security, for that the 1,200*l.* was extinguished, but held that he was entitled to redeem the reversion on payment of Mr. Watts's 400*l.* and interest secured thereon. Mr. Watts, the plaintiff, now appealed from the latter part of the decree; and on the opening of the appeal a discussion ensued, whether the counsel for Mr. Tanner was at liberty to open the whole case, although he had not presented a cross appeal on the point of extinguishment. The Court decided that the respondents were at liberty to open the whole decree.

Mr. Rolt and Mr. Shapter, for the appellant.—As the Court has decided that the whole case may be opened, the first point is as to extinguishment of the debt; and it is plain it is extinguished, there being no satisfactory proof of a contract to keep Mrs. Severne's security on foot, and with-

out such a contract Mr. Tanner had no right to a transfer of her security—*Dunstan v. Patterson* (1). What was here done was to give Mr. Tanner the equity of redemption; and he, as owner, cannot be a mortgagee on his own estate; and this case is in principle the same as *Greswold v. Marsham* (2) and *Mocatta v. Murgatroyd* (3), and the decision of Sir William Grant, in *Toulmin v. Steere* (4). The memorandum of July 1846 was not one contract, and Mrs. Severne's money was paid off without any stipulation for its being kept alive; and moreover, as the whole property was but an equitable interest in a reversion of personality, there was no legal estate to be kept on foot. The following cases were also cited:—

Wade v. Coope, 2 Sim. 155.

Brown v. Stead, 5 Ibid. 535; s. c. 2 Law J. Rep. (n.s.) Chanc. 45.

Medley v. Horton, 14 Sim. 222; s. c. 13 Law J. Rep. (n.s.) Chanc. 442.

Farrow v. Rees, 4 Beav. 18.

LORD JUSTICE LORD CRANWORTH.—It can only be made out that Mr. Tanner is a purchaser by the memorandum, which has a stipulation that he shall have the benefit of Mrs. Severne's existing security; and I think he is entitled to it.

LORD JUSTICE KNIGHT BRUCE.—No man can avail himself of one part of this contract without adopting the other. It is plain that a person who borrows money cannot be his own creditor, or set up an incumbrance of his own against his creditor. But *Toulmin v. Steere* carried the proposition a step further, and applied the same rule to a man who acquired an equity of redemption as to the original mortgagor. That decision proceeded upon two previous decisions. The language of Sir W. Grant is this: "The cases of *Greswold v. Marsham* and *Mocatta v. Murgatroyd* are express authorities to shew that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in,

against subsequent incumbrances." With the greatest deference to the authority of that eminent Judge, I always doubted, and still doubt, whether the cases mentioned by him go that length. In this case the payment and the agreement that Mr. Tanner should have the benefit of Mrs. Severne's security appears to us, on a reasonable view of the acts of the parties, to have been substantially one transaction. We do not think that there is any room for doubt as to what was Mr. Tanner's intention. And whether it was enforceable at law, or in equity only, is immaterial for the purpose of the present argument. Mr. Tanner made the payment with the intention of standing in the place of Mrs. Severne. She became, in effect, a trustee for him. As the purchase has not yet been completed, the time has not arrived at which extinguishment could take place. We think that Mr. Tanner, having paid his money to Mrs. Severne, is entitled to stand in her place in the particular circumstances of the case.

Mr. Stuart and *Mr. Dickinson* were then heard upon the right of Mr. Tanner to redeem only one of Mr. Watts's securities.

Mr. Teed and *Mr. Martindale*, for the other parties.

LORD JUSTICE KNIGHT BRUCE.—The respondents are entitled to the 1,200*l.* secured by Mrs. Severne's mortgage; but if they desire to have the property, they must redeem both the appellant's mortgages.

LORD JUSTICE LORD CRANWORTH.—I am of the same opinion. I think it is quite settled that, whether the suit is for foreclosure or redemption, the mortgagee has a right to say to the mortgagor, you must redeem entirely, or not at all.

M.R. }
Feb. 7, 25. } THORNTON v. ELLIS.

Conversion—Tenant for Life—Railway Shares—Mortmain Act.

A testator, a portion of whose property consisted of railway shares, bequeathed it to certain persons for their lives, and after the

(1) 2 Phill. 341; s. c. 16 Law J. Rep. (n.s.) Chanc. 404.

(2) 2 Chanc. Ca. 170.

(3) 1 P. Wms. 393.

(4) 3 Mer. 210.

decease of the survivor to the British and Foreign Bible Society and the Home Missionary Society:—Held, that the railway shares must be sold and the produce invested in stock; and that the question whether the railway shares were within the provisions of the Mortmain Act was premature.

This bill was filed by the treasurer of the British and Foreign Bible Society, for the administration of the estate of John Ellis, who, by his will, said, "the residue of my property of every description whatever it may be at the time of my death, I bequeath the interest and proceeds thereof to my dear sisters Elizabeth and Sarah Charlotte, during their joint lives, and to the survivor for life; and after the death of the survivor I bequeath the interest and proceeds of the residue to Mrs. Eliza Easy, now residing at No. 8, South Street Terrace, Rye Lane, Peckham, for life; and after her death I bequeath the interest and proceeds of the residue to her daughter, Emma Charlotte Easy, for life, provided she does not marry, but if she marries I bequeath the interest and proceeds of the residue to herself and her brothers, Thomas and William Easy, now at Port Phillip in Australia, (the share of Emma Charlotte Easy to be for her own use, independent of her husband) for life, and on the death of one, him or her, to the survivors for life, and on the death of two the whole to the survivor for life, and after the death of the survivor, I bequeath the residue as follows:—One moiety to the British and Foreign Bible Society, whose office is in Earl Street, Blackfriars, and the other moiety to the Home Missionary Society, for the benefit of the said societies and for carrying out the designs of the said institutions."

It having been referred to the Master to make the usual inquiries, with liberty to state special circumstances, he, by his report, found that the personal estate of the testator, at the time of his death, consisted, among other things, of twenty 100*l.* shares in the Great Western Railway Company and one hundred 25*l.* shares in the Great Northern Railway Company.

The cause came on upon further directions, and two questions were raised: first,

whether the ultimate residuary legatees were entitled to have the railway shares sold, and the produce invested in consols; secondly, whether the railway shares were to be regarded as real estate within the provisions of the Mortmain Act, the 9 Geo. 2. c. 36.

Mr. R. Palmer and Mr. Baggallay, for the plaintiff.—Upon the first point, *Morgan v. Morgan* (1), *Hinves v. Hinves* (2), *Howe v. Lord Dartmouth* (3); and upon the second point, *Ashton v. Lord Langdale* (4), *Myers v. Perigal* (5), and *Tomlinson v. Tomlinson* (6) were cited.

Mr. Roupell and Mr. Beavan, for the tenants for life. — It is a general rule that where interests in terminable property are given in succession, it ought to be converted and invested; but this rule is always controuled by the intention appearing on the will; the words here plainly meant the enjoyment to be of whatever the property might consist at the testator's death, and slight circumstances have been considered a sufficient ground to induce the Court to depart from the general rule. In *Collins v. Collins* (7) a testator gave to his wife all and every part of his property in every shape, and without any reserve for life, and at her death the property so left was to be divided. In *Bethune v. Kennedy* (8) the gift was of "all I do or may possess in the funds, copy or leasehold estates;" the words, though residuary, were considered as a specific gift of the dividends accruing on long annuities. The gift is not a bequest of a general residue, but of "every description whatever it may be at my death," which clearly referred to the then state of investment. Upon the second question, the cases of *Sparling v. Parker* (9) and *Walker v. Milne* (10) would

(1) 14 Beav. 72.

(2) 3 Hare, 609.

(3) 7 Ves. 137.

(4) 20 Law J. Rep. (N.S.) Chanc. 234.

(5) 16 Sim. 533; a. c. 18 Law J. Rep. (N.S.) Chanc. 185.

(6) 9 Beav. 459.

(7) 2 Myl. & K. 703.

(8) 1 Myl. & Cr. 114.

(9) 9 Beav. 450; a. c. 16 Law J. Rep. (N.S.) Chanc. 57.

(10) 11 Beav. 507; a. c. 18 Law J. Rep. (N.S.) Chanc. 288.

be decisive—*The King v. the Dock Company of Hull* (11). This Court has not adopted any general rule that property of every description shall be converted. In *Howe v. Lord Dartmouth*, the question arose whether it was the rule of the Court to call in mortgages which were a good investment, as a matter of course, and without inquiry; and it was held that an inquiry was necessary before they would be called in. Before the establishment of the public funds investments were made upon mortgages. The second question is premature, and cannot be decided until the death of the tenants for life.

Mr. Lewis, for Joshua Ellis, one of the next-of-kin of the testator, who was brought before the Court by supplemental bill.—The Master, by his report, finds that the railway shares are interests connected with land; and as no exceptions have been taken to the report, that ought to determine the question.

Mr. R. Palmer.—After finding the general state of the testator's property, the Master finds that the testator was possessed of no real estate other than as aforesaid, which leaves the question open to the Court.

Without any reply,

The MASTER OF THE ROLLS.—I do not find anything in the will to entitle the tenants for life to enjoy the property *in specie*; the rule of the Court is now settled and invariable, and any person who may have an interest in the fund, though a discretion may be given to the trustees, can apply to have the property converted, and the produce invested in the funds—*Prendergast v. Prendergast* (12). I am, therefore, of opinion that the railway shares must be sold, and that the produce must be invested in consols. I make no observation upon the question arising under the Mortmain Act, but no exceptions to the Master's report were necessary, as it did not decide anything.

PARKER, V.C. }
Feb. 25.

ELVY v. NORWOOD.

Mortgage—Redemption—Arrears of Interest—Statutes of Limitations—Heir.

A. mortgaged an estate in fee to B, and covenanted to pay B. the mortgage debt and interest. A. died intestate, leaving C. his heir-at-law. At the time of the death of A. an arrear of more than six years' interest was due. Suit for redemption by C. against B:—Held, that C. was not entitled to redeem, except on the terms of paying the principal and the whole of the interest due.

By indentures, dated the 22nd and 23rd of February 1830, Mr. Elvy mortgaged freehold hereditaments to Mr. Norwood, to secure 100*l.* and interest. The mortgage deed contained the usual covenant for the payment of the mortgage debt.

Mr. Elvy died, leaving his two sons his co-heirs; the mortgaged lands being of gavelkind tenure.

This was a claim filed by the heirs of the mortgagor against the mortgagees for redemption. At the time of filing the claim an arrear of interest of more than six years was due, in respect of which no acknowledgment had been made. The only question on the claim was as to the amount of interest payable by the plaintiffs.

By the 3 & 4 Will. 4. c. 27. s. 42. it is enacted, that no arrears of interest in respect of money charged upon land shall be recovered but within six years next after the same shall have become due, or next after an acknowledgment, &c.

By the 3 & 4 Will. 4. c. 42. s. 3. it is enacted, that actions of covenant that shall be brought at any time shall be sued within twenty years after the cause of such actions, but not after.

Mr. Bird, for the plaintiffs, contended that they were not bound to pay more than six years' interest.

Mr. Speed, for the defendant, contended that the plaintiffs were only entitled to redeem on the payment of the whole arrear.

(11) 1 Term Rep. 219.

(12) 14 Jurist, 989.

The following cases were cited—

Henry v. Smith, 2 Dr. & War. 381.

Harrison v. Duignan, Ibid. 295.

Du Vigier v. Lee, 2 Hare, 326; s. c.

12 Law J. Rep. (N.S.) Chanc. 345.

Hughes v. Kelly, 3 Dr. & War. 482.

Hunter v. Nockolds, 1 Hall & Tw.

644; 1 Mac. & G. 640; s. c. 18 Law

J. Rep. (N.S.) Chanc. 407.

PARKER, V.C.—I think that this case is not decided by any of the authorities referred to. A mortgage deed was executed in February 1830, for securing the payment of a principal sum and interest, with a covenant therein, for payment of the interest. The mortgagor has since died, and the present plaintiffs, who are his co-heirs, seek to redeem that security. There is a long arrear of interest unpaid, and the question is as to the amount of interest which the plaintiffs are bound to pay in this suit; whether they are to pay the arrears for six years or beyond that period. Upon the construction of the 3 & 4 Will. 4. c. 27. it has been decided that the only arrears of interest that are a charge upon the land are arrears for six years, and that, as regards the land, there is a right to recover only the arrears for six years. On the other hand, there is the other statute, the 3 & 4 Will. 4. c. 42, which leaves the personal liability on the covenant open for twenty years. The covenant in this case is one in which the heirs of the mortgagor are bound, and the present plaintiffs, being his co-heirs, are, consequently, bound by the covenant to the extent of the assets descended to them. The case, therefore, stands thus:—as regards the land, there is a mortgage security for only six years' arrears of interest, and the heirs, who are the persons interested in the land, are liable, by means of the covenant, to pay twenty years' arrears. Suppose that, instead of a covenant, the heir had been liable on a bond given by the mortgagor, then, by the settled course of this court, the heir could not redeem the mortgage of his ancestor without submitting to discharge the bond debt. So, in the case of a collateral mortgage debt, for which the ancestor had given a covenant, on the ancient authorities the mort-

gagee would have had a right to tack that obligation against the heir. Beyond all doubt he could not tack a mere covenant against the ancestor, but, having a covenant in which the heirs are bound, he is right in tacking it against the heir. In deciding that the plaintiffs cannot redeem, unless upon the terms of paying twenty years' arrears of interest, I am not deciding anything contrary to the cases of *Hughes v. Kelly* and *Hunter v. Nockolds*. Having here a covenant of this nature, and this being a suit to redeem the land which was another security for the same debt, I consider that the Court has a right to tack these securities, and that by so doing the Court is acting in accordance with the view taken in *Du Vigier v. Lee*.

PARKER, V.C. }
March 25. } WALLIS v. SAREL.

Sale, Conditions of—Interest on Purchase-money—Sale of a Reversion.

Real estate, including property in possession and in reversion, was put up for sale by auction in lots, under a condition that the vendors should confirm the Master's report of purchases on or before the 25th of December 1849, and that, on or before that day, each purchaser should pay his purchase-money into court, and be entitled to the rents of his lot from that day, and that if, from any cause whatever, the purchase-money should not be so paid, he should pay interest on it at 5l. per cent. from that day. A. purchased a reversion in fee, being one of the lots. Through the default of the vendors, the Master's report was not confirmed until August 1851. Motion that A. should pay his purchase-money into court with interest from the 25th of December 1849:—Held, that interest was payable from that day at 4l. per cent.

On the 22nd of September 1849 certain real estate was put up for sale by auction in lots. To the greater part of this property the vendors were entitled in possession.

The second condition of sale was as follows:—"The vendors undertake at their own expense to procure and confirm the Master's report of all purchases, and obtain

an order for each purchaser to pay the amount of his or her purchase-money into court on or before the 25th of December 1849; and, on or before that day, each purchaser is to pay into the Bank the amount of such purchase-money, and then be let into possession of, or be entitled to the receipt of the rents or an apportioned part of the rents of, his or her lot; but if, from any cause whatever, the purchase-money shall not be so paid in on the 25th of December 1849, the purchaser is to pay interest thereon at the rate of 5*l.* per cent. per annum from that day to the time of payment." By the third condition the vendors undertook to have an abstract of their title ready for delivery to the purchasers within ten days after the confirmation of the Master's report of the sale.

Lot 6, the property in question on this motion, was a reversion in fee, subject to a term of ninety-nine years, determinable on the deaths of two persons aged fifty-seven and fifty-three, at a rent of 3*l.* 9*s.* 2*d.*

Owing to circumstances in which the purchaser of this lot had no concern, the vendors did not confirm the Master's report as to this lot until August 1851, and the abstract of title was not delivered until September 1851.

This was a motion on the part of the plaintiff that the purchaser of this lot should pay his purchase-money into court with interest from the 25th of December 1849.

Mr. Moxon, for the motion, contended that, although the purchaser was not in fault as to the delay, he was still liable to pay this interest. The sale being of a reversion, the purchaser had the benefit of the wearing out of the lives, and was to be considered as having been in possession from the time of the sale. He cited—

Trefusis v. Lord Clinton, 2 Sim. 359.

Morris v. Wood, Dart on Vend. and Purch., p. 330, 2nd edit.

Mr. Nichols, for the purchaser, contended, that as the delays in confirming the Master's report and delivering the abstract were to be attributed to the vendors, and had not in any way been caused by the purchaser, the purchaser was not bound to pay the interest required. He referred to

De Visme v. De Visme, 1 Hall & Tw. 408; 1 Mac. & G. 336; s. c. 18 Law J. Rep. (N.S.) Chanc. 159.

PARKER, V.C. said, that he thought that the sale in question, being of a reversion, the case of *De Visme v. De Visme* did not apply. The purchaser had had the benefit of the wearing out of the lives, and he must pay interest from the 25th of December 1849. This interest ought, however, to be at the rate of 4*l.* per cent. per annum only, according to the usual practice of the court, and the purchaser was to be entitled to the rents received in the mean time.

M.R.	}	PAYNE v. LITTLE.
1851.		
July 22;		
Nov. 20.		
1852.		
Jan. 7, 24;		
March 29.		

Stay of Proceedings—Costs—Bill—Dismissal.

A new next friend of a feme coverte having been substituted, the old next friend, who was a defendant to the suit, was ordered to give security for costs up to the time of his appointment, and proceedings were stayed in the mean time. No security having been given, it was asked that in default of its being completed within a limited time, the bill might be dismissed, with costs, but the application was refused.

This suit was instituted by Anne P. Payne, a *feme coverte*, by the defendant, Charles H. Payne the younger, as her next friend; and upon a motion for staying the proceedings until the bill should be amended by substituting a new next friend, it was decided that a defendant could not act as the next friend of a plaintiff *feme coverte*—*Payne v. Little* (1). A motion was subsequently made that the bill should be dismissed, with costs, in case the last order should not be complied with; and on the 2nd of July 1851, an order was made, with the consent of the plaintiff, to amend the bill within a week, by substi-

tuting E. W. Hardy as the next friend, and that C. H. Payne should give security for the costs up to the time of making the amendments: such security to be approved of by the Master, and in the mean time all further proceedings were stayed.

The Master rejected the security proposed by C. H. Payne; and a motion was made on behalf of the defendants to dismiss the bill, with costs, unless the security should be completed within a limited time: and in support of this application,

Mr. Lloyd and Mr. Bagshawe referred to *Giddings v. Giddings* (2), in which a plaintiff who was ordered to give security for costs, gave an insufficient security. An order was then made that he should give other security within a month; but having made default, he was ordered to give security within a limited period, and in default the bill was to stand dismissed, with costs.

Mr. Selwyn opposed the motion.

The MASTER OF THE ROLLS made the order.

The Registrar stopped the minutes dismissing the bill, and the case being again mentioned, it was asked that the words "and in default, that the bill be dismissed, with costs," be introduced into the minutes.

March 29.—The MASTER OF THE ROLLS. —I have communicated with Mr. Bedwell, the Registrar. I cannot make the order asked. Who would there be to pay the costs, if the bill was dismissed? The substituted next friend would not be liable to pay them: were he liable, no security would be necessary; and C. H. Payne would not be liable to pay them, as he had ceased to be the next friend: the plaintiff, also, if this bill should be dismissed, might file the same bill to-morrow. The case of *Giddings v. Giddings* was not the next friend of a married woman; the plaintiff, there, lived out of the jurisdiction: the case, therefore, does not apply, and I am unable to make any order upon this application; but I shall give no costs.

M.R. }
March 13. }

MANT v. LEITH.

Trust, Breach of—Investment—Real Security—Railway Debentures—Cestui que Trust—Acquiescence.

A trustee, at the request of his cestui que trust, a married woman, who was entitled for her life to the dividends of a sum of 4,000l. consols, sold out the trust fund, and invested it upon a railway debenture. Upon a suit by her to have the fund re-invested in stock,—Held, that railway debentures were not real securities contemplated by the deed, and that he must replace the stock and account for the dividends as if it had not been sold; that no costs ought to be given on either side, as he had acted only as requested by the plaintiff; and that the costs of the parties entitled in remainder must be paid by the plaintiff.

Sarah Iggulden, the great-aunt of the plaintiff, Elizabeth, the wife of Thomas Mant, transferred the sum of 3,100l. consols, into the names of William White and John Iggulden, both since deceased, and the defendant, James Leith; and by an indenture, dated the 24th of March 1832, she conveyed to them certain freehold estates, upon trust, that they and the survivors of them, after the decease of Sarah Iggulden, should, from time to time, pay, apply, and dispose of the rents and profits of the freehold premises, and the interest, dividends, and produce of the stock, and of every addition thereto, as the same should respectively accrue due and be received by them, into the proper hands of the plaintiff, to and for her separate use and benefit, exclusive of marital controul and without power of anticipation, the receipt or receipts of the plaintiff only and alone, notwithstanding her coverture, to be good and effectual discharges to the trustees for the same; and after the decease of the plaintiff, upon trust, to pay, apply, and dispose of the rents, issues, and profits of the trust estates and premises, unto and for the benefit of two daughters of the plaintiff therein respectively named and their children; but if either of them should die without leaving issue, then to the other of them and her children. It was also provided that it should be lawful

(2) 10 Beav. 29; s. c. 16 Law J. Rep. (n.s.) Chanc. 183.

for the trustees and the survivors or survivor of them, when and as often as it should be found necessary or expedient, with the consent and approbation of the person or persons then in the receipt and enjoyment of the annual or other periodical produce thereof, to be testified in writing, under her or their hand or hands, to sell and dispose of the trust stock, and to place out the money to arise thereby, or which should arise by the same or any part thereof in any of the public stocks or funds of this kingdom or on real securities; and such monies, funds, and real securities from time to time to change, alter, call in, and dispose of, with such consent as aforesaid, as should be judged necessary, replacing and laying out the money to arise thereby in or upon any or either of such securities as aforesaid, in the names or name of the trustees or trustee thereof for the time being, upon the before-mentioned trusts of and concerning the first-mentioned stock and realty or as near the same as the nature of the case and the then circumstances would admit of.

On the 26th of January 1837 Sarah Iggulden died. During her life the freehold premises were sold and the produce was invested by the trustees, in their names, in the purchase of 900*l.* consols.

Elizabeth Mant, being in receipt of the income arising from the 4,000*l.* consols, requested James Leith, the then surviving trustee, to alter the investment, that it might produce a larger income. James Leith opened a communication with the Great Northern Railway Company, and on the 26th of October 1850 he, by letter, informed the plaintiff that it was proposed to advance the trust funds on mortgage to the company at 4*l.* 10*s.* per cent.; to which he received a reply.—

“October 31, 1850.

“Dear Mr. Leith,—I have really of late been almost prevailed upon to write to you relating to the circumstance of the present high rate of 3*l.* per cent. consols, but as often repulsed the attempt, considering that you were still on the look out, which your letter of the 26th inst., received on the 29th, confirms, and now places the matter almost to a certainty of its being carried out to the extent of so desirable a transaction, it having had my serious attention;

yet all I can further or more say upon so important a business will be for myself to repeat and sanction your proceedings of investing the property in allusion, that is, upon mortgage at 4*l.* 10*s.* per cent. interest, paid regularly, half-yearly, upon the trust of the Great Northern Railway Company, agreeable to the document you inclose, the money emanating, say 4,000*l.* consols, from the deed of trust executed by my aunt, Miss Sarah Iggulden, of the county of Kent, as over which you are the absolute trustee. I am happy in confessing the cautious and judicious measures you have hitherto exemplified, as on many other occasions, towards my property.—Sincerely yours, Elizabeth Mant.”

On the 5th of February 1851, James Leith advanced the sum of 3,700*l.*, part of 3,850*l.*, the produce of the 4,000*l.* consols, after deducting expenses, to the Great Northern Railway Company; and by an indenture, dated the 11th of February 1851, the company, under their common seal, assigned unto James Leith the undertaking and all future calls on shareholders, and all the rates, tolls, and sums of money arising by virtue of their act, to secure the repayment, on the 5th of January 1858, of the sum of 3,700*l.*, with interest in the mean time at the rate of 4*l.* 10*s.* per cent. per annum, payable half-yearly, on the terms therein mentioned.

Upon being informed of what had been done, Elizabeth Mant, on the 11th of February 1851, wrote to the defendant:—

“Your letter of the 6th inst., together with the account of broker, selling of stock, and the secretary's letter of the 5th, also to the Great Northern Railway Company and Messrs. Baxter, Rose & Norton, of the 31st ult., have been received this morning through the bank at this place, which information I conclude you wish me to acknowledge. You also observe you will indorse the indenture declaratory of your trust and send it to me or attested copy at your earliest capability, and for all which I am obliged.”

After this investment the defendant paid the remaining sum of 150*l.* into the National and Provincial Bank at Deal, where the plaintiff then resided, until a proper investment could be found.

Disputes having arisen in consequence

of the irregular payment of the dividends, the plaintiff instituted this suit to impeach the investment as a breach of trust, and to have the trust funds restored to a proper state of investment. It also asked that new trustees might be appointed in the place of James Leith.

There were two daughters of the plaintiff at the date of the settlement, Elizabeth Iggulden Mant and Sarah Alderton Mant. The former married Henry S. Shrapnell, and had two children, and they were all made parties to the suit. The other daughter married Henry Frederick Tyler, but died shortly after without issue.

Mr. R. Palmer and *Mr. Terrell*, for the plaintiff.—The fund in this case was the subject of a trust which the trustees might, in their discretion, invest upon real securities; but railway debentures do not come within that description—9 & 10 *Vict. c. lxxi. s. 9*, 8 *Vict. c. 16*, *Robinson v. Robinson* (1). The securities would not sell in the market for half their value, and when the investment was made no information as to their value was given. The money could not be called in until after the expiration of a term of years. If there were other incumbrances upon the railway, and there should not be sufficient to meet the demands, how were the priorities of the creditors to be determined? The whole success of the company must depend upon the carriage of passengers; neither the toll-houses nor the line were included in the mortgage. The undertaking and its profits were alone pledged. If the toll-houses had been included, they might have yielded a rental; but still they would not have been such a security as this Court would consider proper for an investment of trust property. The stock must, therefore, be replaced in the funds, and the trustee must pay the costs—*Russell v. the East Anglian Railways Company* (2), *Doe d. Myatt v. the St. Helen's and Runcorn Gap Railway Company* (3).

Mr. Smythe, for Thomas Mant, the

(1) 11 Beav. 371; s. c. 18 Law J. Rep. (N.S.) Chanc. 73; *ante*, 111, 118.

(2) 3 Mac. & G. 104; s. c. 20 Law J. Rep. (N.S.) Chanc. 257.

(3) 2 Q.B. Rep. 364; s. c. 11 Law J. Rep. (N.S.) Q.B. 6.

plaintiff's husband, and for Mr. and Mrs. Shrapnell and her children, who were entitled in remainder.

Mr. Roupell and *Mr. Shebbeare*, for the trustee.—If a *cestui que trust* caused a trustee to commit a breach of trust, the Court would indemnify the trustee out of the estate of the *cestui que trust* who induced it—*Phillipson v. Gatty* (4). The plaintiff sued on her title as a *feme sole*, and she had the sole power of allowing the change of investment. She never averred that she acted in ignorance or that she was misinformed. The trustee had acted upon her authority, which controuled his own. It was the plaintiff alone and not the infants who now complained of the investment, and she must indemnify the trustee against all loss.

The MASTER OF THE ROLLS.—I cannot consider this a proper investment or such a one as, under the power in this settlement, ought to have been made. Assuming this to be a real security, it is not sufficient for a trustee to say so and rely upon that as his defence. It is his duty to consider the nature of the property and the conditions upon which it is held. It may possibly be involved in litigation or subject to liabilities which may prevent its being an available security; and in this very case the security under the provisions of the act of parliament for making the railway cannot be enforced in the ordinary manner in which real securities are made available. No ejectment can be brought, neither can any foreclosure be obtained. Repayment cannot be demanded for eight years; the security may be sold, but the value is diminished by the enjoyment being made reversionary; and the parties entitled in remainder may become entitled in possession before the time of payment. In all respects, therefore, it was a breach of trust; and the practice of conveyancers confirms this; and in modern settlements powers are introduced to invest the trust funds upon railway debentures. Mrs. Shrapnell and her children did not, neither could they give any authority. The trustee, therefore, could not protect himself on the ground that it was done upon the request of the

(4) 6 Hare, 26; s. c. 17 Law J. Rep. (N.S.) Chanc. 241.

cestui que trust. He must, therefore, re-invest the money in consols. Mrs. Mant, however, did give express authority to the trustee to alter the investment; and I cannot permit her to complain of the particular species of investment, which, though improper, she sanctioned, and which she might have known was not such an investment as should have been made by a trustee. I cannot allow her to receive the costs from the trustee, since he did no more than he was requested; and I cannot make her pay him the costs, as that would imply that he had no duty to perform, and that the request of the *cestui que trust* would be a sufficient indemnity to him. The duty of a trustee was to protect the fund; and if one *cestui que trust* asks what is improper, such a request can be no justification as against other parties. I will not therefore give any costs on either side. Mrs. Shrapnell and her children must have their costs from the plaintiff, as they are brought here in consequence of this litigation; and Mr. Leith, having replaced the fund, must account for such dividends as would have arisen from the stock. He is also entitled to a reasonable time to replace the 4,000*l*. I think also the *cestui que trust* has a right to attach this fund, as it is property to which the trust funds have been traced; but I will not permit him to dispose of it, unless it is to raise money to replace the trust funds. In that case the Court will afford him an opportunity of selling the debentures; but, except for that purpose, it will not part with them. The 4,000*l*. must be replaced before the last day of June.

M.R. }
 1851. } HOLLINGSWORTH v. SHAKESHAFT.
 Nov. 11; } ANDREWS v. SHAKESHAFT.
 Dec. 2. }

Will—Construction—Defective Suit—Omitting to demur—Successful Defendant—Costs of Hearing refused—Interest on Balances not prayed for.

A testator gave his freehold estate and "property whether real or personal" to M. S. for life, and after her decease he gave all his said freehold estate and property to S. H. and his wife for their lives, and after their decease he gave all his said freehold pro-

perty to their children for an estate of inheritance in fee simple; but in case none should attain twenty-one, he gave his freehold estate and property to W. M. his heirs and assigns in fee simple. He charged his personal estate with the payment of several legacies, and the residue of what he should die possessed of was to become the property of M. S.:—Held, that M. S. was entitled to the personal estate, and that S. H. his wife and children took no interest in the personal estate.

A plaintiff, whose case wholly fails, will not be allowed to perfect it by the gift or waiver of one defendant against another.

If the case made by the bill is clear, a defendant who brought the cause to a hearing instead of demurring, was refused all costs though he succeeded.

Interest on balances may be charged against an executor, though it is not prayed by the bill.

John E. Steygould, by his will, dated the 14th of May 1817, gave and bequeathed to Margaret Steygould all his freehold estate, situate in Wapping or elsewhere, and property, whether real or personal, as well as money and effects, &c. in trust for her use for life; and after her decease, he gave and bequeathed all his freehold estate and property unto his cousin Samuel Hollingsworth and Martha Elizabeth his wife, or the survivor of them, in trust for their lives; and after their decease, he gave and bequeathed all his said freehold estate and property in trust for their children, or the survivors or survivor of them, if more than one share and share alike when they should have attained the age of twenty-one years, for an estate of inheritance in fee simple to such children or child, and his, her or their assigns. But in case none of the children should attain the age of twenty-one, he gave and bequeathed his said freehold estate and property unto William Wilson, his heirs and assigns, in fee simple for ever. He then charged his personal property with several bequests, and then gave "all the rest, residue and remainder of which I shall die possessed, interested in or entitled unto, to become the property of Margaret Steygould."

The testator died on the 19th of August

1829, and his will was proved by Margaret Steygould, Samuel Hollingsworth and Charles Shakeshaft, his executors, whom he also named his trustees.

The personal estate consisted of two sums of 3,300*l.* consols, and 3,000*l.* reduced Bank annuities, which the executors invested in their joint names, and the dividends were received by Margaret Steygould until her decease, which took place on the 16th of June 1833. After the decease of Margaret Steygould, Charles Shakeshaft, the executor, received the dividends accruing due upon the several sums of stock, and paid them to Samuel Hollingsworth up to October 1834; but early in 1835 he refused to continue the payments,—alleging that it was doubtful whether Samuel Hollingsworth had any right to them under the will; and after his decease, he transferred the two sums of stock into his own name and received the dividends, but never took any proceedings for obtaining the sanction or opinion of the Court.

Charles Shakeshaft also sold out a part of the residuary estate, and applied the proceeds to his own use.

The suit of *Hollingsworth v. Shakeshaft* was instituted by Martha Elizabeth Hollingsworth, the widow of Samuel Hollingsworth, and her son, who was the administrator of his father, against Charles Shakeshaft, the executor of the original testator, and against Robert Williams Andrews who claimed the fund as the legal personal representative of Margaret Steygould, praying for a declaration that Samuel Hollingsworth, upon the decease of Margaret Steygould, became entitled to the dividends of the residuary personal estate during her life, and that upon his decease the plaintiff, M. E. Hollingsworth, became entitled to the dividends during her life, and that subject thereto the other plaintiff became entitled to the residuary personal estate. It also asked that Charles Shakeshaft might be charged with interest on the monies received by him and with the value of the stock sold out and applied to his own use.

The defendant, Charles Shakeshaft, died after the institution of the suit, and his widow and executrix, against whom the suit was revived, voluntarily replaced the

sum sold out, and admitted assets of her testator, Charles Shakeshaft, sufficient to answer the purposes of the suit; and the several sums of money in question in the cause were paid into court to the general credit of the cause.

Andrews v. Shakeshaft, the second cause, was between the same parties, but the plaintiff, R.W. Andrews, the legal personal representative of Margaret Steygould, claimed the residuary estate of the testator against the other defendants. The plaintiffs in the first and second suits compromised the matter in dispute between them, and then presented a petition to come on with the causes proposing a distribution of the fund according to that compromise. Under those circumstances, it would not have become necessary to decide the question of construction between the parties were it not that the defendant, the legal personal representative of Charles Shakeshaft, who, for fifteen years, received and retained the dividends which he knew himself not to be entitled to, proposed that one decree should be made by consent in both causes, giving the defendant her costs in the suit out of the residue of the fund administered, but charging the estate of the executor, Charles Shakeshaft, with interest at 4*l.* per cent. on the dividends received and retained by him. And she insisted on the two causes being tried strictly and separately, and contended that if upon the true construction of the will the Court should be of opinion that the plaintiffs, in *Hollingsworth v. Shakeshaft*, were not entitled to these funds, that bill must be dismissed; and that the Court should then, in the other suit of *Andrews v. Shakeshaft*, make such a decree as might be proper, but which she insisted would not be a decree charging the estate of Charles Shakeshaft with interest, inasmuch as there was no prayer to that effect contained in the bill.

Mr. Lloyd and *Mr. Hoare*, for the plaintiffs in the suit of *Hollingsworth v. Shakeshaft*.

Tebbs v. Carpenter, 1 Madd. 290.

Heighington v. Grant, 1 Beav. 228; s. c. 10 Law J. Rep. (N.S.) Chanc. 12; 5 Myl. & Cr. 258.

Melland v. Gray, 2 Coll. 295.

Mr. R. Palmer and Mr. Hardy, for the defendant—*Cresy v. Beavan* (1).

Mr. Willcock and Mr. Prior, for Andrews, the plaintiff in the second suit.

Cholmondeley v. Clinton, 2 J. & W. 135.

Fulham v. M^cCarthy, 1 H. L. Cas. 703.

Tonkin v. Sir John Lethbridge, G.

Coop. 43.

Mr. Lloyd, in reply.

Dec. 2.—THE MASTER OF THE ROLLS.—I at first thought that the defendant R. W. Andrews might, in the suit of *Hollingsworth v. Shakeshaft*, have waived his right in favour of the plaintiffs, and that by that means I might have avoided the decision of the point, and although this might be transferred where independently of the interest of Andrews, the plaintiffs the Hollingsworths had a distinct interest sufficient to sustain the suit; yet I think that where the plaintiff's interest wholly fails, it cannot be set up against the defendant who has an interest, but the case must be tried according to the interest of the plaintiff as it stands upon the record, and that if he has acquired a subsequent interest, it must be brought before the Court by a supplemental bill. I am of opinion, that I must yield to this objection, and the defendant is entitled to require the Court to determine whether the plaintiffs, in *Hollingsworth v. Shakeshaft*, can maintain the suit against the defendant.

Yielding, therefore, to this objection, and having taken the cases separately, and having to consider the true construction of the will, I must adhere to the opinion that I expressed strongly at the hearing of the cause, that according to the true construction of the will, Margaret Steygould took all the residue of the personal estate, subject to the payment of the legacies, and that consequently the plaintiffs the Hollingsworths having no title to this fund, this suit cannot be maintained by them. I am, therefore, compelled to dismiss the bill. As this question arises exclusively upon the construction of the will of the testator, which is fully set forth by the bill, it was the duty of the executor if he intended to take

this objection, to do so at the earliest stage of the cause, that is, by demurrer to the bill, by which all further expenses in the suit would have been avoided, and the right of R. W. Andrews would have been conclusively settled and ascertained. He has not thought fit to adopt this course, and having regard also to the other circumstances of the case to which I have already adverted, I shall dismiss the bill without costs. The same observations apply to both the defendants.

In pursuing this course, I follow the rule adopted by Lord Langdale in *Sanders v. Benson* (2). The result of this dismissal will be that the defendant Mrs. Shakeshaft would, in the ordinary course, be entitled to have the three sums of money paid out again to her; but I shall not at present give any direction for that purpose, but wait till some application is made for it. The plaintiff, R. W. Andrews, may, if he thinks fit, apply to have the fund transferred to the cause of *Andrews v. Shakeshaft*.

It remains to be considered what decree is proper to be made in the suit of *Andrews v. Shakeshaft*. The bill in this suit prays for an account of the dividends which have accrued due on the sums of stock constituting the residue, and also for payment of the arrears due, but it does not pray for interest on those dividends; and it is contended by the defendant that the Court cannot make the estate of Charles Shakeshaft liable in this suit to the payment of such interest; but I am not of that opinion. I consider that the Court cannot in the present stage of the cause, and according to the existing practice, direct such interest to be paid: but in a great variety of cases, the Court has given interest on further directions, although the question has not been reserved at the hearing. *Cresse v. Hunter* (3) and *Sammes v. Rickman* (4) are cases of this description. So also was *Goodyere v. Lake* (5). In *Melland v. Gray* the original bill does not appear to have prayed for interest, but by the decree on further directions the Vice Chancellor Knight Bruce directed the

(2) 4 Beav. 350.

(3) 2 Ves. jun. 157.

(4) Ibid. 36.

(5) 2 Amb. 584.

(1) 13 Sim. 99.

Master to inquire what sums had been from time to time retained by the executor; and on the cause coming on for hearing on further directions, the executor was charged with interest on the several sums from time to time received by him. My own experience agrees with this decision, that the Court has ultimately in many cases charged the executor with interest when it has not been prayed for by the bill. I entertain no doubt that the Court will properly direct such inquiry to be made, and accounts to be taken as will, if a proper case for the purpose appears by the Master's report, enable the Court to fix the estate of the executor, Charles Shakeshaft, with interest on the dividends received and retained by him; although this course of proceeding will be more dilatory and expensive than if the Court had, in the first instance, made an adverse decree settling all questions between the parties. Accordingly, this is the course which I shall adopt here. I shall, in the case of *Hollingsworth v. Shakeshaft*, dismiss the bill, without costs, and in the case of *Andrews v. Shakeshaft*, I shall declare the plaintiff R. W. Andrews entitled to the three sums of stock, and the dividends that have accrued thereon since the decease of Margaret Steygould. Direct the defendant, Mrs. Shakeshaft, to transfer and pay the same accordingly, and refer it to the Master to take an account of the dividends which have accrued due on the sum of 3,300*l.* consols, and the 3,000*l.* reduced 3*l.* per cent. annuities, since the decease of Margaret Steygould. The Master must also inquire and state to the Court when and by whom such dividends respectively have been received, with liberty to state special circumstances; and I shall reserve further directions and costs. The petition also must stand over.

M.R. }
 Jan. 27; }
 March 29. } JONES v. FOXALL.

Trust, Breach of—Annual Rests—Costs—Compromise—Letters—Evidence.

*A trustee of a marriage settlement, who allowed a sum of 350*l.* to remain in the hands of a trading firm for a period exceed-*

*ing fifteen years after the death of the tenant for life, but who eventually, and before the bill was filed, paid the principal, with 5*l.* per cent. interest:—Held, liable to account, with annual rests, and also to the costs of the suit.*

The Court will discountenance all attempts to convert offers of compromise, by letter, into admissions prejudicial to the parties using them.

Observations as to the limited purpose for which such letters may be used.

Ann Minchin previous to her marriage was possessed of a sum of 350*l.*, which she had lent at interest at 5*l.* per cent. to Thomas Clark, Francis Clark and Joseph Foxall, who carried on business in co-partnership as toy-makers at Birmingham, under the firm of Thomas Clark & Co.

In June 1830, upon the marriage of Thomas Jones with Ann Minchin, she assigned the 350*l.* due from the firm of T. Clark & Co., together with certain stock in trade, &c. belonging to her, to Charles Chamberlain and J. Foxall, upon trust, to stand possessed of the trust monies and effects for the separate use of A. Minchin for life, and to pay, assign and deliver the same, or any part thereof, to her or to such person or persons as she should by writing, or by her last will appoint, with full power for her to carry on the said trade, and to vary the stock, debts and effects employed therein, as a feme sole, for such time as she should think proper. And upon further trust, that the said trustees should, when requested by A. Minchin by any note or writing, and after her decease, of their or his own proper authority, collect, get in and receive the sum of 350*l.* and interest, and other the monies, effects and premises, and invest the produce in their names in the public funds of Great Britain, and pay the dividends to A. Minchin for life for her separate use, and after her decease in trust for the child and children of the marriage.

The marriage was duly solemnized, and A. Jones received the interest during her life, and never required the 350*l.* to be got in. She died on the 5th of November 1834, leaving George Jones, the plaintiff, an infant, her only child, but no step was taken to get in the 350*l.*, or to receive the

interest, until this bill was filed in January 1850.

At the time of the execution of the settlement, the 350*l.* was due from J. Foxall, the trustee, and his co-partners jointly and severally, and so it continued until October 1847, when T. Clark died, and F. Clark and the defendant, J. Foxall, continued to carry on the business until the beginning of the year 1850, a fortnight before the filing of this bill, when the partnership was finally dissolved.

In March 1836, C. Chamberlain retired from the trust, without having taken any step to get in and invest the money settled; and on the 24th of March 1836 Thomas Willson was appointed co-trustee with J. Foxall in his stead. C. Chamberlain subsequently died, and this suit was revived against his legal personal representative, but neither F. Clark, nor the legal personal representative of T. Clark, deceased, were made parties to the suit.

The bill prayed an account of the profits made by J. Foxall on these balances, and for a reference to the Master to ascertain whether it would be for the interest of the plaintiff to take the amount of the profits realized by the use of these sums of money; or if the Court should be of opinion that he was not entitled to such relief, then that it might be paid, with interest at 5*l.* per cent. per annum, with yearly rests.

The defendant, J. Foxall, by his answer said, that before the 31st of December 1849, and above a fortnight before the bill was filed, the whole of the principal and interest at 5*l.* per cent. was invested in the funds in the joint names of J. Foxall and T. Willson, upon the trusts of the settlement, and that the plaintiff was entitled to nothing more, and that consequently whatever decree the Court might make as to the security of the fund, they, the defendants, were entitled to have their costs of the suit.

A long correspondence was entered into between the solicitors of Thomas Jones, the plaintiff's father, and the solicitors of the defendant J. Foxall, a great portion of which was embodied in the answer of the defendants, and was given in evidence to prove admissions against the plaintiff, and which was justified on the ground that an

issue would have been necessary to try a fact stated in the letters, which might have defeated the suit, though written without prejudice, if they had not been put in evidence.

Mr. James and *Mr. Selwyn*, for the plaintiff.—Upon the death of Ann Jones, a clear breach of trust was committed by both the trustees. If a partner died, leaving a capital in the firm, it was a debt due from the surviving partners to the estate of the deceased partner; and in this case, as the debt was not received, and the surviving partners have made a profit, it is a debt due from them. They had full notice that the money was the subject of the trust. The plaintiff, therefore, is entitled to an account, with annual rests.

Heathcote v. Hulme, 1 J. & W. 122.

Burden v. Burden, 1 Ves. & B. 170.

Willett v. Blanford, 1 Hare, 253; s. c. 11 Law J. Rep. (N.S.) Chanc. 182.

Mr. R. Palmer and *Mr. Eddis*, for the defendant, J. Foxall, insisted that no annual rests ought to be directed, but that the defendants were entitled to the costs of the suit, as the principal and interest was invested before the bill was filed.

Chambers v. Howell, 11 Beav. 6.

Wedderburn v. Wedderburn, 2 Keen, 722; s. c. 4 Myl. & Cr. 41; 8 Law J. Rep. (N.S.) Chanc. 177.

Mr. Elmsley and *Mr. Shee*, for the executor of C. Chamberlain.—No time is clearly defined within which *laches* is to be attributed to a trustee.

Brice v. Stokes, 11 Ves. 319.

Walker v. Symonds, 3 Swanst. 1.

Buxton v. Buxton, 1 Myl. & Cr. 80.

Mr. James, in reply.

March 29.—THE MASTER OF THE ROLLS.—The question is, whether the defendant, J. Foxall, is liable as a trustee of the settlement made on the marriage of Ann Minchin, the mother of the infant plaintiff, for more than the principal, with interest at 5*l.* per cent. for a sum of 350*l.* secured by that settlement. The defendant admits his liability to that extent, and before the filing of the bill expressed his readiness to

make the amount good without suit. The plaintiff, by his next friend, claims more than this, and contends that the defendant is liable to account for the profits produced by the 350*l.* or for interest at 5*l.* per cent., with annual rests, on the ground that the money was employed by the defendant in his trade and in violation of his duty as trustee. The settlement provided that the trustees should call in the debt of 350*l.* during the life of Ann Minchin when they should be requested by her so to do, and after her decease the settlement made it imperative upon the trustees, without any application or request from any one, to call in this sum and interest due on it, and to invest the amount in government or real securities upon the trusts of the settlement.

The rules which apply to cases in which executors are charged with interest on balances retained by them are subject to difficulty, arising not so much from any doubt as to the principles themselves, as from the practical application of them to particular cases. Generally, it may be stated that, if an executor has retained balances in his hands which he ought to have invested, the Court will charge him with simple interest at 4*l.* per cent. on those balances. If, in addition to this retention, he has committed a direct breach of trust, or if the fund has been taken by him from a proper state of investment in which it was producing 5*l.* per cent., he will be charged with interest after the rate of 5*l.* per cent. per annum. If in addition to this he has employed the money so obtained by him in trade or speculation, for his own benefit and advantage, he will be charged either with the profits actually obtained by him from the use of the money, or with interest at 5*l.* per cent. per annum, and also with yearly rests, that is, with compound interest. The principle on which the Court charges an executor with profits which have actually arisen from the property of the *cestui que trust* employed by him, is obvious, and of general application when such profits are proved to have been made. It was the money of the *cestuis que trust*, and they are entitled to receive the profits that are earned. The principle upon which executors and trustees, when charged with interest on balances, are made

to account with yearly or half-yearly rests, is not so clearly defined, nor are the decided cases by any means free from obscurity or contradiction. In some cases the Court has charged the trustee with annual rests, because the trust under which he acted, in distinct terms required him to accumulate the fund with compound interest. In other cases the principle seems to have been, that the Court visits the trustee or the executor with an account in the nature of a penalty for his misconduct, where he has not merely committed a breach of trust, but where he has himself actually endeavoured to derive, or has, in fact, derived, some pecuniary advantage from the use of the money of which he has thus obtained possession. In all these cases, however, a large discretion seems to have been exercised by the Court, which has regarded the facts and circumstances attending each particular case, and it is to the exercise of this discretion that the difficulty of discovering the principle in some of the reported cases is to be attributed, and it is only upon this principle that the later cases, in which the rule has been drawn more stringently against the trustee, can be reconciled with some of the earlier cases.

In the case before me, a direct and positive breach of trust was committed. It was not merely negligence by omitting to perform the duty incidental to trustees, but a direct disobedience by the defendant J. Foxall in his character of trustee of the plain and positive trust which he had been directed to perform, and which, by accepting the trust, he had undertaken to perform. The trustees were enjoined by the deed on the decease of the mother to get in the sum of 350*l.*, and to invest it upon the trusts of the settlement, and if this had been done the fund would have produced compound interest for the plaintiff; for as he was then, and still is, an infant, and as his father appears to have been of ability to maintain him, the dividends might and ought to have been re-invested from time to time for his benefit until he attained twenty-one. Instead, however, of adopting this course, the defendant J. Foxall continued his money as part of the capital engaged in the firm carried on by himself and his partners, and, besides the advantage resulting from the increase of capital to the concern

his share of the profits produced by it is increased.

It was argued that the sum was of small amount, and that it can scarcely be supposed any great advantage was to be derived from a sum of £50*l.* to a trading concern. I feel myself bound, however, to disregard that argument. The principle must be the same, whether the sum be large or small; and if the benefit is small, the sum charged upon the trustee will be proportionately small also. In all this J. Foxall acted in direct violation of his duty as trustee. It was a violation of his duty not to endeavour to obtain payment of the principal or interest of this sum of money for the benefit of the infant *cestui que trust* from the month of November 1834 up to the month of January 1850, when this bill was filed, a period exceeding fifteen years. The rate of interest secured by the conditions on which the loan was originally made was 5*l.* per cent. per annum. Interest, therefore, at a less rate than 5*l.* per cent. could not be charged, and if paid and advanced to the benefit of the infant, it would have accumulated at compound interest. The neglect to pay off this money is a tacit acknowledgment by the partners, the trustee being one of them, that the retention and employment of it by them was beneficial, even though 5*l.* per cent. per annum was paid for it. It is obvious, therefore, that J. Foxall must be charged with something more than the mere repayment of the principal and the interest retained by him and his partners for fifteen years.

The question is, in what way he is to be charged. I cannot charge him as trustee with a greater amount of profits than he has actually received; and according to the evidence before me, as indeed was probable, the trustee, J. Foxall, received only a third part of the profits produced by this sum. It would clearly, therefore, not be for the interest of the plaintiff to make him account only for one-third of the profits. But with regard to the question of annual rests, there are various considerations that have led me to the opinion that he must be charged with them. These considerations are, first, the direct breach of trust committed by the trustee not requiring payment of this money. Secondly, the long time that has elapsed since the

breach of trust was committed. Thirdly, the absence of any attempt either to repair the breach or to perform the trust till complaint was made shortly before the filing of the bill. Fourthly, and more especially, that during all this time the whole of the trust fund has been employed in the trade carried on by the trustee and his partners, from which, in common with them, he has derived some benefit. To which may be added, the circumstance I have mentioned, that if the defendant J. Foxall and his partners had regularly paid the interest they had contracted to pay, even if the principal money itself had not been repaid, the infant would have had the benefit of that interest which has been retained by the trustee and his partners in their trade.

Taking all these matters into consideration, I am of opinion that the defendant J. Foxall must be charged, not only with interest at 5*l.* per cent. on the balances, but in taking such account he must be charged with yearly rests. In addition to that, as this suit has been occasioned by the necessity of resorting here to repair the breach of trust committed by him, and as he has not offered to do without suit what in my opinion the plaintiff is entitled to recover, I am of opinion that he must also pay the costs of the suit.

I should here conclude what I have to say; but I think it proper to add that I have paid no attention to the correspondence and negotiation which occurred between the father of the plaintiff and the defendant J. Foxall, which has been given in evidence and commented upon in this case. In the first place, the plaintiff, who is an infant, cannot be bound by admissions by any one professing to act on his behalf; but, in addition to this, I find the offers were made without prejudice to the rights of any parties, and I shall, as far as I am able, in all cases endeavour to suppress a practice, which, when I was first acquainted with the profession, was rarely, if ever, ventured upon; but which, according to my experience has been common of late, namely, that of attempting to convert offers of compromise into admissions and acts prejudicial to the parties making them. If this were permitted, the effect would be that no attempt to compromise a suit would ever be made. If no reservation of the

parties who make an offer of compromise, could prevent that offer and the letters from being afterwards given in evidence, and made use of against them, it is obvious that no such letters would be written or offers made. In my opinion, such letters and offers are admissible for one purpose only, *videlicet*, to shew that an attempt has been made to compromise the suit, which may be sometimes necessary; as, for instance, in order to account for lapse of time, but never to fix the persons making them with admissions contained in such letters, and I shall do all I can to discourage this, which I consider to be a very injurious practice.

The estate of the other trustee is liable to make good the principal and interest, but the annual rests are to be decreed only against J. Foxall, whose firm derived benefit from the money, and who was the principal acting trustee.

M.R. }
 June 20; } *Ex parte* THE OVERSEERS OF
 July 10; } THE POOR OF ECCLESALL
 Aug. 2. } BIERLOW.

Charity—Trust Funds—Investment—Real Estate.

The Court will sanction the sale of a piece of land, which in 1747 was purchased by trustees with charitable funds and conveyed to them, it being plainly advantageous to the charity. It will also sanction the re-investment of the money in real estate; and the Court will confer upon the trustees powers to perpetuate themselves, as well as to lease the land, there being such powers in the deed conveying the land to the trustees originally purchasing.

This petition was presented under the 52 Geo. 3. c. 101, and the Trustee Act, 1850, praying for the appointment of trustees for a trust or charity, and to obtain an order vesting a close of land, called "The Carr," in Ecclesall, with the appurtenances, in the petitioners as trustees, and to confirm a contract made to sell the same to John Shortridge, and that the trustees, upon payment of the residue of the purchase-money and interest might be at liberty to

convey the land to the purchaser and his heirs. It also asked for the confirmation of a scheme for the investment and management of the trust property; or for a reference to the Master to appoint new trustees, and state whether the contract should be carried out, and to settle and approve of a scheme for the investment and management of the trust property, and that the trustees to be appointed might be invested with powers of appointing new trustees, and of demising the lands to be purchased, similar to those contained in the indentures originally conveying the lands to trustees. It also asked for payment of the costs, and that they might retain them out of the purchase-money.

In 1747 the trustees of certain charitable funds laid them out in the purchase of a piece of land called "The Carr," situate near Hawalin, otherwise Machon Bank, in Ecclesall Bierlow, in the parish of Sheffield, and by indentures dated the 10th and 11th of February, 1747, which were registered at Wakefield, and enrolled at the Chapel of the Rolls, the piece of land, which contained about three acres, and was let for 4*l.* 10*s.* a year, was conveyed to John Nodder and his heirs, to the use of John Nodder, John Fenton, Thomas Waterhouse, Richard Dalton, Thomas Bright, Joseph Parker and William Fox and their heirs, upon trust out of the yearly rents to expend the sum of 40*s.* in the purchase of good wholesome bread to be distributed on four several Sundays, which were specified, in equal proportions, in the chapel of Ecclesall immediately after divine service in the forenoon among thirty poor persons, inhabitants, who should have attended service in that chapel, so that each of such thirty poor persons might have a loaf of the same bread of the true value of 4*d.*, and in case there should be more than thirty persons, entitled to partake, then among such as the trustees should think fit; and as to the residue of the rents, after deducting all expenses, one-third part was to be applied for the relief of twenty poor housekeepers within Ecclesall, and for that purpose to be paid to the overseers to be distributed, and the remaining two third parts of the residue of the rents were to be paid by the trustees to the overseers of the poor of Ecclesall, to be distributed

among the poor of the township of Ecclesall. The deed also contained a power that as often as three of the trustees should die, the survivors of them or the major part of them should appoint three other inhabitants of Ecclesall to be trustees jointly with the survivors, and to convey the premises, so as that the same might be vested in them jointly. It also contained a power authorizing the trustees to demise the premises for twenty-one years at the best rent that could be obtained.

It appeared that since 1789 the overseers of the poor of Ecclesall had received the rents, and that since 1839, 6*l.* 6*s.*, being one-half of the rent, had been paid by the overseers to the churchwardens to be distributed by them in bread, and that the other 6*l.* 6*s.* had been divided by the overseers of Ecclesall amongst the poor persons inhabitants of the township.

The Carr field having increased in value, and being well situate for building purposes, the overseers on the 3rd of September 1851, put up the same to auction, when John Shortridge was declared the purchaser at the sum of 680*l.* subject to conditions, the fourth of which was "that the vendors should within twenty-one days from the day of sale make out a possessory title to the land, &c., in the overseers of Ecclesall for the last fifty years and upwards, by producing to the purchaser on application at the office of the vendors' solicitor the books of account of the overseers of the poor for the time being in which the rent of the land is from time to time entered, and should also produce a statutory declaration and furnish a copy thereof to the purchaser to identify the land and to shew the possession thereof by the overseers for the last twenty years, which should be deemed sufficient evidence of title in the vendors, who should not be bound to give or deduce, or the purchaser to require any other evidence of title whatever to the land." Fifth: "that on payment of the remainder of the purchase-money, the purchaser should be entitled, at his own expense, to a conveyance of the land, but should not in such conveyance require any other party or parties to join therein in conveying the land to him except the present overseers of the poor for the time being, and in such conveyance the vendors should not

be required to enter into covenants for title, but only that they or any of their predecessors had not to their knowledge done any act to incumber the land," &c.

It was also provided by the eighth condition that if from any cause whatever the contract on the part of the vendors according to these conditions could not be carried out by them, or any dispute should arise between the vendors and the purchaser, the vendors should, at their option, either enforce the contract against the purchaser or be at liberty to rescind the same and return the deposit money, but without interest, each party paying his own expenses.

John Shortridge refused to accept a conveyance of the land from the overseers of the poor, on the ground that it was held upon a special trust for charitable and not for general parochial purposes, and was not legally vested in the overseers, but in the heirs or devisee of the surviving trustee named in the indenture of the 11th of February 1747; he also refused to allow the contract to be rescinded until an application had been made by the overseers to the Court under the act above mentioned, to confirm the sale, and to authorize and enable the overseers to convey the land to him, or until the Court had refused to grant such application. J. Shortridge was willing to complete the purchase on having a conveyance, while at the same time the sale would be for the benefit of the charity. It was not known who of the trustees was the survivor, or in whom the close of land was legally vested.

The petitioners then stated that they were willing to be trustees, and that the purchase-money should be invested until it could be again laid out in land.

Mr. Lloyd and *Mr. Humphry*, on behalf of the overseers and other inhabitants of Ecclesall, appeared in support of the petition.

Mr. James appeared for the Attorney General.

THE MASTER OF THE ROLLS.—I think upon the authority of *In re Parke's Charity* (1) that I may make the order, and give the trustees power to appoint new trustees,

from time to time, when they are reduced to, or below the number of five; but the surviving trustees exercising that power must not be less than three, and at each appointment the number of new trustees to be appointed must not be less than ten. A fortnight's notice of the intention to appoint new trustees, and the names of the persons proposed, must be placed upon the doors of Ecclesall Church; and the trustees are to distribute the income amongst the poor of the parish not receiving parochial relief. The costs of all parties, including those of the Attorney General, to be retained out of the purchase-money.

LORDS JUSTICES. 1851. Nov. 21. 1852. May 1, 3, 4.	}	SPARROW v. THE OXFORD, WORCESTER, AND WOL- VERHAMPTON RAILWAY COMPANY.
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Railway Company—Part of a Manufactory—Tunnelling.

By the special act for a railway company certain clauses were introduced, requiring the securing to the owner of a certain property particular benefits by arching, making roads, &c., if that property or adjoining property were taken. By another section no building was to be erected on part of the land required by the company; and by another section, the company were required to buy certain specified property. The 92nd section of the Lands Clauses Consolidation Act requires a company, if it takes part, to take the whole of a manufactory, and that act was incorporated with the special act. The company gave notice of an intention to take a small strip of land which was within the boundary line of a manufactory, but which was not, at the time of the passing of the special act, nor at the time of the notice, built upon, but which was soon afterwards covered with buildings:—Held, first, that the land proposed to be taken formed part of a manufactory within the meaning of the 92nd section of the Lands Clauses Consolidation Act; and secondly, that the sections in the special act were not inconsistent with the 92nd section of the general act.

At the hearing, the company produced

evidence to shew that what they required could be attained by making a tunnel under the land, and so not touch any part of the surface; but the Court held, that it was not competent for them to set up such a case at the hearing; and

Semble—that such a tunnel would be taking part of a manufactory; and finally,

Held, that where the construction of an act of parliament, which gives authority for the compulsory taking of land is doubtful, it should be construed most favourably to those who seek to protect the land from innovation.

The bill, in this case, was filed to restrain a railway company from taking part of a manufactory. The company denied that the land they wanted was part of a manufactory. The motion for the injunction was heard, before Vice Chancellor Turner, on the 3rd, 4th, 5th, and 13th of November 1851, when he declined to grant it, but did not decide the dispute whether the land was part of a manufactory. On the 21st of November the Lords Justices, differing from the Vice Chancellor, granted an interim injunction, and directed that the question of manufactory or not should be tried at law. Upon this point the case was mentioned several times; but no arrangement could be come to as to the frame of the pleadings, and ultimately it was agreed that each side should file affidavits which should be considered as the evidence in the cause, and the whole dispute be settled by the judgment of their Lordships. The following narrative, principally taken from the earlier part of the very elaborate judgment of Lord Cranworth, contains the substance of the case.

The bill was filed on the 10th of September 1851, the object of which was to obtain an injunction restraining the defendants, the Oxford, Worcester, and Wolverhampton Railway Company, from entering upon, or taking possession of certain pieces of land required by them in the notices they gave on the 25th of June 1851, mentioned in the schedule and the defeazance of the bond, which they afterwards gave; and from proceeding to take measures to acquire the said pieces of land by compulsory purchase. The plaintiffs were Messrs.

Sparrow, one of whom was owner, and both of whom were occupiers of large tin-plate works and manufactory, at Horsley Field, near Wolverhampton, and it appeared that one of those gentlemen purchased the manufactory from some person of the name of Henderson, about three or four years ago, shortly before the time when the particular act of parliament under discussion (the Oxford, Worcester, and Wolverhampton Railway Company (Deviation) Act, 11 & 12 Vict. c. cxxxiii.) passed, which obtained the royal assent on the 14th of August 1848, and soon after they purchased it, it having been left rather in a dilapidated state, they improved it, and added some buildings, which buildings were situate upon the line of the projected railway. The company having been previously incorporated, the act of parliament passed on the 14th of August 1848; and they took no steps with reference to the land they required, for this portion of their intended line at least, until the 25th of June 1851, nearly three years after the royal assent was given to their bill, and nearly, therefore, at the expiration of the time during which they had a power, by compulsory process, of taking land on giving such notice within the time limited for that purpose by the act. They did give a notice to the present plaintiffs that the railway would pass through their land, and that 19½ perches would be required by the company; that it was their intention to take the same, and contract for it; and they thereby offered to contract for the purchase of the plaintiffs' interest, and for compensation for damages, &c. It was such a notice as was required by the act to be given by the company when they wished compulsorily to take land belonging to another person, through whose land the railway was to pass. The plaintiffs, upon the receipt of that notice from the company, delivered a counter-notice, claiming, that if the company took the piece of land which they proposed to take,—a small portion of that which the plaintiffs alleged to be their manufactory,—then they would require the company to take the whole of the manufactory; and that counter-notice which they gave was authorized, as they contended, by the 92nd section of the

general act, the Lands Clauses Consolidation Act, and which provides shortly, "That no party shall at any time be required to sell or convey to the promoters of the undertaking" (that is, of the railway) "a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof." The company disputed their obligation to take the whole, and contended that they were entitled to take a part only, which was included in their notice, namely, about nineteen perches, being the little portion that ran to the southern end of what the plaintiffs called their manufactory, skirting along the Stour Valley Railway. In this state of things, on the 10th of September 1851, the plaintiffs filed their bill for an injunction to restrain the defendants (the company) from proceeding to take a part only. That was substantially the object of the injunction.

An application was made, shortly after to the Vice Chancellor Turner, to obtain an interim injunction; but His Honour did not grant that injunction, thinking, amongst other grounds for his refusal, that the 92nd section of the general act did not form part of the company's act; that it was not by implication incorporated with it; and there were other grounds also upon which he refused to grant the injunction. The plaintiffs appealed from that decision, and the case was argued, at considerable length, in the month of February last, and on that occasion the Lords Justices considered that all they had then to decide was, whether a sufficient case was made out to make it expedient that, in the mean time, and until the cause could be heard, the defendants should be restrained from doing what they were proposing to do, and that matters should be left *in statu quo* till the cause was heard; and, thinking that it was expedient, they therefore granted an interim injunction; and, at the same time, by arrangement with the parties, gave them a facility to have the cause heard speedily, both parties agreeing that, instead of examining witnesses, each party should make what affidavits he thought fit, and those affidavits should be treated as evidence in the cause, and that the cause should be set down to be heard

before their Lordships speedily, and not in the ordinary course.

Sir W. P. Wood, Mr. Malins, Mr. Shapter, and Mr. Gray, for the plaintiffs, cited the following cases:—

Brocklebank v. the Whitehaven Junction Railway Company, 15 Sim. 632; s.c. 16 Law J. Rep. (N.S.) Chanc. 471.

Barker v. the North Staffordshire Railway Company, 2 De Gex & Sm. 55; s.c. 5 Railw. Cas. 401.

Mr. Bethell, Mr. Roli, Mr. J. W. Bovill, and Mr. Willes, for the company, after referring at length to the 12th, 13th, and 14th sections of the special act, which will be found fully stated in the judgment, argued that there would be an absurdity to suppose that the legislature intended the clause in the general act to be incorporated into the special act, the effect of which would be that if the company took part of the Messrs. Sparrow's tin-plate works they must take the whole, and taking the whole they must build arches, make roads, maintain ways, and perform other important acts to their own property, whether they intended or wished to use that property in such manner or not; and that, on the other hand, there was obvious common sense in excluding the 92nd section of the general act from the special act; because, then, all these particular clauses of the special act would be operative to protect the interest of the landowner, his protection and benefit being the grounds for their insertion by the legislature. It was further contended that so much of the land as the company required was no part of the manufactory at the time of the passing of the special act; and, therefore, that the plaintiffs had no right to build on and so deal with this land as to render it so. The land was land, and only land, when the act passed, and if it was rendered something more by the act of the owners they could claim no benefit of such conduct. Lastly, it was argued that as the company only now intended to make a tunnel under the land, instead of over the surface, there was no interference with the entire superficial uses of the land, and therefore the only objection to the taking of the land was utterly untenable. Such a taking of land under the surface

was not a taking of part of a manufactory contemplated by the Lands Clauses Consolidation Act. They cited the following cases:—

Taylor v. Clemson, 3 Railw. Cas. 65, 725.

Doe d. Armistead v. the North Staffordshire Railway Company, 20 Law J. Rep. (N.S.) Q.B. 249.

Regina v. the London and South-Western Railway Company, 12 Q.B. Rep. 775; s.c. 17 Law J. Rep. (N.S.) Q.B. 326.

Sir W. P. Wood was not called upon to reply.

LORD JUSTICE LORD CRANWORTH, after detailing the facts, said,—The question now is, upon this hearing, whether or not the plaintiffs have entitled themselves to the relief which they ask. There are two main questions for consideration: one a question of fact, and the other a question of law. The question of fact is this: whether that which the defendants propose to take does, within the meaning of the general act, constitute a "part of the manufactory;" and, secondly, the question of law is, supposing it to constitute part of the manufactory, are they enabled to take it without taking the whole? Now, on the question of fact, that again divides itself into two questions: one of which is, perhaps, rather a question of law and of fact, arising out of the consideration of that which is mere fact.

What they propose to take is, a certain piece of land enclosed within the wall that surrounded the manufactory, but which, at the time the act passed, was not covered with buildings, though it was within the wall of that which is called the manufactory. Soon after the passing of the act (the plaintiffs having made their purchase just before the act passed) considerable additional buildings were put upon that piece of land, which was vacant at the time the act passed, or the greater portion of it was vacant; the whole, probably, was vacant when the act passed; additional buildings were put upon it, and there can be no possible doubt but that these additional buildings constitute part of the manufactory in the strictest sense; but then it was contended, that what was to be looked at was,

not the state of matters when the company proceeded to take the land, but the state of the property at the time when they gave the notice; and it was said, at that time those buildings did not exist; at that time it was vacant ground, within the wall, it is true, of the manufactory, but not having any manufacturing process carried on upon it, and therefore not constituting, within the meaning of the act, part of the manufactory. Now, we do not feel it necessary to decide the question, as a matter of law, whether what is to be regarded is the state of the property at the time the act passed or at the time when the land was taken by the company. We do not consider it at all necessary in the case to look at or to discuss that question; because we are both most clearly of opinion, without the least difficulty or hesitation, that this was, to all intents and purposes, part of the manufactory at the time the act received the royal assent; and we think so, as a jury coming to the conclusion what did or did not, at that time, constitute a part of the manufactory. Well, on all these questions there may be nice lines sometimes, on which it may be difficult to say on which side of the line a particular piece of land or a particular building lies; whether it be outside, so as not to be part of the manufactory, or inside, so as to be part of the manufactory. But we do not feel ourselves driven to any refined discussion about this case, because, looking at the model submitted to our inspection, which is agreed to be an accurate representation, it appears (I speak this only for myself) that there is singularly little of vacant space within the wall. I can easily believe what one or two of the witnesses said, that they were always pressed for room in order to have a place where they might deposit their rubbish and the scoria that came from the furnaces. The manufactory could not go on without that, any more than it could go on without the furnace itself. It seems to me, and I am sure also, to my learned Brother, to be perfectly clear that, in this case, everything included within the wall constitutes part of the manufactory. Sometimes there is a little vacant space between the buildings and the wall, which is meant for the purpose of enclosing and sur-

rounding that which evidently, and popularly, and rationally constitutes part of the manufactory. Therefore, it seems to me to be perfectly immaterial to consider whether the buildings were on that vacant space after the act received the royal assent, or whether we are to consider the state of the property after the buildings were erected, or before, because, whether considered in the one light or the other, they clearly constituted part of the manufactory, within the only rational meaning that could be attributed to that word.

Then, constituting part of the manufactory, the company giving notice that they would take a piece of land that constituted part of the manufactory, are they, or are they not, bound to take the whole of the manufactory? Now, that depends upon a question of law, whether or not the 92nd section, which I have already read, was or was not, expressly or impliedly, incorporated into the special act (11 & 12 Vict. c. cxxxiii). Now, Mr. Willes referred to the language of the Lands Clauses Act itself, to shew (as if that was the test) whether it was incorporated or not. It may be one mode of ascertaining it; but it is not the best mode. The best mode is to look at the special act, and see what the special act says. The second clause of that act says, "Be it enacted, that the provisions of the Lands Clauses Consolidation Act shall, so far as the same are applicable, and are not inconsistent with the provisions hereinafter contained, be incorporated with and form part of this act." Now, it is not disputed that the provisions of the 92nd section are applicable in the sense in which the words are thus used; but what was contended was, that the 92nd section was inconsistent with the provision thereinafter contained; and it is upon that point that we have had—the greatest difficulty I will not say,—but I will say the greatest pressure upon our minds; because it appears to have been the opinion of a Judge of the highest eminence, and for whom we both, in common with all the profession, feel the most profound respect, that it was not incorporated with the act; therefore we have felt very diffident (I speak for myself, and, I may say, my learned Brother is diffident) of the opinion we have formed; and the reason

is, because it certainly clearly appears to us that it is to be decided in the contrary way from that which Vice Chancellor Turner decided. We thought it almost clear from the beginning, that there was nothing in any of the subsequent provisions inconsistent with the notion of the 92nd section being incorporated in that act; and I proceed, therefore, shortly to see what are the grounds on which it was contended, here and before the Vice Chancellor, that the 92nd section was not incorporated as being inconsistent with the act.

Now, I think the argument has always proceeded upon a fallacy. It was assumed that the 92nd section was imperative; it was assumed that the enactment was, that they must take it; whereas it only is, that they must take it if the other party requires it to be taken; but it would have been the height of injustice to enact that in all cases they must take it *in invitum*. The owners of the manufactory might say, in many cases, "It is quite immaterial whether you take the whole or not; it is immaterial to us whether you take merely this part or the whole;" and then they are not bound to take the rest. It seems to me, the whole argument on the part of the defendants has proceeded on this fallacy; for when one looks at the different arguments which have been deduced from the 12th, 13th, and 14th sections, and considering that the 92nd section is not that under all circumstances the land must be taken, but only that it must be taken if the owner of the manufactory requires it to be taken, all the difficulty appears to me to vanish.

The 13th section, which was mainly relied on, has enactments to this effect. It appears that a gentleman of the name of Crane was the owner of other adjoining land to this manufactory, and by arrangement between the plaintiffs (the owners of this property) and Mr. Crane, for their common convenience, it was arranged that there should be a side line, as it is called, a little private railway, that was to run on for the accommodation both of the plaintiffs' works and Mr. Crane's, for a considerable way down to the west, so as to join, not this railway, but the Stour Valley Railway, evidently with a view to the accommodation of those

parties who were interested in that side line or private railway. The 13th section enacted, "that such part of the railway by that act authorized to be made as should pass through any of the several plots, pieces, or parcels of land, in the parish of Wolverhampton, &c., numbered 159, 160, 161, and 162, on the plan, and so much of the piece of land numbered 158 as was thereafter defined," (that is, those pieces of land on which this side line or private railway was to be formed,) "should be arched or covered over, &c.; and such arching or covering should commence at the centre of the south-eastern pier of the sixth arch of the Birmingham, Wolverhampton and Stour Valley Railway Viaduct now erecting, &c.; and such arching or covering should be contrived in such manner and of such strength as should make it sufficient to bear and carry over and upon the same a branch railway, or branch railways to be worked by horse power; and in case the owner or owners for the time being, and other parties interested in the said plots, pieces or parcels of land, and the said company should differ as to the manner of constructing, or as to the strength of such arching or covering, the same should be settled by arbitration in manner prescribed by the Railways Clauses Consolidation Act, 1845, with respect to the settlement of disputes by arbitration."

Now, the argument was, that that provision is inconsistent with the notion that the company should take the whole of this manufactory; if so, it was said, for what purpose make an enactment about making a railway, which will in truth be their own railway? They might deal with it as they thought fit. But there are two answers to that: first, the answer I have already hinted at, namely, that *non constat* the railway company would be called upon to take the manufactory, it might be that the plaintiffs might choose to retain their manufactory, and then this secures to them the benefit; and secondly, there is another argument which completely satisfies this clause, which is this, that this side line or private railway was not for the exclusive benefit of those parties: certainly *one* other proprietor, Mr. Crane, was interested. I do not know that I rightly collected whether any other persons were or not—it is

quite immaterial. There is no doubt the party mainly interested was Mr. Crane; therefore, the provision in the 13th section was absolutely necessary to secure Mr. Crane if there is nobody else interested in the private railway—it was absolutely necessary to secure the interests of the plaintiffs if they should not call upon the defendants, under the 92nd section, to take the whole of the manufactory. Therefore, it seems to me that there is nothing whatever inconsistent with the 13th section in supposing that the 92nd section was to have its full operation.

With regard to the 14th section, it is thereby enacted "that the owner or owners for the time being of the said several plots, pieces or parcels of land last hereinbefore mentioned, and all other persons interested therein, shall have and enjoy the same powers, rights, privileges, easements and authorities over and above and upon the upper surface of the said arching or covering, including the power of making, maintaining and working the said branch railway or railways, to be worked by horse power as aforesaid, over and upon the said arching or covering as the said owner or owners or other persons now have and enjoy in, upon and over the said several plots, &c., provided always, that the said owner or owners or other persons shall not be at liberty to erect upon the said arching or covering any building or buildings without the consent in writing of the said company," &c. Now, it is argued that what the 14th section shews is this, that it is impossible that the 92nd section can be considered as incorporated, for this reason, when this railway was made there was a provision in the 14th section, that no buildings should be erected upon the new side line or private railway (which included part of that which therefore is now to be taken from the plaintiffs) without the consent, in writing, of the company. They would be running over this railway, therefore the company were interested in seeing that nothing should be done to damage them. For what purpose, it is said, stipulate for that, if the company itself is to become the proprietor of the manufactory, as an adjunct to which the private railway is to be erected? But the same answer applies. The company may become the proprie-

tors, and then this would become superfluous. Of course they could not give a consent in writing to themselves. They may do what they think fit with their own property. It may be that they may not become the proprietors, then such stipulation is necessary.

Then, again Mr. Willes has particularly directed our attention to the 12th section, which he says is inconsistent with the notion that the 92nd section was part of this act. The 12th section provides that certain properties as they are called, numbered respectively 90, 91, 130, 131 and 140 (being, I will assume for the present, all of them manufactories; they are all either houses or manufactories, or something that would come within the same class as that which is referred to in section 92.)—the 12th section enacts, that the company shall, and they are hereby required to purchase all these properties, being all included within the line of deviation, but not apparently according to the parliamentary plan that was handed up to us, not the properties that would be taken, unless there should be a deviation from the intended line of railway. Then, it is said, for what purpose do you enact that these particular manufactories should be taken when the 92nd section would have effected all the purposes? That is a complete fallacy. The 92nd section only gives authority to the owner of a manufactory to insist upon the whole being taken if any part is taken, while this enactment, as to the properties numbered 90, 91, 130, 131, and 140, positively stipulates that they shall take the whole of it. It is obvious on looking at the plan, that a large portion of this must have been taken in some way to stop the mouths of the opposing parties, who were the owners of properties, because they cannot use them all for the purposes of the railway; they are all along out of the line that was contemplated, though within the line of deviation; and therefore, I conclude, it was to buy off opposition that this enactment was introduced. It is sufficient for the purposes of the present object to say, that it is a perfectly different enactment from the 92nd section. The 92nd section does not say that you shall take every manufactory that is within your line of deviation; but

it says, if you take a part of the manufactory you shall, if the owner wishes it, take the whole of the manufactory. What is enacted by the 12th section is different, namely, with regard to five several manufactories within the line of deviation, but not probably in the line that will be touched by the railway, you shall take and pay for those whether you use them or not. It appears that this also wholly fails as a reason for inducing us to suppose that the 92nd section is inconsistent with the provisions of this act. * * Now, that being the state of the case, the conclusion at which we have arrived is, that, in point of fact, the property that the railway company has given notice to take was, at the time they gave the notice, part of the manufactory, and that the 92nd section entitles the owners of the remaining part of that manufactory to insist upon the whole being taken.

The only remaining question (which has now been raised for the first time—it came upon us entirely by surprise), is that, although they had given notice in the ordinary way that they meant to take the land, they are now entitled, if they cannot take the land, to burrow under it as it were, to make a tunnel, which they say they are able and willing to do without taking or touching any part of the surface. It is a sufficient answer to that argument to say, that it has been raised since the matter was before us, and since we granted the interim injunction. The notice is a notice which entitles them to take the land if they are not restrained from proceeding under that notice. Many arguments were urged to shew the title of the defendants to make a tunnel. It was said, suppose the manufactory was at the top of a hill, and you were burrowing under it at the distance of 1,000 feet, are you then taking part of the manufactory? I do not feel myself called upon to answer that question; but if I were, I rather believe that you are, on the principle of the maxim "*Cujus est solum ejus est usque ad inferos.*" Do you mean to say that if you were an inch below the surface you would not take a part of the manufactory? It might all fall down if you undermined any portion of it; and I am rather inclined to think that, however

deep below, it would be within that enactment. If that has been a *casus omissus*, I think it ought to be construed in a way most favourable to those who have been seeking to defend their property from innovation. I do not think that arises, because here is a notice to take the land, and upon that notice they are proceeding to take it in the ordinary way. That is virtually what was contemplated when the notice was given; and it is perfectly obvious from the language of the bond they gave, that that is what they are to do; for they have given a bond under the 83rd section to enter, and in that bond they have stated thus, that 150*l.* has been assessed as the value of the purchase in fee simple of the messuage, tenements, hereditaments, and the several lands mentioned numbered 161, and that 350*l.* has been assessed as the value for severance. It is perfectly obvious that what is meant is, that they are to take land, and pay 150*l.* for the value of the building, and 350*l.* for the inconvenience occasioned by the severance. This is the way they put it themselves; and I cannot but come to the conclusion that this is a mere afterthought. I do not think they would have the liberty of doing it, unless they had given a proper notice for the purpose; but it is quite obvious either they are entitled under this notice to take the land or to do nothing.

I think, therefore, the plaintiffs are entitled to the relief they ask. The injunction, therefore, will be made perpetual in the terms in which it was made before, except with this suggestion: that there should be something, I think, of this sort:—the plaintiffs being ready and willing, and undertaking to make a good title to the same, and to convey the same. I suppose there will be no difficulty about that. Of course, if they have not a good title to the manufactory they will not be able and willing to convey it.

LORD JUSTICE KNIGHT BRUCE.—I have but a very few words to say after what Lord Cranworth has said, being very clearly of opinion that the plaintiffs are entitled to a decree,—perhaps the few words I am about to say are superfluous. I continue to entertain an opinion differing

from the judgment which I hold in the highest respect and estimation, upon the question of the effect of the 12th, 13th and 14th sections. I am of opinion for the mere reason that it is competent to the plaintiffs, if they should think fit, to sell part and not the whole, that those three sections do not prevent the application or incorporation of the 92nd section in the special act. I am, however, clearly of opinion, upon the undisputed facts of the case, that, whether the state of the property at the time when the notice of June last was given, or at the time of the passing of the special act, is regarded for the purpose, the land which the company require is part of the plaintiffs' manufactory within the meaning of the 92nd section, incorporated, as I have said that I think it is, in the special act. * *

Then, with regard to the design now said to be practicable, and intended, of carrying the railway under the surface of the land in question, in such a manner as not to disturb or interfere with it, one sufficient answer to that has been stated independently of others that might be given, which is this, that the notice of June was a notice to purchase merely and absolutely the fee simple of the land specified in it. That notice (whether amounting to a contract or a declaration of intention, forbidden by law to be receded from, is of no importance) had the effect of a contract, and, moreover, the effect of giving the plaintiffs the right to say that their lands should not be taken, that their land should not be used (I mean the land mentioned in the contract), unless if they desired to sell the whole of the manufactory, the defendants should purchase it. From that position the defendants, however desirous to recede, are, in my opinion, not entitled to recede.

Substantially, therefore, I agree entirely that the decree must be with the plaintiffs; and I believe that my learned Brother also agrees with me, that these defendants ought to pay the costs of the suit, including the costs of the original motion for the injunction.

LORDS JUSTICES.
1852.
Feb. 27.

WELLESLEY v. WELLESLEY.
THE COUNTESS OF MORN-
INGTON v. THE EARL
OF MORNINGTON.

Married Woman suing in Formâ Pauperis
—Costs.

The Court of Chancery having given a married lady leave to sue in formâ pauperis, on evidence that she could not procure a next friend, made a decree in her favour. One of the defendants appealed, but the appeal was dismissed, with costs:—Held, that the appellant defendant must pay the lady herself the costs.

On the 23rd of July 1848, the Countess of Mornington, then living apart from her husband, obtained from the late Vice Chancellor of England leave to sue *in formâ pauperis*, on an affidavit of her poverty, and that she was unable to procure any one to act as her next friend. In the month of July 1849 the two above-mentioned causes came to a hearing, the question being whether the lady had a right to have all the means which were put in the power of Lord Mornington (one of the defendants), acted upon by Lord Wellesley, his son by a former marriage, (the other defendant), so as to carry into effect as far as possible a certain agreement, under which Lady Mornington would be entitled to an annuity of 1,000*l.* a year, when the same learned Judge decided in the lady's favour. From this decree Lord Wellesley appealed; but, after hearing arguments, their Lordships, being of opinion that there was "no colour, no shadow, no pretence for the appeal," agreed that it must be dismissed, and, if possible, with costs. Counsel were, therefore, directed to argue the question whether the lady, a peeress of the realm, having sued as a pauper, could claim her costs on the dismissal of an unsuccessful appeal, in the usual way.

Mr. Bethell, Mr. Lloyd, and Mr. Nalder, for the appellant, submitted that the plaintiff, suing in formâ pauperis, was only entitled to such costs as she had sustained out of pocket; but no cases were cited.

Mr. Rolt, Mr. Willcock, and Mr. Free-ling, for Lady Mornington, argued that being successful, her ladyship was entitled to the costs in the same manner as any other suitor, and relied on, as a modern authority, the case of *Rubery v. Morris*(1), where Lord Cottenham laid it down that it was "most consistent with principle, and most reconcileable with the weight of authority, to hold that any party asserting an unfounded claim by a bill, or resisting a well-founded claim by answer, should not profit by the poverty of his opponent, but should, upon failure, pay the ordinary costs of the litigation."

LORD JUSTICE KNIGHT BRUCE.—The reason is plain enough: professional men are engaged to afford their aid and experience to the pauper, and not to the pauper's opponent. These costs ought, in my opinion, according to the weight of authorities, to be *dives* costs; but then comes the difficulty, there being no next friend to whom they are to be paid. The Countess is a married lady, and therefore the Earl would be entitled to the money when paid. I can hardly conceive it possible that Lord Mornington will interfere with their receipt.

Mr. Lloyd.—Lord Wellesley, the unsuccessful appellant, is in this difficulty: that he is ordered to pay costs, and, confessedly, the hand to receive those costs is uncertain. He may incur hazard of double payment should he pay to the wrong person.

LORD JUSTICE LORD CRANWORTH.—If the Court had authority to permit Lady Mornington to sue without a next friend, and that authority has not been called in question, it has now authority to do all necessary acts consequential upon it. The costs must be the usual *dives* costs, and the order will be made in the ordinary way: and, on the one hand, if there be any difficulty raised whether Lady Mornington can receive them, her ladyship can come to the Court, while, on the other hand, if Lord Wellesley finds any difficulty

on the point spoken of on his behalf, he, too, can come here, and this Court will hear him. At present the order is, that the appeal be dismissed, with costs.

LORDS JUSTICES. }
 1852. }
 March 30. }

In re RICHARDS.

Lunacy—Leave to attend Inquisition.

A party interested under a deed executed ten years back was allowed to attend the execution of a commission de lunatico inquiring when the lunacy was alleged to have existed for a period antecedent to the date of the deed, but upon an undertaking to abide by such order as the Court might make as to the party's own costs and the increased costs occasioned by the attendance at the inquisition.

The petition in this case was presented by an infant by his next friend, which stated that a commission *de lunatico inquiring* had been issued against Mr. Richards, of which the petitioner had received no notice, and of which he had only casually heard within the last three days; that the commission was issued on an allegation of a lunacy having existed for thirty-five years; that Mr. Richards, the alleged lunatic, had, by deed, dated the 14th of January 1842, made a settlement of his property, whereby, after reserving a life interest to himself, he settled a life interest on the father of the petitioner, then a life interest on the infant himself, and then declared various trusts over for the benefit of other parties; that the commission was issued at the instance of a first cousin and of a third cousin of the alleged lunatic, and that the petitioner was the child of a first cousin; that the petitioner's father was dead, and that the petitioner was therefore interested in the property, subject only to the life estate of the alleged lunatic; that the day appointed for the holding of the inquisition was the 1st of April then next, and that the petitioner feared great injury would result to him unless he were permitted to be represented at the hearing of such commission, and he

(1) 1 Hall & Tw. 400; a. c. 1 Mac. & Gor. 413; 18 Law J. Rep. (N.S.) Chanc. 444.

therefore prayed leave to attend accordingly.

Sir W. P. Wood and *Mr. Locock Webb*, in support of the petition.—In *Re Nesbitt* (1), before Lord Cottenham, the rule is recognized, which is not now denied, that mere relationship without interest will not give a title to ask leave of the Court to be present at the execution of a commission. But his Lordship, on a petition by parties who were interested under a settlement, praying for leave to attend, distinctly declared that the application was in the discretion of the Court, and added, "It is for the interest of all parties that the truth should be ascertained; and therefore, although it occasions some additional expense, unless the estate be a very poor one, it is desirable that they should have leave to attend." That this infant has an interest no one can dispute, and a very material interest too, and that there is hazard of that interest not being properly protected except by an attendance on his behalf is but too probable, since he had no notice of the issuing of the commission.

Mr. Karlake, contra.—The only recognized ground for the allowance of any party to attend at the execution of an inquisition such as this, is the protection of the interest of the alleged lunatic; and so it is laid down in *Ex parte Snook, in re Watts* (2), by Lord Lyndhurst, where his Lordship said he would not be the first to make an order giving leave for the attendance of a party whose object was not to shew that the person was not insane, but to fix a particular date to the commencement of the lunacy, with a view to his own interest, and not to the interest of the lunatic. And on a subsequent day and on another petition in the same matter, Lord Lyndhurst said, "I do not think there is any case to be found in which a party has been allowed to intervene for an object of the kind here stated, I mean where the object is not to benefit the lunatic, but the party himself who makes the application." That case seems from the report not to have been mentioned again. Now, the allegation of this petition that the petitioner

fears that great injury will result to him if the execution of the commission be not attended on his behalf, shews that the purpose was not the benefit of the alleged lunatic, but the advantage of some other party; and therefore, on the authority of *Ex parte Snook* and of *Ex parte Newbury* (3), recognizing the same principle, the petition ought to be dismissed.

LORD JUSTICE KNIGHT BRUCE.—Speaking for myself I should have been disposed, without the authority cited in support of the petition, to grant the prayer. My impression is, that, as counsel, I have been engaged to attend the execution of an inquisition for the sole purpose of seeing that the lunacy was not carried back beyond a certain date, my clients being no further interested than in that fact. Here the purpose for which the attendance is sought, is plain. If the petitioners will undertake to abide by any order the Court may make as to costs—not only their own costs, but the costs so far as they may be increased by their attendance at the inquisition—I am disposed to give leave to the infant by his next friend to attend. I do not say I should not have acted upon the reasoning given in the petition; but the fact that the lunacy is said to have existed for thirty-five years is quite sufficient for me.

LORD JUSTICE LORD CRANWORTH.—I consider that the order should be made on the undertaking spoken of by my learned Brother being given. The object of the attendance—a very reasonable object—of course is, to prevent the finding of the jury overriding the settlement.

Sir W. P. Wood.—The undertaking is given, and the order, therefore, will be as prayed.

PARKER, V.C. }
April 16. } ALCOCK v. ALCOCK.

Married Woman, Next Friend of—Security for Costs.

The next friend of a married woman went to reside abroad. The defendant was held

(1) 2 Phill. 245.

(2) 1 Ibid. 512; s. c. 14 Law J. Rep. (N.S.) Chanc. 241.

(3) Referred to 1 Phill. 513.

entitled either to security for costs from this next friend, or to have a new next friend appointed.

The next friend of a *feme covert* went to reside in America.

This was a motion, on the part of the defendant, that the next friend might give security for costs, or that a new next friend might be appointed.

Mr. Anderson, for the motion.

Mr. Cole opposed it, and cited *Drinan v. Mannix* (1).

PARKER, V.C. said, that there was no difference in this respect between a next friend and a plaintiff. Security for costs must be given, or a new next friend must be appointed, and that the proceedings in the mean time must be stayed.

PARKER, V.C. }
 April 27. } WILSON v. BENNETT.

Will—Construction—Power of Sale—Devise of Trust Estates.

A. devised freehold and leasehold estates to B. and C, their heirs, executors, administrators and assigns, with a power for B. and C, or the survivor of them, his heirs, executors and administrators, to sell the devised property. A. survived B, and died, leaving C. his heir-at-law, and having by his will devised all his trust estates to C. and D, and appointed them his executors:—Held, that neither C. alone, nor C. and D. together, had the power of selling estates devised by A.

The case of *Wilson v. Bennett* is reported in 20 *Law J. Rep.* (N.S.) *Chanc.* 279.

After the decision in that case had been pronounced, it was ascertained that S. Wilson was the heir-at-law of the surviving trustee. The special case was amended by inserting that fact, and was set down to be argued again.

The case then assumed this form.—N. Hyde devised his real, personal, copyhold, and leasehold estate to J. Hyde, J. Wilson, and J. Leigh, their heirs, executors, ad-

ministrators and assigns, and empowered his trustees, and the survivors and survivor of them, his heirs, executors and administrators, to sell his said property. J. Wilson survived the other trustees, and died leaving S. Wilson his heir-at-law, and having, by his will, appointed S. Wilson and P. Wilson to be his executors, and devised to them all the estates vested in him on trust.

The question argued was, whether S. Wilson, as the heir of the surviving trustee, and S. Wilson and P. Wilson, as the devisees of the trust estates, could compel a purchaser to take a title from them.

Mr. Malins and *Mr. Humphry*, and *Mr. Russell* and *Mr. Hardy*, and *Mr. Osborne*, for the different parties.

The following cases were cited—

Bradford v. Belfield, 2 Sim. 264.

Cooke v. Crawford, 13 Ibid. 91; s. c. 11 *Law J. Rep.* (N.S.) *Chanc.* 406.

Tilley v. Wolstenholme, 7 Beav. 425; s. c. 13 *Law J. Rep.* (N.S.) *Chanc.* 410.

Miller v. Priddon, 18 *Law J. Rep.* (N.S.) *Chanc.* 226, affirmed by the Lords Justices, *supra*, 421.

PARKER, V.C. said, that the case of *Cooke v. Crawford* had often been misunderstood. It was not an authority that a trustee ought not to devise trust estates, but that, if a trustee had an estate and also a power, he might devise the estate, but could not devise the power. The present title was too doubtful to compel a purchaser to accept it. The power was intended to be exercised by the persons who had the estate; and, now that the estate and power had been severed, the persons who entered into the contract had not the power to sell the estate. The contract could not be enforced.

PARKER, V.C. }
 July 8. } FOOTNER v. STURGIS.

Judgment Creditor—Foreclosure—Sale.

On a claim by a judgment creditor against his debtor in respect of certain real estate be-

(1) 3 Dr. & War. 164.

longing to the debtor, the Court refused to give a decree of foreclosure.

This was a claim filed by a judgment creditor seeking to have the benefit of his judgment against some real estate belonging to the debtor.

Mr. Hallett, for the plaintiff, asked for a foreclosure, and cited *Ford v. Wastell* (1), in which case it appeared that a decree for foreclosure had been made at the instance of a judgment creditor.

PARKER, V.C. declined to give a decree for foreclosure, and made an order for the sale of the property.

KINDERSLEY,	}	WIGGINS v. WIGGINS.
V.C.		
April 30;		
May 5.		

Will—Construction—Residuary Bequest—Children living at Death.

A testator gave to his wife all his stock in trade, working jewellery and implements of every description whatsoever, and all his book debts, ready cash, money in the funds, bills, bonds, notes, or other securities whatsoever, for her life, if she should so long continue his widow; but at her death, or second marriage, he gave the said stock in trade, monies, debts and assets, and also all his household furniture, to be equally divided among the children he then had, or might thereafter have. But in case his wife should not marry again, then the testator bequeathed to her, all and every his personal estate and effects whatsoever for her life, and the same to be equally divided amongst such of his children as should be living at her decease, share and share alike:—Held, that the first clause in the will was not intended to be a specific bequest, and the last a residuary bequest; but that both clauses were intended to deal with the whole property, and were applicable to different events: the first applying to the testator's widow marrying again, the latter to her dying without marrying again; and the latter event being the

one which happened, the children living at her death became entitled, to the exclusion of the representatives of those who had died.

A question was raised in this case upon the construction of the will of *Clarke Wiggins*, a working jeweller, dated the 17th of September 1809, which was in the following terms:—"First, I will and direct that all my just debts, funeral expenses, and the expenses of proving this my will be fully paid and discharged by my executrix hereinafter named, as soon as conveniently may be after my decease. And I hereby give and bequeath to my dear wife, *Ann Wiggins*, all and every my stock in trade, working jewellery and implements of every description whatsoever, and also all my book debts, sum and sums of money due or owing to me from any person or persons whomsoever, all the ready cash that may be in my house at the time of my decease, money in the public stocks or funds, bills, bonds, notes, or other securities whatsoever, for and during the term of her natural life, if she shall so long continue my widow. But it is my mind and will that at her death, or in case she marry again after my decease, then that the said stock in trade, monies, debts and effects, and also all my household furniture, which I hereby give to her for her sole use and benefit, for and during the term of her natural life, if she shall so long continue my widow, shall belong to, and I do hereby give and devise the same to be equally divided, share and share alike, among the children that I now have, or may hereafter have by my said wife. But in case my wife, *Ann Wiggins*, shall not marry again after my decease, then I do hereby will and direct that she shall peaceably have and enjoy, and I do hereby give and bequeath to her all and every my personal estate and effects whatsoever, for and during the term of her natural life, and the same to be equally divided to and amongst such of my children as shall be living at her decease, share and share alike. And I do hereby appoint my said dear wife sole executrix of this my will; hereby revoking all former wills by me at any time heretofore made."

The testator died soon after the date of his will (which was proved on the 5th of October 1809), leaving his widow and

six children surviving him. A suit was then instituted by the children against their mother for an account, and upon a decree in the suit, the property of the testator was ordered to be brought into court. The widow having lately died, leaving three children only surviving her, the said three children presented a petition, praying that they might be declared entitled to the money equally between them. This was opposed by the representatives of the three deceased children who claimed to be entitled to share in the property.

Mr. Mahns and *Mr. Eddis*, in support of the petition, contended that there were two distinct clauses in this will. In the first, provision was made by the testator for his widow marrying again, and in that case all his children were to share equally in the property; but, in the second clause, the testator provided that if his widow should die without marrying again, those children only who should be alive at her decease were to take. It was clear that the testator intended to give the whole of his property in both clauses. The second event contemplated was that which happened, and consequently the petitioners, who were the only children alive at the death of the widow, would be entitled to the whole of the property, equally to be divided between them.

The following cases were cited:—

Sherratt v. Bentley, 2 Myl. & K. 149.

Morrall v. Sutton, 1 Ph. 533; s. c. 14 Law J. Rep. (N.S.) Chanc. 266.

Mr. Chandless and *Mr. Fisher*, contra, submitted that the evident intention of the testator was to provide for all his children; but if the latter clause were to prevail, independently of the first, the issue of deceased children would be wholly unprovided for. The first clause was, in fact, a specific bequest, and the latter clause was a residuary bequest. If it were held that both clauses comprised the whole of the property, then they would be repugnant, and the general intention of the testator must be collected from the whole will. There could be no reason for supposing that, in the event of his widow marrying again, the testator meant to give

the property to all his children, but if she should not marry again, then only to such children as were living at her death: such an intention would be repugnant to common sense.

The following authorities were cited:—

Cook v. Oakley, 1 P. Wms. 302.

Rawlings v. Jennings, 13 Ves. 39.

Sims v. Doughty, 5 Ves. 243.

Judgment reserved.

May 5.—*KINDERSLEY*, V.C.—This will is very inartificially and inaccurately drawn, but one thing is clear, namely, that it was the testator's intention that his widow was to have the whole of his personal estate during her life, provided she so long continued his widow; and after her death, or after her second marriage, it is also clear that he meant the property to go to some class or classes of his children, either to all, or to some class; and with regard to the benefit which he intended for the wife, it was that her life interest should be determinable on her second marriage.

Now, the last clause in the will is as distinct as it is possible for anything to be. "In case my wife shall not marry again, then I hereby will and direct that she shall peaceably have and enjoy, and I do hereby give and bequeath to her all and every my personal estate and effects whatsoever, for and during the term of her natural life." So far, nothing can be more plain and distinct, but that if she continues single and his widow after the testator's death, she is to have and enjoy the whole of his personal estate and effects whatsoever during the term of her natural life; then it goes on, "and the same to be equally divided to and amongst such of my children as shall be living at her decease, share and share alike." So far, of course, if there had been nothing more in the will it is clear that there never could be an argument raised on the question, and that is the very event which has happened.

But then there is the clause in the prior part of the will, on which the question is raised, whether that prior part of the will does not vary the construction which ought to be put on the plain words of the last clause. By that prior part of the will the

testator has purported to give to his wife (not in terms) all and every his personal estate whatsoever, by description, in this way, "all and every my stock in trade, working jewellery and implements of every description whatsoever," that is a specific portion; "also all book debts," that is another specific portion; "sum and sums of money, ready cash in my house," &c., that is another specific portion of the personal estate; "money in the public stocks or funds, bills, bonds, notes or other securities," and so on. In this manner he gives a variety of goods and chattels personal, not in terms, comprising the whole of his personalty; indeed, it is clear that he could not have intended to comprise the whole of his personal estate, because in the very next branch of the will he mentions another kind of personal property, which he knew that he had, and therefore merely meaning to describe some parts, "for and during the term of her natural life, if she shall so long continue my widow; but it is my mind and will that after her death, or in case she marry again after my decease, then that the said stock in trade, monies, debts and effects" (the whole of which he had before described), "and also all my household furniture, which I hereby give to her for her sole use and benefit, for and during the term of her natural life, if she shall so long continue my widow, shall 'belong to,'" (that is another specific portion of personal estate); "and I do hereby give and devise the same to be equally divided share and share alike among" (not the children living at her death, or at her second marriage, but among) "the children that I now have or may hereafter have."

Now, I observe, that the testator's will is dated the 17th of September 1809, the precise date of his death is not stated, but I find that the will was proved on the 5th of October 1809,—that is, the will was proved eighteen days after the date of the will, and I must, therefore, presume that the testator must have died almost immediately after making his will,—a very few days after; and I think, at least, that it is a fair presumption, that what his personal estate consisted of at the time of his death was precisely the same as at the execution of the will, nothing being shewn to the

contrary; and it therefore appears, and I think I may fairly assume, that it was the same personalty which he had just before been describing. It appears to me that I may fairly suppose that in the prior portion of the gift, although he describes it only by specific items, he did, in fact, describe *seriatim* the whole of his personal estate. I at first thought it possible that the prior gift was only a specific bequest, and the latter a general residuary clause; but I think I may fairly assume that the residuary clause would, in that case, have been expressed in special terms; here he says, "all and every my personal estate and effects whatsoever," and that is all that is capable of constituting a residuary clause; but looking at the whole of the will, the question is, whether the prior clause is not inaccurately expressed, in making that prior clause depend upon the residuary clause. Looking at the whole will, therefore, it appears to me that it was a very fair interpretation, which was suggested by counsel, that the first clause meant to apply to the case of the widow marrying again, and the second, not marrying again; but that both clauses meant to deal with the whole personal estate; why he should direct that if she did marry again, the property was to be divided between all the children, but if not, to go to the children living at her death, I confess I do not quite understand, although he might have had a reason: as it stands, however, it appears merely capricious, but it does not appear to me to be worth consideration. Then, it might have happened that a child might have married, died, and left issue during the widow's life, which would have been unprovided for; but that consideration is not enough to lead to the conclusion that the prior clause was merely giving specific portions, the remainder to be given by a residuary clause; and another consideration which tends to confirm my view is, that if, as the plaintiff contends, the latter clause is a residuary clause only, and the prior, specific; then, in the event of the widow marrying again, the residuary personal estate is entirely undisposed of during the remainder of her life; this would produce an intestacy, because the residuary estate would thus be undisposed of, but this is not, therefore,

conclusive. Upon the fair construction of the will, I think, there must be a declaration that, in the events which have happened, the whole personal estate, on the death of Ann Wiggins, should go to the three children who survived her.

KINDERSLEY, V.C. }
 April 21; } GRAY v. GRAY.
 May 8. }

Trust, Intention to create.

*A testatrix, by her will, gave 2,000*l.* stock to two trustees, in trust, to pay the dividends to the plaintiff for her separate use; and after making her will, she expressed her intention of giving a further sum of 2,000*l.* to the plaintiff upon the same trusts. One trustee died during the life of the testatrix; the surviving trustee transferred two separate sums of 2,000*l.* stock, at two different times, into her own name, and gave the plaintiff a power of attorney to receive the dividends upon both sums. There was evidence to prove that the trustee knew of the desire of the testatrix to give the second sum of 2,000*l.* to the plaintiff, and that the trustee had expressed her intention of carrying that desire into effect. The trustee afterwards became of unsound mind:—Held, that the second sum of 2,000*l.* so transferred by the trustee was sufficiently impressed with a trust in favour of the plaintiff.*

This bill was filed by Harriet Gray, a legatee under the will of Mary Margaret Cave, against the executors of the will, for the purpose of obtaining a declaration that a sum of 2,000*l.* reduced annuities, which had formed part of the testatrix's estate, was impressed with a trust in favour of the plaintiff. The testatrix, by her will, dated in November 1843, gave a sum of 2,000*l.* 3*l.* per cent. consols, part of a larger sum in the same stock standing in her name, to her brother, David Cave, absolutely. She also gave the sum of 2,000*l.* consols to David Cave and her sister, Cecilia Cave, in trust, for the benefit of the plaintiff, Mrs. Gray, who was also a sister of the testatrix, during the life of herself and her husband, for her separate

use; and if the plaintiff survived her husband, then the said 2,000*l.* stock was to be for her own use, but if she died in his lifetime, then the said stock was to fall into the residuary personal estate of the testatrix. And the residue of her personal estate the testatrix gave to Cecilia Cave.

After the date of the will, David Cave, the brother of the testatrix, died; and the bill alleged that the testatrix, previously to her decease, had intimated to Cecilia Cave, her sister and the only surviving trustee of her will, that, in consequence of the death of her brother David, she wished to alter her will, and to give the sum of 2,000*l.*, which she had bequeathed to David Cave, to the plaintiff, in addition to the other 2,000*l.* which she had given her by her will. That the testatrix was, for some months before her decease, in a very weak and infirm state of health, and had not sufficient strength, except at great personal inconvenience, to attend to any alteration in her will, but that she had exacted a promise from Cecilia Cave that the said 2,000*l.* so bequeathed to David Cave should be given to the plaintiff.

In support of these allegations, there was the evidence of W. Woodward, a nephew of the testatrix, who deposed that, after the death of the testatrix, and on the 29th of July 1845, he had accompanied his two aunts, the plaintiff, Mrs. Gray, and the defendant, Cecilia Cave, to the Bank of England, and was present when the said Cecilia Cave executed two transfers of stock, each of 2,000*l.* consols, which had formed part of the testatrix's estate, into her own name. That the transfers were effected by a stockbroker, named Chant, who at the time suggested that, as one of the sums of 2,000*l.* was to be held by the said Cecilia Cave in trust for the plaintiff, and the other sum of 2,000*l.* was for her own benefit, it would be better that the two sums should be placed in different stocks; and accordingly one of such sums was transferred in the name of Cecilia Cave into the 3*l.* per cent. reduced annuities and the other sum was allowed to remain in the 3*l.* per cent. consols. That upon the occasion of such transfers being made, the said Cecilia Cave stated to the deponent that she knew it had been the intention of the testatrix, Mary Margaret Cave,

to increase the legacy to the plaintiff to 4,000*l.* in consequence of the death of David Cave. That the testatrix had mentioned this intention to her upon several occasions, and had desired her to carry out this intention, saying, she wished her sister, the plaintiff, to have the other 2,000*l.* upon the same trusts as the original legacy bequeathed to her. The deponent further stated that the said Cecilia Cave had declared to him that she should carry out her late sister's instructions.

There was also evidence to prove that, on the 12th of August 1845, the said Cecilia Cave added 2,000*l.* to the said 2,000*l.* 3*l.* per cent. reduced annuities, making that sum 4,000*l.*; and that the plaintiff had ever since received the dividends upon the whole sum of 4,000*l.* under a power of attorney executed by Cecilia Cave. It further appeared that Mr. Chant, the stockbroker, was still living, but had become subject to infirmity of memory, and was unable to give any testimony regarding this transaction; and that Cecilia Cave had, since these transactions, become of unsound mind.

Mr. Walker and *Mr. Terrell* appeared for the plaintiff, and cited—

Ex parte Pye, 18 Ves. 140.

Thorpe v. Owen, 5 Beav. 224; s. c.

11 Law J. Rep. (N.S.) Chanc. 129.

Ouseley v. Anstruther, 10 Beav. 453.

Wekett v. Raby, 2 Bro. P.C. 386.

Mr. Willcock and *Mr. Taylor* appeared for the defendants.

Mr. Welch, for the residuary legatee.

Judgment reserved.

May 8. — KINDERSLEY, V.C. after stating the facts of the case, said — The question here is, whether the second sum of 2,000*l.* transferred by Cecilia Cave into her name in the Reduced Bank Annuities is so completely impressed with a trust in favour of the plaintiff that it can be enforced in a court of equity. When the case was argued, I felt some doubt about it; but I must confess that, after consideration, I have come to the conclusion, that there is a complete trust. There is no doubt whatever that the first sum of 2,000*l.*

3*l.* per cent. reduced annuities, which was bought and transferred into the name of Cecilia Cave on the 29th of July, was a complete appropriation of that sum to satisfy the legacy to the plaintiff given by the will, for it was transferred into her name as the sole surviving trustee. No doubt, if David Cave had been living it would have been placed in the joint names of him and of Cecilia Cave. By the evidence of Mr. Woodward (the nephew of the plaintiff and of Cecilia Cave), who does not appear to have any interest in the matter, it is sufficiently proved, as against Cecilia Cave, that it was the intention of the testatrix to have increased the legacy to the plaintiff, and that she meant to carry out what the testatrix had desired. Then it appears that on the 12th of August, after the first 2,000*l.* had been transferred, Cecilia Cave again went to the same stockbroker, Mr. Chant, and bought a second sum of 2,000*l.*, which was also transferred into her name, and she, at the same time, executed a power of attorney authorizing the plaintiff to receive the dividends upon the whole sum of 4,000*l.* The only doubt in my mind has been, whether Cecilia Cave parted with the stock. She certainly retained the legal title; but it is clear that the only way she had of carrying out what she herself said was the intention of the testatrix was by doing exactly what she did. She was the only surviving trustee of the will, and she was bound to place the additional sum in her name as trustee upon the same trusts as the original sum. It is true that she might have executed a deed declaring the trusts of both sums. That course, however, was not necessary with reference to the original legacy of 2,000*l.* in order to make the investment of it a due appropriation, and if not necessary for the original legacy, it was not necessary in order to constitute a trust in respect of the further sum of 2,000*l.* The rule is, that if the person creating the trust has distinctly expressed the purpose of his act, and has done all that is necessary to complete the intention, the Court will hold the trust completely imposed; and this case appears to me to come within that rule, since Cecilia Cave did all that was necessary to impress a trust on the stock in question. Since these transactions Cecilia Cave has

unfortunately become of unsound mind; and Mr. Chant, the stockbroker, who might have proved the transaction, has become subject to an infirmity of memory, so that I must decide the case upon Mr. Woodward's evidence, which is confirmed by the transactions themselves. Under all the circumstances, I shall make a declaration that the second sum of 2,000*l.* reduced annuities was impressed with the same trusts as the original legacy.

LORDS JUSTICES.

1852.

Jan. 27.

In re TOWNSEND.

Lunacy—Funeral of a deceased Lunatic.

A lunatic died without leaving ready money to pay the expenses of his funeral, and of whose person or of whose estate there was no committee. The heir-at-law, who was one of the next-of-kin, petitioned that a sufficient sum belonging to the lunatic should be paid out of court for such purpose; but the Court directed the persons with whom the lunatic had resided to proceed with the funeral, and ordered the petition to stand over.

A petition for this purpose is necessary; a warrant from the Lunatic Office is not sufficient.

This was the petition of the heir-at-law and one of the next-of-kin of the lunatic, Mr. Townsend, which, after setting forth that there was no committee of either the person or estate, although one had been approved of by the Master in Lunacy, and that the lunatic had died on Friday, the 23rd of January (then instant), but there was no money in the house to defray the expenses of the funeral, prayed that the Court would order a sufficient sum out of the money standing to the credit of the lunatic to be paid to the petitioner for the purpose of burying the deceased, the petitioner undertaking duly to apply it.

Mr. Grove, in support of the petition, stated that the petitioner was a nephew of the lunatic, who had lived with him. The

petitioner's wife had had an allowance of 50*l.* a year out of the lunatic's estate, for her trouble in attending upon him, but since the death of the committee of the estate in October last, no part of that money had been paid.

Mr. Follett, for the other next-of-kin and for the person who had been approved of as the new committee, appeared to oppose the petition, as being wholly unnecessary and a burthensome expense on the lunatic's estate. The report of the Master, approving of the new committee, had not been confirmed; and the proper course would have been for the petitioner to have gone to the Lunacy Office, and taken out a warrant for the purposes proposed to be effected by the present petition.

The officer from the Lunacy Office, who was in attendance, stated to the Court that a petition was the proper course.

[LORD JUSTICE LORD CRANWORTH.—A petition is necessary. Is any one making preparation, so far as can be, for the funeral?]

Mr. Grove.—Yes; the petitioner and his wife are doing so as far as they are able, but they are poor people, yet they are willing to continue in the performance of that duty. The lunatic has made a will, which is sealed up, and is in the Lunacy Office, and it is proposed that the same shall be opened, in order to see whether the lunatic has given any directions.

LORD JUSTICE KNIGHT BRUCE.—Let there be no unseemly wrangle or dispute to interfere with the performance of the last offices to this lunatic. Let the will be opened, the funeral be completed, and the petition in all other respects stand over.

LORD JUSTICE LORD CRANWORTH.—*Primâ facie* the nephew and his wife, with whom the lunatic has lived, are the most proper persons to be engaged in such a matter. Let them proceed with the funeral, but we can now give no directions as to payment; as to that, the petition must stand over.

LORDS JUSTICES. }
 1852. } *In re* NOBLE.
 Jan. 28. }

Lunacy—Payment of Lunatic's Allowance to a Survivor of two Committees.

Two committees of the estate of a lunatic were appointed, one of whom died, and no new committee was appointed in his place. The estate being small, the Court permitted the income to be paid to the survivor on the production of an affidavit of his solvent circumstances.

The petition in this case stated, that two committees of the estate and one of the person of the lunatic had originally been appointed, but that one of the committees of the estate had died, but no new committee had been appointed in his place; that the estate of the lunatic consisted solely of consols, the dividends of which produced a few shillings over 100*l.* a year; that the Master had reported that it was proper that the whole income should be applied for the lunatic's maintenance, and that that had been hitherto done; that the expense of the appointment of a new committee would seriously deduct from this small income, and that, therefore, it would be for the benefit of the lunatic that such expense should be saved. The petition then prayed that the income might be paid to the surviving committee alone.

Mr. Osborne appeared in support of the petition.

Mr. Cottrell, for the next-of-kin, offered no opposition.

LORD JUSTICE LORD CRANWORTH.—Is there any evidence as to the solvency of the surviving committee? It may be very right to appoint A. and B. committees, and to entrust them with the lunatic's income, but it may be far from proper that B. alone should be trusted. If such an affidavit as I have adverted to is produced to the officer, and it is satisfactory to him, I think, to save expense, as the estate is so small, the order may be made.

LORD JUSTICE KNIGHT BRUCE.—I quite concur in the view that some account

should be given of the solvency of this gentleman. On the production of a proper affidavit, let the order be made.

LORDS JUSTICES. }
 1852. } *In re* SWINDELL.
 April 30. }

Lunacy—Committee—Loss to Estate—Liability.

A sum of money having been lost to the estate of the lunatic under circumstances which the Court considered to be the fault of the committee in not taking steps to enforce payment, the estate of the committee, who had died, was charged with the same.

The question on this petition, which came on for the confirmation of the report of the Master in Lunacy, related to the liability of the estate of a deceased committee to make good a sum of money. *Mr. John Rose Swindell* was, on the 21st of February 1828, found a lunatic, and *Mr. Thomas Pearsall* was, in July following, appointed committee of his person and estate, and so continued until his death in the latter end of November 1838. *Mr. B. T. Balguy* acted for *Mr. Pearsall* during the whole time as his solicitor in the matter of the lunacy. In February 1838, *Mr. Balguy* became bankrupt, and in May following obtained his certificate. On the 19th of March 1839, after a considerable contest between *Mr. Edward Ordish* and other parties, in which *Mr. Balguy* acted as his solicitor, *Mr. E. Ordish* was appointed committee, and he continued *Mr. Balguy* as his solicitor, both in the matter of the lunacy and in his private affairs, down to the month of October 1842. In October 1839 *Mr. Balguy* offered to occupy the mansion-house called Borrowash House, part of the lunatic's estate, at the rent paid by the former tenant, namely, 132*l.* a year; and *Mr. Ordish* agreed, and, accordingly, *Mr. Balguy* became yearly tenant at that rent. *Mr. Balguy's* costs for the litigation, on the appointment of the committee, were taxed at 98*l.* 3*s.*, and were subsequently paid by *Mr. Ordish*. *Mr. Balguy* occupied the house until Michaelmas 1843, but he

was discharged from his office of solicitor to the committee in October 1842. No rent was paid. After Mr. Balguy's discharge as solicitor, Mr. E. Ordish employed Messrs. Jessopp in his place, and they, by their client's direction, put a distress into Borrowash House for rent, but in consequence of the insufficient value of the levy and the promise of Mr. Balguy to pay off the money by yearly instalments of 100*l.*, and to pay down 100*l.*, which was more than the value of the goods, the distress warrant was withdrawn. Mr. Balguy paid the 100*l.*, and afterwards 79*l.* was realized by a sale of some of his property. Mr. Balguy, in March 1843, had executed a warrant of attorney to confess judgment for the whole of the arrears, 395*l.* Mr. Ordish never enforced the warrant of attorney, and part of the money was ultimately lost, but in passing his accounts before the Master, as stated in an affidavit, he called attention by his solicitors to the fact of the arrear, "but the Master acquiesced in the course adopted by the said E. Ordish in delaying to put the judgment in execution against the said Bryan Thomas Balguy."

Mr. E. Ordish died, in August 1851, intestate, and letters of administration of his estate were granted to his son, Mr. John Pearsall Ordish, in March 1852. The Master reported that the money was not lost by the wilful default of the committee, and that the administrator of his estate ought not to be charged therewith. It now shortly appeared that besides the 395*l.* there was subsequently due one more year's rent, but the committee having received the 100*l.* and 79*l.*, and having paid the 98*l.* 3*s.* costs to Mr. Balguy, on account of the lunatic's estate, the amount ultimately lost was the difference between those sums.

Mr. Swanston and *Mr. Smythe*, for the administrator, in confirmation of the report, relied on the Master's finding, and on the fact that it was reasonable that the tenant should not pay rent when costs would accrue to him.

Mr. Rolt and *Mr. J. V. Prior* contended that the administrator ought to be charged, but were willing to allow to him the 98*l.* the committee had paid for costs. They claimed the whole of the loss extra that,

as having been occasioned by the wilful neglect of Mr. E. Ordish.

LORD JUSTICE LORD CRANWORTH.—This is a very distressing case, and a very objectionable one. This committee chooses to employ, as his solicitor, a gentleman who had been but a few months before a bankrupt, and had re-established himself. The first act done by the committee, after that, is, that he lets this house to his own solicitor,—a very objectionable proceeding,—at a rent of 132*l.* per annum. The solicitor continues tenant for four years, and never pays a sixpence of rent. Being the solicitor to the committee up to nearly the fourth year of his tenancy, or rather to the end of the third year, about the third year he is dismissed, and continues tenant for a year afterwards. The question is, whether, there having been no rent received, except a certain sum on account, that was not lost through the fault of the committee in not enforcing its payment. The only excuse is, that there were accruing costs, which is put into his mouth by his solicitor himself, putting that as a sort of set-off against the payment of rent. Eventually there are no costs, except the 98*l.*, which the parties are willing to allow to be deducted, and the whole of this rent, except the two sums of 100*l.* and 79*l.*, is lost. No other conclusion can be arrived at than an answer in the affirmative to the question I have stated, because the committee has been wanting in that vigilance which the Court is bound to require from one holding that fiduciary situation. I am extremely grieved that such is the result at which I am bound to arrive; but considering how important it is to keep strict guard upon the conduct of persons undertaking to watch over those who, by the visitation of God, are incapable of taking care of themselves, there is no other conclusion to be arrived at but to charge the committee with the whole amount of 395*l.*, but to give him credit for the 100*l.* and the 79*l.*, then adding another year's rent, after deducting from it the 98*l.* the amount of costs he paid to Mr. Balguy.

LORD JUSTICE KNIGHT BRUCE intimated his concurrence.

L.C. }
March 20, 31. } CUTTS v. SALMON.

Specific Performance—Purchase by a Solicitor from his Client—Infant.

Bill by a solicitor against his client for specific performance of a contract for sale by auction dismissed, with costs; the purchase being made by the solicitor (who had the conduct of the sale) whilst his client was a minor, and the sale not having been conducted with due regard to the interests of the client or the protection of the estate.

The solicitor for the vendor, bidding in person at the sale on his own behalf, is bound to state that fact publicly, in order to exclude the inference that he is bidding on behalf of the estate.

A reserved bidding is proper in the case of a sale of an infant's estate; but where there is no reserved bidding, that fact should be publicly stated.

This was an appeal, by the plaintiff against a decision of the Vice Chancellor Knight Bruce dismissing the bill, with costs. In 1845 certain lands in Essex, of which three brothers, the defendants, were tenants in common in fee, were put up to sale by auction. The plaintiff, an attorney, was employed by the defendants to conduct the sale, and he gave instructions to the auctioneer to prepare the particulars of sale. The auction took place in June 1845, and all the lots were sold. The plaintiff attended the sale and bid for and was declared the purchaser of one of the lots adjoining to some property of his own, and the usual memorandum was signed by the auctioneer; but, as to this lot, the conditions of sale requiring an immediate deposit of 10*l.* per cent. were not complied with. The plaintiff obtained possession of the land so purchased by him, and had ever since continued in possession. At the time of the sale, Edmund Salmon, the youngest of the brothers, was a minor, and he did not attain his majority until the month of November following. The sale of this lot had never been completed. In 1848 the defendant, Edmund Salmon, repudiated the sale to the plaintiff, having, however, between 1845 and 1848 received from the plaintiff upwards of 200*l.* as his share of

the purchase-money of the lots; and in the same year, he filed his bill against the present plaintiff, praying that the sale to him might be set aside as fraudulent and void, and for a re-sale. This bill was dismissed, on the ground of acquiescence. The present bill was filed, by Mr. Cutts, for specific performance of the agreement for sale, and was dismissed by the Vice Chancellor, with costs.

Mr. Lee and Mr. Sims Williams appeared, for the plaintiff, in support of the appeal; and Mr. C. P. Cooper, Mr. Malins, Mr. Elderton and Mr. Goodwin, for the defendants.

The LORD CHANCELLOR. — This case admits of little doubt. The rule of law is clear that an attorney may purchase from his client; but if he does purchase from his client, he must shew that he deals with him at arm's length; and no attorney would be well advised in dealing with his client without the intervention of another solicitor. I do not mean to lay down a rule that a purchase by a solicitor from his own client, without the intervention of a third party, could in no case be sustained, but I say that no prudent man would take such a course.

This is a singular case. It appears that Mr. Cutts was the solicitor of the testator who devised this property, and was in the possession of the title-deeds and of the will, and he had all that knowledge of the estate which properly belonged to what I may call a family solicitor. By the will, the trustees took at most an intermediate estate up to the time of the youngest of the three brothers coming of age; and upon the happening of that event, the young men became absolute legal owners of the estate as tenants in common in fee. It is clear from the evidence that the defendants did wish to sell the estate; but there was reason to think that they were led to believe that the legal estate was in the trustees for sale. If that was a mistake, it arose from total ignorance of the commonest rule of law with respect to the operation of the will. The first advertisement, announcing the sale of the estate, was as early as March 1845, and was in these words:—"The valuable farms to be sold, in the month of June next, by order

of the trustees named in the will of the late Mr. John Smith ; possession will be given at Michaelmas next." "Further particulars will be given, and the estate may be looked over on application to Mr. Cutts, solicitor, &c." Now, this I must consider a representation, brought home to Mr. Cutts himself, as early as March 1845, a representation by him to the purport and effect that the estate was in the trustees for sale, and was to be sold in June, and that possession was to be given at Michaelmas. Now, the error was afterwards discovered, but how, is not explained ; and the particulars of sale were altered, making it a sale generally without reference to the trustees ; and yet the trustees continued to act as if they had some authority to sell. Now, it appears that there were three closes constituting part of the estate, which Mr. Cutts very naturally desired to have, as adjoining his own property. As far as my opinion goes, I absolve Mr. Cutts from anything like fraud in the odious sense of the term. The question then arose as to how the property should be lotted, and this business of lotting the auctioneer took principally upon himself. It appears that several persons, amongst whom was Mr. Cutts, went in a body to look over this estate with a view to the allotment ; but when they came to that portion of it which Mr. Cutts wished to purchase, and did eventually purchase, it appears that Mr. Cutts withdrew : a fact which impresses one with the notion that he then thought that the trustees could not interfere with the sale. The three closes in question, with other property, formed lot eight in the particulars. Mr. Cutts bought this property for 2,500*l.*; and I may observe he made a very good purchase ; for after retaining in his own hands the three fields which he was particularly desirous of possessing, and which contained upwards of twenty-four acres, he let the remainder of the lot for 100*l.* a year. This is no proof of fraud, but it must be regarded, at least, as a good bargain on the part of Mr. Cutts. I am not prepared to say that the amount of the purchase-money was so inadequate as to justify the Court in setting aside the conveyance ; but when Mr. Cutts made up his mind to purchase this part of the property, he ought strictly to have

withdrawn himself from all dominion over it. Instead of doing that, he allowed himself to be put forward on the advertisement as the solicitor having the conduct of the sale, and as the person to be referred to in case further information were required. It is admitted that he drew such of the conditions of sale as bear upon the title, and with full knowledge of the title. Those conditions stipulated that an abstract should be delivered in twenty-one days ; that the abstract should shew a good title ; and that possession should be given and the purchase completed in Michaelmas 1845, the sale being to take place in the month of June previous. What was the state of circumstances at that time ? Edmund, the youngest of the three brothers, and on whose attaining the age of twenty-one the estate would vest in the three, was then a minor, and did not attain his full age until the November following. Now, observe the first false step taken by Mr. Cutts after he had discovered the mistake as to the trustees. I am bound to consider him as cognizant of the fact that Edmund, not being of age, could not sell, and could not convey at the time stipulated for by the conditions of sale. What, therefore, is to be said of the conduct of an attorney who puts up for sale the estate of a client who is under age, and stipulates that that client shall convey when he is under age ? He must have known at the time that every dissatisfied purchaser might turn round after the sale had taken place and throw up his purchase, and bring an action, on the ground that the sale had taken place without the possibility of making a title according to the stipulations. It is not possible to sustain such a transaction if it stood upon these grounds only ; but this is not all.

Mr. Cutts, whose name appeared on the particulars as solicitor to the estate, and whose person was known to everybody in the room, attends the sale and bids openly, and bids for himself. What would be the fair inference which every person present at that sale, and who knew anything of the ordinary transactions of this nature, would have drawn from this circumstance ? Undoubtedly, that Mr. Cutts, the solicitor for the vendors, was bidding on behalf of the estate,

that is, for the vendors, and not for himself. Now, let us inquire what effect that would have had upon the sale. The case of *Twining v. Morrice* (1) shews the effect the Court has given to a circumstance of this nature. If a solicitor, known to be the solicitor of the vendors, attends the sale and bids without mentioning publicly the fact that he is bidding on his own account, the public are led to believe, as they naturally would without evidence to the contrary, that the solicitor is bidding on behalf of the estate. He thereby damages the sale, making it appear not to be a *bond fide* sale, and by that very circumstance enables himself to buy at an undervalue.

But I observe further that the sale took place without a reserved bidding. Mr. Cutts, intending to buy part of the estate himself, put up the property of these young men, one of whom was an infant, without any reserved bidding. What is to prevent his buying the estate at any price when it is without any protection of that kind? Can a solicitor maintain a sale against his client when he has put that client in a condition to have his estate sold for, it may be, a fourth or a fifth of its proper value? A reserved bidding is not necessarily for the purpose of screwing up bidders to the highest point, but for the purpose of preventing the estate going for a grossly inadequate price. But even supposing that omission could be justified, which I am of opinion it cannot be, he ought undoubtedly to have told the public that it was a sale without reserve, for the open knowledge of that fact would have assisted the sale; and the vendors were entitled to that advantage.

Again, Mr. Cutts, as solicitor for this infant vendor, by the particulars of sale imposes upon the rest of the world a condition that 10% per cent. should be paid down instantly as a deposit, and the remainder of the purchase-money at Michaelmas 1845, and possession should be given at the same time. Mr. Cutts purchases part of the estate. His clients were entitled to 10% per cent. down, a large proportion of the purchase-money, the remainder to be paid at Michaelmas. This early period of payment was

of course a great benefit, if this young man had been then competent to receive it, which he was not. Let us see how Mr. Cutts executes this contract between himself and his client. He pays no deposit, but he takes possession at the day named; so that he bids with this advantage, knowing that he was bidding without a liability to pay the deposit, and with the impression on his own mind that he would pay the purchase-money when it suited his convenience. But suppose at the sale he had told the public, "no deposit will be required, and you may pay your purchase-money at any time it suits you best." Such a communication would, it is highly probable, have raised the biddings much higher. However, he does no such thing. The conditions imposed must be presumed to be proper as between the seller and the buyer, whoever the buyer might be; yet he dispenses with the whole of them in his own favour, and at the expense of his client. If such a dealing can constitute a contract between a solicitor and his client, this Court must cease to be a court of equity. There is no proof that the money was paid to his client until the beginning of 1847. Possession was taken of the estate, and the money represented the estate; and two years afterwards, the money is doled out to the client by fifties and twenties, and hundreds and twenties, just in a way to induce a young man to spend his patrimony instead of making a solid investment of the whole of it, which he would have had the inducement to do, and most probably would have done, if he had that which was his undoubted right, namely, payment of the whole in a lump on his attaining twenty-one.

I think that no part of the transaction can be defended; and though I acquit Mr. Cutts wholly of fraud in a felonious sense, yet I think there was fraud in the sense in which this Court uses the term: unfair dealing with the estate, advantage taken of the client by not giving him those benefits to which he was entitled, and by assuming to himself all the benefits to which as solicitor he was entitled. I have not the least hesitation in affirming the decree, and dismissing the appeal, with costs.

(1) 2 Bro. C.C. 326; s. c. 10 Ves. 313, 398.

L.C. } *In re CUMMING, a Lunatic.*
 March 17, 27. }

Lunacy—Traverse.

A person found lunatic by inquisition is entitled as of right to traverse the finding; but before granting the writ the Court will be satisfied by personal examination that the alleged lunatic is competent to exercise volition upon the subject, and desires to have a traverse of the finding.

Where a personal examination of the alleged lunatic by the Court is impracticable, the Court will adopt some other mode of inquiry—semble.

Whether a party may file a traverse in the Petty Bag Office without the intervention of the Court—quære.

In this case a commission of lunacy had been issued, under which Mrs. Cumming had been found to be a person of unsound mind. Mrs. Cumming then presented a petition to the Lord Chancellor, praying that she might be at liberty to traverse the finding, and that in the mean time all further proceedings in the lunacy might be stayed.

In consequence of the alleged conflict of authority on the question of law involved in the petition, the case was heard before the full Court of Appeal.

Mr. Bethell, Mr. Roundell Palmer, and Mr. Southgate, for the petition.—In some of the early cases it was held that the granting or refusing a traverse of an inquisition was in the discretion of the Court—*Ex parte Roberts* (1), *Ex parte Barnsley* (2), *Ex parte Southcote* (3), *Re Fust* (4); but it is now clearly established that a traverse is matter of right at law—*Ex parte Ferne* (5), *Sherwood v. Sanderson* (6), *Ex parte Ward* (7); and the only discretion to be exercised by the Chancellor is to ascertain whether the lunatic is capable of volition, and that the application is the

application of the person on whose behalf it is made—*In re Bridge* (8).

The following statutes were also referred to :—

17 Edw. 2. c. 10.

2 & 3 Edw. 6. c. 8. s. 6.

8 Hen. 6. c. 16.

6 Geo. 4. c. 53.

[LORD JUSTICE LORD CRANWORTH.—If this is a positive right, that is, *ex debito justitiæ*, in case of refusal is there any remedy by mandamus or otherwise?]

That consequence must necessarily follow as in any other case of a similar right. In *Bridge's case*, though Lord Cottenham thought there was no doubt of the lunacy, he nevertheless granted the traverse.

The LORD CHANCELLOR at this part of the case directed that the lunatic should be sent for, or that an affidavit should be made that her health would not permit her attendance.

The Attorney General, Sir W. P. Wood, Mr. Roll, Mr. Petersdorff, and Mr. Morris, contra.—This matter of traverse is a creature of the statute law, and the party seeking to avail himself of it must take it with the conditions attached to it by the statute. There was no right of traverse at common law—4 *Co. Rep.* 55 a. Lord Cottenham was mistaken in saying in *Re Bridge* that at the time the right of traverse was given, the Crown took the profits of lunatics' property to its own use; for by the 17 Edw. 2. c. 10. "the King shall take nothing to his own use." The right of traverse was given first by the 34 Edw. 3. c. 14; then the 36 Edw. 3. c. 13. for the first time gave traverse in all offices found for the King, but, upon condition of the party shewing his title by good evidences; and therefore "the Chancellor by his good discretion, &c. shall let and demise the lands so in debate to the tenant." The same condition is imposed in the 8 Hen. 6. c. 16. and the 1 Hen. 8. c. 10. Then came the statute 2 & 3 Edw. 6. c. 8. The sixth section enacts, "That if any

(8) Cr. & Ph. 338; a. c. 10 Law J. Rep. (N.S.) Chanc. 404.

(1) 3 Atk. 7.

(2) Ibid. 184.

(3) 1 Amb. 109.

(4) 1 Cox, 418.

(5) 5 Ves. 450, 832.

(6) 19 Ibid. 280.

(7) 6 Ibid. 579.

person be or shall be untruly founden lunatic, &c., be it enacted, that every person and persons grieved or to be grieved by any such office or inquisition shall and may have his or their traverse to the same, immediately or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage, as in other cases of traverse upon untrue inquisitions or offices founden," &c. These words clearly point to a preliminary investigation before the right of traverse is conceded, namely, that the Chancellor should have good grounds for supposing it was "untruly found." As in the case of lands a *prima facie* title must be shewn, so in the case of lunacy the state of mind must be shewn—*Sir John Cutts's case* (9), *Scowre-field's case* (10), *Ex parte Duplessis* (11), *Buller's Nisi Prius*, 216, *Anonymous case* (12), *Ludlam's case* (13), *Ex parte Saumarez* (14).

[The LORD CHANCELLOR.—In that case the order was discharged because the traverse was not followed up.]

The person coming for a traverse is bound to shew some reason for supposing the finding of the jury incorrect. The statute 6 Geo. 4. c. 53. removes all doubt upon the subject. It directs a petition to be presented to the Chancellor, who is "to hear and determine such petition." But if the traverse is matter of absolute right, then it must issue, even though it were proved that the order was sought for some collateral and dishonest purpose. In *Robert's case*, Lord Hardwicke went into the evidence. In *Ex parte Ward*, Lord Eldon dismissed the petition because it laid no foundation for impeaching the finding of the jury. The practice of serving the heir-at-law and next-of-kin of the lunatic with this petition proves that the order is not a matter of course.

Mr. Bethell replied.

The LORD CHANCELLOR.—The question which has been argued before us is one of

great importance in a constitutional point of view, though it lies in a very narrow compass. There are two questions: first, whether a party has a right to traverse the finding of a jury upon a commission against a person who has been found lunatic; and next, whether the traverse is at all times "as of right." The true meaning of that expression I will consider afterwards. The whole question depends in the first instance upon the statute of Edw. 6, and must be decided upon the words of that statute fairly construed, and with regard also to the view of other Judges from the time of the passing of that ancient statute. Now, the 6th section of that statute, after providing for other cases, proceeds as follows—"Or if any person be, &c."—[His Lordship here read the section as set out above.] Much reliance has been placed on these words, "and have like remedy and advantage, as in other cases of traverse upon untrue inquisitions or offices founden." Now, if in an application for a traverse the Court is not simply at liberty, but is bound, to enter into the whole question which was before the jury, it must hear all the evidence which was before the jury, before it would be at liberty to grant or refuse the application. And in order to establish the claim to enter into the whole of the evidence, the case is put upon the ancient statute regarding escheators; and the proposition of the Attorney General, founded upon that statute was, that there could be no right to traverse until you had established your title; and that being so as to escheats generally, he argued that the law, as applied to the present case, required, according to the words of the statute, that a party should have the like remedy and advantage as in other cases of traverse upon untrue inquisitions found, and therefore a title must be shewn before the Court could grant an order to traverse. Now, that argument proceeds upon a mistake; for the right to traverse there given in regard to lands, and upon ordinary escheats and offices found, was of this nature: that the party had by the act not only a right to traverse, but to have the lands demised to him at a rent for a certain time during the existence of the trial. Now, this is explained very satisfactorily by Staunford in

(9) *Ley*, 26.

(10) *Ibid.* 22.

(11) 2 *Ves. sen.* 555.

(12) *Mosely*, 71.

(13) 1 *Collinson on Lunacy*, 167.

(14) *Secretary of Lunatics Book*, 1822, B. 44. No. 63.

his book on Prerogative. After stating several of these old statutes which have been referred to, he says—"Hereupon it is to be noted that the shewing of the evidence is only rehearsed as to the letting of the lands to farm, and not to the traverse; for by this statute he may traverse without shewing any evidence, but not have the lands to farm. Also by these statutes he is not bound to any certain time for taking of his traverse, but only for taking of the lands to farm; for he may tend his traverse when he will, so he desire not the farm of the lands. But if he will have them to farm, he must tend his traverse within the month, as appeareth." So that in this book, which is always considered as one of great authority, it clearly appears that it is a misapplication of that statute to bring it to bear upon the statute which governs this case. Now, if this point had to be decided for the first time upon the meaning of the statute of Edw. 6, I can hardly conceive that stronger words could have been used to give the party the right to traverse; it is to be "at his or their pleasure." It is, indeed, to be governed by the usual laws as regards traverses as far as they may be applicable, but that does not take away the right given by these express words.

The authorities of an early period do not much assist us. I will come down at once therefore to the time of Lord Hardwicke. In the cases referred to, though he did put it in some sense as a matter of right, yet it cannot be denied that he went into the cases and examined the circumstances to satisfy himself that it was a proper case for a traverse. How, then, did it come that the Chancellor was applied to? For if it were an absolute right, the party might at once lodge his traverse in the Petty Bag Office. In a case which I shall presently state that course was taken, and though objected to, was not interfered with. I do not mean to say anything upon the question whether a party might not, behind the back of the Court, and irrespective of the statute 6 Geo. 4, lodge his traverse at once in the Petty Bag Office. It is plain, however, how petitions came to be presented to the Court. The traverse cannot, of course, take place until the party has been found lunatic under a commission issued by

the Great Seal. The Great Seal grants the custody of the persons and estates of lunatics. If a person goes behind the back of the Court and exercises his legal right to traverse (if he has such right), could he come and ask for his costs as upon a proceeding instituted under the authority of the Great Seal? He must depend upon his rights at law whatever they may be. The reason, then, is evident why parties come with their petitions to this Court. The Chancellor has the duty of issuing this very writ, and therefore the parties come to ask permission to take this step; and from all the cases it appears that the Court has exercised, not so much a discretion, as a care and caution in issuing the writ. The authorities have all been referred to in the case of *In re Bridge*. Lord Hardwicke, I conceive, went to a greater length, in point of evidence, than any subsequent Judge would have gone. Lord Thurlow, in *Re Fust*, following Lord Hardwicke, did go into the circumstances of the case, and I am not clear that he was wrong in so doing. In that case it became necessary to impeach a marriage. The husband came here to assist the traverse, to prevent the marriage being impeached by the commission; and the Chancellor, perceiving the collateral and improper purpose for which the traverse was to be used, refused to grant the order. As regards the latter cases, it is apparent that every successive Chancellor, from Lord Thurlow to the present time, has been of opinion that the granting of the writ is, in some sense, a matter of right. Lord Eldon's opinion as to the rule of law is perfectly clear; he states it again and again without limit; and, even in the case of a third party aggrieved by the finding, he is of opinion that he has a right to traverse—*Ex parte Hall* (15); and in *Ex parte Ward*, though the applicant was a stranger, having no personal interest, he did not deny the right. The opinion of Lord Rosslyn upon the point admits of no doubt. Lord Lyndhurst was never called upon to express any opinion upon the point. Lord Brougham in a case before him, *Re Tubb*,

in 1834, makes this observation—"My predecessors seem to have considered it as matter of right." Lord Cottenham's authority was to the same effect. Lord Truro twice decided the point in accordance with the decisions of his predecessors. The authorities, therefore, as far as they go, are conclusive upon the question.

In the case of *Gervais Healy*, which was in 1748, the party seems to have gone to the Petty Bag Office and entered a traverse without the intervention of the Court. The cousins and co-heirs of the lunatic petitioned the Court that the traverse might be discharged. It appears that no order was made, but the costs of the petition were reserved until the traverse should be tried. Before the traverse could be tried, Gervais Healy died. That seems to be a very considerable authority to shew that at that time, not only was it considered as of right, but so much so that the party might behind the back of the Chancellor file his traverse in the Petty Bag Office, and carry the same down for trial; but in that case the costs were to be reserved until the issue was tried. It appears from a case in the Lunacy Office in February 1825, that a petition was presented by a lunatic for a traverse, and also a petition by the lunatic's son-in-law to be appointed committee, and thereupon an order was made by Lord Eldon, appointing an interim manager of the lands, and directing that the lunatic should be brought before him. A note was taken by Sir George Turner, V.C. of what fell from Lord Eldon upon that occasion. He said, "I will see the person who is the subject of this commission, and learn from him whether it is his real intention to traverse."

The effect of the decisions has been, that the party himself has a right to traverse, and also any other person having an interest in the question; but then he must do it within a limited time: and even with respect to the party himself, Lord Eldon says he is not so confident that there is not a right to limit him as to time. These authorities, therefore, are of the greatest weight, and it would require very great deliberation, and very strong reasons operating upon the mind of any Judge to induce him to oppose his opinion to so

much authority. But I am clearly of opinion that these decisions are authorized by the true meaning and spirit of the act itself upon which they are founded; and if I had had to decide the case now for the first time, I should have come to the same conclusion.

Now, the traverse being as of right, the question remains how that right is to be exercised. It is impossible to deny that in every case that has been cited the Chancellor has addressed himself to the consideration of the question, whether it was a proper case for the writ to issue; and if that was so, whether the determination of the question was made to depend upon an examination of the lunatic or the affidavits of parties. In order, then, satisfactorily to decide that question, you must first decide whether in any proper sense the writ is of right or not. Because if it is of right, as I think it will be now decided to be, then the considerations affecting the propriety of issuing the writ, or not, would be very different from those to which the Court would address itself if the writ were not strictly of right. But being strictly of right, it is still, as it ought to be, under a certain controul. For instance, if, upon a petition for the writ, I were to call, as I necessarily must in every such case, for the attendance of the lunatic, and I saw instantly the signs of absolute raving madness, nobody could suppose that the person holding the office I fill would be at liberty to allow the writ to issue. In such case, it would be apparent that there was no untrue finding, and consequently no necessity for a traverse; and the duty imposed upon the Court of protecting the person and estate of the lunatic would require it to deny the writ. In some of the cases, before Lord Hardwicke particularly, and also before Lord Eldon, matters have been entered into in a manner hardly consonant with the strict interpretation of the term "as of right." But this is not matter of surprise, when one considers that a petition is presented, and served, and the common order made that all parties should appear and be heard; but it is no proof of the right or duty of the Court to enter into the general question of the correctness of the finding of the jury.

I cannot admit the authority of Lord Eldon for that proposition, when I find it deliberately stated, again and again, that it is of right, and that the Chancellor shall personally examine the lunatic upon the question.

Now this brings me to the consideration of my duty with reference to the decision in the present case. My first duty, without doubt, is to satisfy my mind that the application is *bond fide*, and that the lunatic is so far competent as to be able to satisfy me that she really does desire to have a traverse as against the finding. If I were in any doubt upon that point, I do not now mean to say that I would hear evidence as to her state of mind; but if I were not satisfied as to what her intentions and wishes were, if she herself did not appear to know her own mind upon the subject, I do not say that in such a case the Chancellor might not feel himself at liberty to consider by whom she was surrounded, by whom the application was made, and what were their objects and views. It will be time enough, however, to enter into these considerations when that question arises. The case now before me is one in which the Court will decide that the traverse is of right, in the proper sense of the term. I have myself examined Mrs. Cumming, and have represented to her what may be the consequences of this traverse in point of expense. I have had a considerable conversation with her; and, whatever may be her delusions upon other subjects, upon this point she is as reasonable, as free from heat or passion, as any reasonable person with whom I ever conversed. Though she is aware that it may put in peril the remainder of her property, she desires this traverse may issue. She is content to make this sacrifice for, what she calls, her liberty of action; and she has satisfied me that, as far as such person can have volition, she has it. I am of opinion, therefore, that, the traverse being decided to be as of right, this is a case in which I am bound to allow it to go.

I have one further observation to make, though it does not bear upon the question of law. This lady's property is said to be of small amount; without great caution the whole of it may be swallowed up in litigation; and, at the age of seventy-six,

she might be stripped of the whole of her means of subsistence by the operation of a law brought in for her protection. It will be a reproach to all parties and also to the law if this matter is carried on with unnecessary expense. Upon this occasion, eight counsel have appeared; three on the part of Mrs. Cumming and five on the other side. I make an order that the costs of two counsel only on each side be allowed; and I will make an order that, in whatever further steps are taken on either side, the expense shall be restricted within the smallest possible limit, in order to preserve to this lady, if it is in the power of the Great Seal to do it, some remnant of her fortune for the remainder of her days.

LORD JUSTICE KNIGHT BRUCE.—The observations of the Lord Chancellor render it almost superfluous for me to add anything. An inquest under a commission of lunacy is, I apprehend, in reality a proceeding to which the alleged lunatic is not a party, and therefore, whether he shall have appeared before the jury for the purpose of contesting the allegation of lunacy or not, his rights after the finding of the jury are the same. If he is not in default for not appearing and contesting, then it would be a monstrous principle to hold that he is not entitled, as of right, to dispute the finding; nor do I understand law and principle, or, in other words, law and justice, to differ in that respect. The jurisdiction, therefore, in my judgment, is only to ascertain whether the application is an act of free will on the part of the person, and not whether the will is that of a person of sound mind. When in the judgment of that jurisdiction, there is a plain and sufficient expression of free will, the traverse cannot, I think, be refused, however clearly beneficial to the alleged lunatic it may appear to the mind of the Judge that the finding of the jury should remain undisturbed. It is the right of an English person to require that his personal freedom and the free use of his property should not be taken from him on the ground of alleged lunacy, without his being allowed the opportunity of establishing his sanity before a jury as a contesting party, and not merely as a subject of inquiry. Whether, in the present case, there has been such

a plain and sufficient expression of free will as has been mentioned (though I consider it highly probable) I do not know, and therefore I cannot give any opinion upon it, it having been thought right by the Lord Chancellor, Lord Cranworth and myself, that the Lord Chancellor alone should see and converse with Mrs. Cumming.

LORD JUSTICE LORD CRANWORTH.—I have only to express my entire concurrence in the judgment of the Lord Chancellor and my learned Brother, adding a few words to what has been said. I think that under the statute of Edw. 6. the party aggrieved by an inquest which has found her a lunatic has a right to traverse: and that that right is clear under the words of the statute, independently of authorities. This right may appear inconsistent with the fact that the Lord Chancellor exercises a sort of discretion. But that is a discretion to see that the party herself is really applying for the traverse; because the peculiar nature of the subject-matter of the inquiry makes the analogy from ordinary cases to a great extent inapplicable. If a person sues out a writ to recover land or other property, it is presumed to be his own act; but where there are *prima facie* grounds for supposing the party to be incapable of having the will, it is fit that some precaution should be adopted for the purpose of seeing that that which is to be done as the exercise of the will of the party, is really so done. This is ordinarily effected by the Lord Chancellor personally examining the party. I do not, however, mean to say that, even without such personal examination, some inquiry might not be made on the subject; *ex. gr.*, where the person is in that state of bodily illness which would render it impossible that he should be seen by the Lord Chancellor. I do not say that a case might not occur in which some discretion might not be exercised; but in the general observations that have been made I entirely concur; and I have added these few words lest it should be supposed that I entertain some doubt when I really entertain none.

LOrDS JUSTICES. }
1852.
April 2.

In re CUMMING.

Lunacy—Care of a Lunatic's Person and Application of the Estate pending a Traverse.

Where, in the opinion of the Court, it will be for the benefit of the lunatic that the care of the person should remain undisturbed, it will so direct, and will direct the whole of the income of the property to be paid to the lunatic, pending a petition to traverse; although the Court will confirm the report of the Master in Lunacy, appointing a committee of the person and a committee of the estate.

At the time (after the hearing of the lastly reported case) when the residue of Mrs. Cumming's petition for a traverse was heard before the Lords Justices, a petition also came on for hearing, presented by the next-of-kin and co-heiresses-at-law, on the 4th of February 1852, which prayed the confirmation of the Master's report, approving of Miss L. Baker as committee of the person, and Mr. James Spark as committee of the estate of Mrs. Cumming, and for other purposes as to costs. By orders made on the 20th of November and the 22nd of December 1851, arrangements were made, under the sanction of the Court, for the personal care and comfort of the lady.

Sir W. P. Wood and Mr. W. Morris, in support of the petition, urged that it was important to provide in the ordinary way for the safety of the lunatic and her property, pending the traverse, and that as, until the traverse had been heard, the lady must be treated in all respects as insane, and her property be administered accordingly, the Court should proceed in the ordinary manner by confirming the Master's report. If, however, the counsel for Mrs. Cumming could shew any good reason for a contrary course, the matter might be different.

Mr. Bethell, Mr. Roundell Palmer, and Mr. Southgate argued that, with regard to this particular case, it was of the utmost importance that no change should be made in the establishment of the lunatic pending the traverse. That if the Master's report

was confirmed, appointing a committee of the person, and Mrs. Cumming was placed in the hands of the friends of those who sued out the commission, and deprived in consequence, either wholly or to a great extent, of intercourse with those friends in whose good wishes and upon whose advice she relied and was now proceeding, she would not have it in her power to contest, in a fair and proper manner, the validity of those proceedings, by which she was declared a lunatic and unfit for the management of her own affairs. It was not shewn that the person who resided with Mrs. Cumming was not in every way a proper and fit person to be with her. With regard to the appointment of a committee of the estate, the property was not of such a nature as to render such an appointment at the present time a matter of immediate necessity or expediency. That in such cases the Court had full power to act according to its own discretion; and in this particular case, the evidence shewed that if the proceedings were not stayed, according to the prayer of the petition of Mrs. Cumming, not only would her comforts and health be most materially affected, but even the administration of justice in a fair and impartial manner would be endangered. That pending a traverse, the stay of proceedings, before the passing of the 6 Geo. 4. c. 53, would have been a matter of course. That it was not the object of the legislature by that statute to make it imperative upon the Court to take proceedings, as if the right to traverse the inquisition was not conceded, and as if the validity of the commission was not called in question. That statute was merely passed in order to give jurisdiction to the Court in matters wherein it was defective.

LORD JUSTICE KNIGHT BRUCE. — It is my opinion that the benefit of Mrs. Cumming will be best consulted by interposing not at all, or as little as possible, with the system of personal care of her which exists at the present time. No sufficient reason has been shewn why the committees shall not be appointed, or why the grant shall not take place, care being taken that the income of the property shall be received by her as if the grant were not made. The present system of personal care shall not be

interfered with till further order. I think, therefore, that the petition should stand over so far as relates to costs.

LORD JUSTICE LORD CRANWORTH concurred (1).

L.C. }
May 5, 26. } *In re WHEELER, a Lunatic.*

Lunatic—Mortgage — Re-conveyance — Costs.

The costs of obtaining a re-transfer of premises mortgaged to a lunatic are to be paid out of the lunatic's estate where the petition for that purpose is presented by the committee of the estate. If the petition be presented by the mortgagor, he will not be allowed the costs, except in a case where the committee has refused to proceed.

Certain leasehold estates were vested in the lunatic as mortgagee. The present petition was presented by the committee of the lunatic's estate and by E. Young, the mortgagor, praying that Young might be at liberty to pay the mortgage money into court, and that thereupon the mortgaged estates might be vested in Young, freed from the mortgage debt, &c. An order was made according to the prayer of the petition, but the question of costs was reserved.

Mr. G. M. Giffard now appeared for the petitioners, and asked that the costs might be paid out of the lunatic's estate, and cited—

In re Marrow, Cr. & Ph. 142; s. c. 10

Law J. Rep. (N.S.) Chanc. 340.

In re Townsend, 2 Ph. 348; s. c. 16

Law J. Rep. (N.S.) Chanc. 456.

In re Lewes, 1 Hall. & Tw. 123; s. c.

1 Mac. & Gor. 23; 18 Law J. Rep.

(N.S.) Chanc. 153.

Mr. Pitman, for the next-of-kin of the lunatic.

Mr. Edwards, as *amicus Curiae*, mentioned the case of *Ex parte Clay* (2).

(1) The whole case is said to be under arrangement, and that a new investigation before a jury will not take place.

(2) Shelford on Lunatics, 393.

The LORD CHANCELLOR said he would look into the matter, and mention it on a future day.

May 26.—The LORD CHANCELLOR.—*Ex parte Richards* (3) before Lord Eldon, disposes of this case. If I had had originally to decide this question, I should not have so decided it. Though that case has been doubted, yet I find it has been so repeatedly followed that I do not feel myself at liberty to alter the practice. I do not, however, approve of it, thinking it contrary to principle, and opposed to the settled rule that the costs occasioned by the mortgagee putting the mortgaged estate in settlement are to be borne by the mortgagor. I think in these cases the petition ought not to be presented by the mortgagor, though that seems to have been the common practice. In future, if the mortgagor presents a petition, in a case where the committee has not refused to do so, I shall not give the mortgagor his costs.

PARKER, V.C. }
April 29, 30; } HUME v. BENTLEY.
May 5.

Vendor and Purchaser—Conditions of Sale—Lessor's Title.

Leasehold property put up for sale with the condition that the lessor's title would not be shewn and should not be inquired into. In the inquiry as to the title in a reference to the Master, the purchaser shewed that the lessors were a canal company, and that the company had, under their act, the power of selling the property, but not the power of leasing it:—Held, that the purchaser was precluded by the conditions of sale from taking that objection to the title.

Certain leasehold property was put up for sale by auction, with the following condition of sale:—"That the vendor shall, at his own expense, on or before the 14th of May, deliver to the purchaser or his solicitor a proper abstract of title, and the lessor's title will not be shewn and shall not be inquired into."

(3) 1 J. & W. 264.

The property was purchased by the defendant, who declined to complete the purchase. A bill for specific performance was filed by the vendor, and the usual reference for title was made. In the investigation of the title in the Master's office, it appeared that the property had been leased by a canal company. An objection was raised by the purchaser that, under the act of parliament by which the canal company had been constituted, they had no power of leasing the property in question, though they had a power of selling it. The Master reported in favour of the title.

Exceptions were taken to the report on the above ground; which now came on to be heard.

Mr. Daniel and *Mr. Renshaw*, for the exceptions.

Mr. Malins and *Mr. Giffard*, for the plaintiff, contended that, by the condition of sale which has been mentioned, the defendant was not at liberty to raise any question as to the title of the lessor.

The following cases were cited—

Duke v. Barnett, 2 Coll. 337; s. c. 15 Law J. Rep. (N.S.) Chanc. 173.

Spratt v. Jeffery, 10 B. & C. 249; s. c. 8 Law J. Rep. K.B. 114.

Warren v. Richardson, You. 3.

Shepherd v. Keatley, 1 Cr. M. & R. 117; s. c. 3 Law J. Rep. (N.S.) Exch. 288.

PARKER, V.C.—The question here is, whether it was open to the purchaser to take objections to the lessor's title. This is purely a question upon the construction of the contract for sale. A vendor of leasehold property, by the general rule, is under an obligation to deduce and shew the lessor's title, but there is no doubt that a stipulation may be made that the vendor should be relieved from that obligation. In the case of *Shepherd v. Keatley* it was decided that the contract did not amount to a stipulation that the purchaser should accept the title without objection or inquiry. A different construction was put upon the contract in *Spratt v. Jeffery*. Comments have been made upon that case, but I do not see any inconsistency between

the two cases. The Court, in one of them, construed the conditions of sale as more extensive than in the other. It may be that the Court, in *Spratt v. Jeffery*, erred in construing the contract as importing an acceptance of the lessor's title without objection; but there can be no doubt that, if the parties stipulate that the purchaser shall accept the title without objection or inquiry, that would be a lawful agreement. Now, what is the contract here? The condition is, "that the lessors' title will not be shewn, and shall not be inquired into." Does that oblige the purchaser to accept the lessor's title, such as it is, or what was the meaning of it? In addition to the terms of the contract I find "that the lessor's title will not be shewn," with other words that ought to have effect given to them—"that the title shall not be inquired into." The only reasonable meaning of this stipulation is, that inquiry was altogether precluded for every purpose. I find that the purchaser did call upon the Master to look into the vendor's title to some extent; that is, he produced before the Master the act of parliament, which he asked the Master to look into. I think that the purchaser was precluded from going into that inquiry by the terms of the condition of sale. I do not see what force can be given to the words "that the title should not be inquired into," except that it should be accepted by the purchaser without objection or inquiry. The exceptions to the Master's report must be overruled, on the ground that this is a matter which the purchaser has precluded himself from going into by the terms of the contract.

LORDS JUSTICES.

1852.

June 1.

HUGHES v. MORRIS.

Specific Performance—Contract for Sale of Ship—Ship Registry Act.

A court of equity will not enforce specific performance of a contract for a sale of a ship or part of a ship.

By the 34th section of the statute 8 & 9 Vict. c. 89. (the Ship Registry Act), every sale or transfer of a ship, or part of a ship, must be registered, and a court of equity

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must construe the section to extend to any contract for sale or contract to transfer. Whether under this statute an action could be maintained on a contract for sale of a ship or part of a ship—quære.

The bill in this case was filed for the specific performance of an agreement for the sale of forty sixty-fourths of the ship *Virtue*, formerly the property of Messrs. Williams & Sawtell, bankrupts. In the month of March 1847, Mr. W. T. H. Phelps, the solicitor appointed by the creditors' assignees, prepared and issued a handbill, announcing the intended sale by auction of the forty sixty-fourths of the ship on the 28th of April 1847, and this handbill purported that the sale was to be by order of the assignees, and the bill referred to Mr. Acraman, who had been appointed and was described in it as official assignee, for further particulars; and copies of the handbill were sent to Mr. Acraman. In pursuance of the announcement contained in the handbill, the forty sixty-fourths of the ship were put up to sale by public auction, under conditions of sale, in which they were described as belonging to the assignees. By the third condition the purchaser was to pay a deposit, and on the payment of the balance at a stated time, "possession of the vessel was to be given up to the purchaser;" and the sixth condition was, "that upon the payment of the remainder of the purchase-money, together with all other charges and dock dues, the purchaser should have a bill of sale from the assignees, of the interest of the forty sixty-fourths in the schooner, together with the ship's stores, sails, and appurtenances enumerated and described in the schedule prepared, and that the vendor should not be obliged to produce any documents or evidences of title whatever other than and except the certificate of registry and bill of sale from E. Phillips to the assignees of the bankrupts."

The plaintiff, Capt. Hughes, through the medium of Mr. Edwards, became purchaser of the forty sixty-fourths, at the auction, for the sum of 375*l.*; and thereupon Phelps & Edwards signed the following memorandum of agreement between W. T. H. Phelps, agent of the vendors, of the one part, and H. Edwards of the other part: "The

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said H. Edwards hath this day become purchaser of the share in the premises comprised in the annexed particulars, subject to the conditions of sale also annexed, for the price of 375*l.*, and has paid unto W. T. H. Phelps, the vendors' solicitor, the sum of 37*l.* 10*s.*, as a deposit of 10*l.* per cent. upon the purchase-money in part payment, and the said H. Edwards agrees to pay the remainder of the purchase-money at the time of payment mentioned in the said conditions, and upon payment thereof the vendors will execute to H. Edwards a transfer or bill of sale of such shares, according to the said conditions." The deposit was, in fact, paid to the auctioneer, and not to Phelps, as stated in the memorandum, upon the 28th of April 1847. On the 29th of April the plaintiff paid the sum of 240*l.* to Phelps, further on account of the purchase-money, and upon the 10th of May 1847 he paid him a further sum of 50*l.* The residue of the purchase-money was not paid, and the bill of sale was not executed. Disputes then took place between Mr. Acraman and Phelps, as to the money paid, Phelps refusing to pay it over to the assignees, on the ground, as it appeared, that costs were due to, or claimed by him. Mr. Acraman arrested the ship in the Admiralty Court. The plaintiff then offered to pay the balance of the purchase-money, and made a tender of that balance; the defendants refused to accept the tender, and therefore this bill was filed for specific performance, for an injunction, and for damages which had been incurred by the detention of the ship by the proceedings taken by the assignees in the Admiralty Court. Upon the 4th of December 1849, an injunction was granted by the Vice Chancellor of England on the terms of the money being paid into court.

The case came on for hearing, before Vice Chancellor Turner, in the month of March 1852, when he dismissed the bill upon a question of agency and on other grounds wholly apart from any considerations under the Ship Registry Act, observing that with regard to that point, "I think it would be improper in me to give any opinion upon it, as I find that in *Davenport v. Whitmore* (1), where the plaintiff's claim

(1) 2 Myl. & Cr. 177; s. c. 6 Law J. Rep. (N.S.) Chanc. 58.

was founded upon an alleged equitable title to a ship by contract, Lord Langdale allowed a demurrer to the bill, and upon appeal, Lord Cottenham, though he overruled Lord Langdale's decision upon another point, declined to give any opinion upon the general question." The plaintiff appealed from the decision of the Vice Chancellor; and by desire of the Lords Justices, the arguments were addressed to the undecided point under the Ship Registry Act, which being adverse to the plaintiff, the argument of the other question became unnecessary.

Sir W. P. Wood and Mr. W. Collins, for the appellant.—All the cases in the books which have decided that the Court of Chancery will not decree specific performance of executory contracts for the sale of a ship, or the part of a ship, have been cases where the Court has felt itself bound to declare the contract void for want of registration, and have arisen under the statutes 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68, and where from the very stringent words of the statutes the Court has had no alternative. Those words, in express terms, relate to such contracts, and, therefore, the courts of equity being bound to follow the law, cases decided under such circumstances are not sufficiently in point or analogous to warrant the Court, since the passing of more recent statutes, in feeling itself bound to follow such a train of decisions. The present case comes under the 8 & 9 Vict. c. 89, the words of the 34th section of which reiterate literally those used in the previous act, 3 & 4 Will. 4. c. 55, and the still earlier statute 6 Geo. 4. c. 110; and all these three statutes are silent on the subject of executory contracts, the inference from which appears to be irresistible that the legislature did not intend any statute after the 34 Geo. 3. to apply by way of prohibition to executory contracts. It is necessary before going further, to refer to the exact words of the 34th section of the statute 8 & 9 Vict., and they are:— "That when and so often as the property in any ship or vessel, or any part thereof, belonging to any of her Majesty's subjects, shall, after registry thereof, be sold to any other or others of her Majesty's subjects, the same shall be transferred by bill of sale,

or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever either in law or in equity: Provided always, that no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry instead of the existing certificate, provided the identity of the ship or vessel intended in the recital be effectually proved thereby." From this nothing can appear more plainly than that the legislature no longer forbade such contracts.

[LORD JUSTICE KNIGHT BRUCE.—Divested of all technicality, the present appeal calls on this Court to repeal so much of the navigation laws as are comprised in the Ship Registry Act. I have always understood, and will continue to so think, until shewn differently by authority, that public policy requires this Court to construe this particular act of parliament so as to effect the intention of the legislature. What was the intention of the legislature to be gathered from decision it is not difficult to collect from the case of *Davenport v. Whitmore*, where the Lord Chancellor refused to give any effect to the contract, so far as it related to the sale of a ship, although he decided contrary to Lord Langdale on the question of demurrer, so far as it related to the freight.]

The opinion of Lord Tenterden, expressed under his authority in the 5th edition of his book upon *Shipping*, after the passing of the 6 Geo. 4, shewed that he considered the question of executory contracts to be different since, from what it was before that statute. At page 50. occurs the following passage (2):—"Upon the subject of transfer of property, it seems fit to notice a distinction between this and the former statutes. A recital of the certificate of registry is not now made necessary to the validity of an executory contract or agreement for the transfer of property, as was expressly required by the 34 Geo. 3. c. 68. s. 14; neither is an indorsement of such a contract on the certificate now required,

which was held to be necessary under that statute—*Mortimer v. Fleeming* (3); and by the language of the new act, if the certificate be not recited in the bill of sale, the transfer shall not be valid and effectual, whereas by the 26 Geo. 3. c. 60. s. 17. the bill of sale was made void." And the learned author does not stop there, for he even alludes to the effect of covenants depending and not depending on the contract, thus:—"The latter difference, however, is probably of no great importance; for, under the former statutes, covenants not depending upon the transfer of the property, such as a covenant to pay money for the security whereof a ship had been mortgaged, was held not to be avoided by reason of an omission to recite the certificate—*Kerrison v. Cole* (4). Whereas covenants depending upon a contract to transfer, such as an agreement to indemnify the seller against expenses, to which he might be liable on account of his interest in the ship, were held to be void in a case where the contract to transfer was invalid—*Biddell v. Leeder* (5). This distinction between covenants, which, according to their subject, are connected with or dependent upon the transfer, and those which are unconnected with or independent of it, may be found applicable to the new statute." The case of *Langton v. Horton* (6) was decided by Lord Langdale on that view.

[LORD JUSTICE KNIGHT BRUCE.—I suppose it is not contended that this contract can be registered; what the bill, I conclude, seeks is this, that the defendants shall be compelled to sign such an instrument as the authorities at the Custom House will register.]

That is exactly what is sought, and the state of the law is such that this circuitous mode of proceeding is necessary. That a mere formality will not be allowed to stand in the way of substantial justice is plain from the important case of *Mestaer v. Gillespie* (7). And, again, in the case of *Pritchard v. Ovey* (8), non-compliance with the re-

(3) 4 B. & C. 120.

(4) 8 East, 231.

(5) 1 B. & C. 327.

(6) 5 Beav. 9; s. c. 11 Law J. Rep. (N.S.) Chanc. 233.

(7) 11 Ves. 629, 636.

(8) 1 Jac. & W. 396.

(2) Abbott on Shipping, 5th edit., edited by John Henry Abbott, pp. 50, 51.

quirements of the Annuity Act did not prevent a suit for enforcing a contract for the sale of an annuity.

[LORD JUSTICE KNIGHT BRUCE.—I am not satisfied that that case came within the Annuity Act at all, or if it did that it was rightly decided.]

The case of *Ex parte Wright* (9) was to the same effect. It is clear that mere regulations, the policy of which has long passed away with the altered state of circumstances, can never be of avail against the settled wishes and practice of the mercantile world. Such contracts as this are daily and hourly entered into in the city of London, and a decision adverse to the reasonable demand of the plaintiff would be an utter surprise upon the merchants of London, who are accustomed to see unchallenged daily contracts for the sale of portions of ships, and which have been submitted openly by public auction. The following cases were also cited—

Brewster v. Clarke, 2 Mer. 75.

Ex parte Yallop, 15 Ves. 60.

Thompson v. Leake, 1 Madd. 39.

Battersby v. Smyth, 3 Ibid. 110.

Follett v. Delany, 2 De Gex & Sm. 235;
s. c. 17 Law J. Rep. (N.S.) Chanc.
254.

Mr. Rolt and Mr. A. J. Lewis, who appeared in support of the decree of the Court below, were not called upon.

LORD JUSTICE KNIGHT BRUCE.—The question before us, as to this part of the case, turns upon the construction of the 34th section of the 8 & 9 Vict. c. 89, assisted more or less by the residue of the act. It is a section which differs, in its phraseology at least, from the law upon the same part of the subject as it had at some time before existed; and it has been plausibly contended that that difference ought to have a material effect upon the construction of the language used in this section. It certainly is not to be disregarded, and it is a fair subject of observation; but, still, if the language used in the statute in force is language plain, and necessarily attended with a plain effect according to the principles of law, it must

be expounded according to that interpretation, and upon those principles. It is plain that the legislature considered itself as providing for that which was a matter of public policy—of general interest—in this provision; and with a view to the general interest, and with a view of supporting and effecting the public policy with regard to this particular subject, it required “that when and so often as the property in any ship or vessel, or any part thereof, belonging to any of Her Majesty’s subjects, shall, after registry thereof, be sold to any other or others of Her Majesty’s subjects, the same shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever either in law or in equity: Provided always, that no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry instead of the existing certificate, provided the identity of the ship or vessel intended in the recital be effectually proved thereby.”

Now this is the case of part of a vessel belonging to some or one of the Queen’s subjects. It has been registered, and it has been sold to another of the Queen’s subjects, in this sense, that it has been contracted to be sold by agreement in writing, one provision of which is that the purchaser shall be at the risk of the vessel and stores from the time of knocking down the hammer, which is a time either simultaneous with the signature of the contract, or previously to it. Any provision, therefore, which should make the property (being the risk of the vessel and stores on the one side, and the profit on the other) at all different, or as from a different time, would be to change that property in the vessel. Now this contract does not, to any extent or in any sense, either accurate or inaccurate, recite the certificate of registry. It is said that that is of no importance, because this is not a bill of sale, and although it is an instrument in writing, yet it does not effect a transfer. That appears to me to be immaterial with regard to the equitable principles which are here called into action.

(9) 1 Rose, 308.

What the legislature had in view was not merely, as I apprehend, the passing or not of what we call the legal estate, but it had in view substantially this, that wherever the property in a vessel was to be changed under certain circumstances, it was to be changed in a particular way. Now whether it was a sale or a contract for sale can make no difference. A contract for sale is, in the view of a court of equity, a sale. Whether an actual transfer was made is of no importance, if an actual transfer was agreed to be made, because that which is contracted to be done is, in the view of a court of equity, for many or most purposes held to be done. If the argument were to prevail, that that which the act directs with respect to a sale or transfer does not extend to a contract for sale, or a contract to transfer, we should in effect, as it appears to me, be repealing the provision of the act of parliament, because the legal title might remain unchanged on the register, and the equitable interest might be continually the subject of transmission made from hand to hand, and from person to person, in a manner utterly disregarding the provisions of the act: and I must say that, in my opinion, upon a question such as this affecting public policy and the general interest, it would be in effect to repeal the act of parliament. A court of equity is bound to follow the law where the public interest is concerned, and where provisions are enacted for such a purpose it must give effect to them.

The case appears to me to stand on exactly the same footing, or even stronger against the plaintiff than the case would be of a parol contract for the sale of lands without part performance. A parol contract for the sale of land, though all the money may be paid without part performance (for the payment of money is no part performance), cannot be carried into effect if the person sued chooses to avail himself of the defence; and this, as I have already said, appears to me to stand upon a principle, at least as unfavourable to the plaintiff as a case of that description, because it is suing on a contract, which the legislature has forbidden this Court, or any other Court, to recognize: an opinion certainly at variance

with the opinion which a very eminent lawyer and a most distinguished common law Judge and author has published or permitted to be published in a most valuable work (*Abbott on Shipping*, p. 50, 5th edit.); and it may possibly be at variance with one decision of a learned Judge, the late Master of the Rolls, from whom also another judgment has proceeded plainly at variance with any such opinion.

Upon the whole, I am of opinion that a court of equity is bound to follow the law in this respect, and to declare that there is no contract which can be recognized. How the case would be if there had been fraud, it is unnecessary to say. Fraud is as much out of the question here as in the simple case under the Statute of Frauds, where performance of a parol agreement is resisted, although all the money has been paid. There is no fraud in the sense in which this Court uses the term in reference to subjects of this description. It appears to me that relief cannot be given here to the plaintiff, and that he must be left to such remedy by action or by actions, as he may think fit, as far as the parties to this record are concerned.

LORD JUSTICE LORD CRANWORTH.—I am of the same opinion; and although some doubts have been ingeniously raised, I confess that my impression has always been clear that, under the present statute, as under the old statutes of the reigns of Geo. 4. and Will. 4, there could be no transfer in equity that was not also a transfer in law of a ship. The only question is this, whether the law has been altered since the year 1816, when Lord Eldon decided the case of *Brewster v. Clarke*; because then Lord Eldon distinctly decided that there can be no bill for specific performance for the transfer of a ship upon a contract of sale. That was the necessary result of that decision. Has the law altered in any way so as to affect the principle upon which that decision went? The suggested alteration is, that whereas originally the legislature had said no transfer should be valid which is not in a particular mode, a few years after the original statute, doubts were entertained whether it extended to contracts; and then it

was enacted that contracts and agreements for sale should also be void. That was the state of the law when *Brewster v. Clarke* was decided.

But, then, it is said that since that case was decided, namely, first by the statutes 6 Geo. 4. cc. 109, 110, 114, when the navigation laws were consolidated; and, subsequently, by the acts 3 & 4 Will. 4. cc. 54, 55, 59, when they were again consolidated; and ultimately by the act 8 & 9 Vict. c. 89, when they were lastly consolidated, the provision as to agreements has been omitted. That is so; and Lord Tenterden undoubtedly says, (having, no doubt, in his mind several decisions at law that had taken place during the time that he was Chief Justice, shortly before the passing of the first consolidation act, 6 Geo. 4. c. 110), that that alteration makes a difference, for that now contracts are not prohibited, in terms. I am not clear, he may not be quite right in that. It may be that now an action may be maintained upon a contract for the sale of a ship, which would have been void before, under the laws as they were before they were consolidated in the reign of Geo. 4. That may be so, but what we have to consider is, what is the effect of the statute now in force, without the enactment as to agreements, upon equitable contracts? I confess it seems to me that it leaves the matter exactly where it was before, because what the statute enacts is, in very informal language, "that so often as any property in any ship or vessel, or any part thereof belonging to any of Her Majesty's subjects, shall be sold, the same shall be transferred by bill of sale," containing such and such particulars, "otherwise such transfer shall not be valid for any purpose whatsoever."

It was argued that a contract, although not valid to transfer the property, may make the party an owner in equity. That would be to get rid of the whole policy of the statute, which is (whether a sound policy or not we need not inquire), that there should be the means of seeing conclusively, by tracing from the original "grand bill of sale" as it is called, from owner to owner, the ownership for all time. But if this doctrine that is contended for be right, there never need be anything

appearing in any document from the very first sale, because by means of successive sales in equity (which in that case would be just as effectual) the property in the ship might be transmitted from party to party; and the whole policy of the statute might be got rid of entirely and effectually. Even supposing there be an alteration of the law, by the omission in the statute, that is merely an alteration with respect to a right of action, and not an alteration that can affect the question of equity. I would observe, moreover, that the notion of a bill for a specific performance of the sale of a ship is a doctrine that rather stands on its own footing. It is a sale of a chattel, and I am not clear (if Lord Tenterden is right) that the remedy by action at law does not give complete relief. But I do not, however, rest upon that, though it has a great deal pressed on my mind; but, supposing I am wrong in that, still the effect of the present statute is the same as the old statute, and its effect is to prevent any transfer in equity, either by contract or otherwise.

LORD JUSTICE KNIGHT BRUCE.—The decree we make is without prejudice to any action.

Mr. Rolt having applied for the costs of the appeal,—

LORD JUSTICE KNIGHT BRUCE.—Wherever the blame may be I think that the plaintiff, a seafaring man, has been as hardly treated, to use no harsher term, as it is possible to conceive. He has been treated in a way in which no man could expect to be treated in a civilized country. He has honestly paid his money, and can get nothing in return, because it is said that *Mr. Phelps*, having the money, refuses to pay it over to the assignees, on the ground that they owe him money for costs. Still the Court having felt bound to decide against the plaintiff, the question is, what will be the course least wrong as to the costs of the appeal? And, on the whole, both my learned Brother and myself are of opinion that will be effected by giving the respondents the deposit, and no other costs.

L.C.
April 15, 21. { *In re* THE OXFORD AND
WORCESTER EXTENSION
AND CHESTER JUNCTION
RAILWAY COMPANY, *ex*
parte SHARP AND JAMES.

*Winding-up Acts—Contributory—Allot-
tee—Committee-man.*

At a meeting of the managing committee of a provisionally registered railway company, at which A. and B. were present as members, it was resolved that the shares of the company should be allotted according to a certain scheme, by which 500 shares were to be allotted to each member of the managing committee under the head of "reserves." In fact, 100 shares only were allotted to and accepted by A. and B. respectively, and for that number only they signed the parliamentary contract. On the winding up of the company the Master placed A. and B. on the list as contributories in respect of 500 shares each:—Held, upon appeal, that A. and B. were liable in respect of the 100 shares only; and that the reservation of the 500 shares in their favour did not amount to a contract binding upon them to accept that number of shares.

In this case the Master had placed the names of Major Sharp and Mr. James on the list of contributories of the company, in respect of 400 shares each, in addition to the 100 shares each for which they had executed the parliamentary contract. By permission of the Lord Chancellor (Lord Truro), the appeal was brought directly from the Master's decision, on the ground that the Vice Chancellor Knight Bruce had, in a similar case in the same company (*Morrison's case*, 20 Law J. Rep. (N.S.) Chanc. 296,) affirmed the Master's decision to the same effect as in the present case.

The company was formed in 1845, and provisionally registered pursuant to the act.

The facts upon which the appellants' liability as to the additional 400 shares each arose were as follows:—

Both Major Sharp and Mr. James were members of the provisional committee and the managing committee, but neither of them were members of the allotment committee. At a meeting of the managing committee, held on the 15th of September

1845, before the appellants had joined the company, the committee by a resolution of that date, appointed an allotment committee, and further resolved, "That 250 shares be offered to each of the provisional committee, and that the secretary be desired to write to that effect to each member of the committee, and request him to state, on or before the 24th instant, whether or not he will take that or any less number; and that 250 in addition be offered to each member of the managing committee."

At meetings of the managing committee, held on the 30th of September and the 7th of October, at which Mr. James was present, it was resolved that the secretary should send letters of allotment to the provisional committee for 100 shares only for the present, accompanying the same with an intimation that that number was part of the 250 originally offered them, and that if, when the committee of management had finally completed their arrangements, they should find themselves in a position to make up the original number, they would be happy to do so.

At a meeting of the managing committee, held on the 10th of October, at which Mr. James was present, it was resolved, "That the committee of allotment be requested to make the allotment in accordance with the accompanying scheme, and that the capital be reduced to 100,000 shares in accordance therewith." The scheme referred to provided that to each of the provisional committee should be issued 100 shares, making 9,100 shares; to the public 30,900; to Mr. Jackson and friends 5,000; making in all 45,000 shares. The scheme then proposed to dispose of the remainder as follows:—

Reserves :	Shares.
16 Managing Committee at 500 . . .	8,000
91 Provisional Committee at 150 . . .	13,650
Promoters	3,000

At a meeting of the managing committee, held on the 21st of October, at which Major Sharp and Mr. James were present, the secretary of the company reported that the allotment committee had completed the allotment of shares, and in doing so had carried out the views of the managing committee as conveyed to them at the last meeting. But in the "allotment book" the names of Major Sharp and Mr. James

appeared as allottees each of 100 shares only.

On the 9th of December, at a meeting of the committee of management, at which Mr. James was present, it was resolved that "the directors be requested without delay to execute the parliamentary contract and subscribers' agreement in respect to the 100 shares allotted to them"; and it was further resolved, that in consequence of the depressed state of the money market, &c., the further prosecution of the company should be postponed. Major Sharp and Mr. James signed the deed for 100 shares each, and paid the required deposit.

The Master placed the names of Major Sharp and Mr. James on the list as contributors for 400 shares each, in addition to the 100 shares for which they had signed the deed. The question raised on the appeal was as to their liability in respect of the 400 shares.

Mr. Daniel and Mr. Terrell, for the appellants.—The scheme of the 10th of October 1845 was inchoate only, and not binding upon the parties without some further act to be done. The appellants can only be liable for the shares which they have accepted, that is, the 100 shares for which they executed the deed. *Hutton v. Upfill* (1) does not apply, the question here being the extent of liability only.

Mr. Cairns, for the official manager.—The situation of the appellants in this case is not that of strangers to the company, for they are themselves the parties making the allotment, and therefore must be held by that to have pledged themselves to take that particular portion of the stock of the company.

The following cases were cited—

Ex parte Davis's Executors, 15 Law Times, 541.

Morrison's case, 20 Law J. Rep. (N.S.) Chanc. 296.

Ex parte Barber, 20 Law J. Rep. (N.S.) Chanc. 146.

April 21.—The LORD CHANCELLOR, after observing upon the difficulty of ascertain-

ing the real facts of the case from the manner in which the materials were presented to the Court, and intimating that in future cases under the Winding-up Acts it would be desirable to have a state of facts agreed on and signed by counsel, proceeded as follows:—Now, as far as relates to the scheme of the 10th of October 1845, it is impossible, I think, to say, that there is an absolute and binding contract on the parties to take these shares; for, first of all, the resolution is that the committee of allotment "be requested" to make the allotment in accordance with that scheme. It appears, in fact, that that scheme was not carried out; for I do not find any evidence that the allotment of 500 shares was ever made to the members of the managing committee, nor that these gentlemen ever signified their intention to take the larger number of shares. As soon as matters began to assume a disagreeable aspect, it was resolved, at the meeting of the 9th of December, that the directors be requested to execute the parliamentary contract and subscribers' agreement for 100 shares each, and Major Sharp and Mr. James executed the deeds for that amount accordingly; and there is no proof of any allotment beyond that, except in the statement of the secretary, that the shares had been allotted in accordance with the scheme. To the extent of 100 shares they are confessedly liable; but it is insisted that they are liable in respect of 400 additional shares, and there was a case arising in the same company (*Morrison's case*), before the Vice Chancellor Knight Bruce, in which it was decided in a case similarly circumstanced, that a member of the managing committee was liable for all the shares so reserved for him. The decision appears to have proceeded upon *Upfill's case*; and without giving an opinion upon that case, I think the circumstances upon which I have now to decide are materially different. In that case there was an offer and an acceptance of shares; in the present case, neither an offer, strictly speaking, nor an acceptance. Beyond that circumstance, on the face of the report of *Upfill's case*, there is a strong reason why, independently of his being a provisional committee-man, Mr. Upfill should have been held liable. By the prospectus under

(1) 2 H.L. Cas. 674.

which all the parties were acting, the managing committee were authorized to carry on the concern and to incur all necessary expenses before the act of parliament was obtained. The man who makes himself a party to such a transaction must be liable to contribute to the expenses incurred according to his own contract and by his own sanction. In this case, I am of opinion that each of these gentlemen, having had 100 shares only offered to him out of the 500 which were within the scope of the scheme, and which 100 shares only he accepted and for which he subscribed the deeds, his liability must be limited to those 100 shares; and I shall, therefore, order the names of the appellants to be struck off the list as to all the shares except the 100, and I shall make no order as to the costs of this appeal.

M.R.
Feb. 14, 21; }
March 30. } HOLLIDAY v. OVERTON.

*Appointment—Restriction on Execution
—Deed—Recital—Words of Limitation.*

A widow, upon her marriage, settled her real and personal property on herself for life, and reserved to herself a power to appoint by will during the intended coverture, with remainder over on default:—Held, that an appointment by will, after the determination of the coverture, was invalid.

Real estate was vested in a trustee in fee for a party for life, with remainder to her children equally:—Held, that the children took life estates only, all words of limitation being omitted.

Recitals will not be allowed to cut down the clear effect of the operative part of a deed.

By a settlement, dated the 23rd of September 1825, made upon the marriage of Mary Heathcote, a widow, with Edmund Drayton, after reciting that it was agreed to settle the property for her separate use for life, and after her decease for "making the reversion and principal thereof a provision for the children of her former marriage, subject nevertheless to the

power of appointment, on the part of Mary Heathcote, by will or testamentary instrument to be executed in manner hereinafter provided upon such trusts and with and under and subject to such powers, provisoes and declarations as hereinafter contained," certain real and personal property which respectively belonged to her, were conveyed and assigned to Thomas Ventom, his heirs, executors, administrators and assigns, upon trust to pay the income and annual profits to her for her separate use for life, and after her decease, in trust for such person or persons, and for such trusts as Mary Heathcote, in and by her last will and testament, or instrument testamentary or in the nature of a will in writing, to be signed and published by her in the presence of three or more credible witnesses, *upon testamentary considerations only during the intended coverture*, should direct or appoint, and in default of such appointment, in trust for the children of Mary Heathcote, equally to be divided between them, share and share alike, as tenants in common and not as joint tenants.

Under a power contained in this indenture, the defendant William Overton was, on the 20th of August 1830, appointed to be a trustee thereof jointly with the defendant Thomas Ventom. There was no issue of the marriage, and Mr. Drayton died on the 19th of May 1835, leaving Mary Drayton, his widow, surviving, and, on the 13th of November 1845, she, in exercise of the power contained in the settlement, made her will, by which she appointed all her estate and effects real and personal, unto and for the use of her daughters, the plaintiffs Mary Henry Holliday, Julia Henry Oukama, and Laura Henry Heathcote, and the defendant Sabina Henry Wenman, their respective heirs, executors, administrators and assigns, as tenants in common, with this exception, that in consideration of Mary H. Holliday having had the sum of 500*l.* left to her, it was her, the testatrix's, desire that she should receive 500*l.* less than any of her sisters. The testatrix appointed William Overton and Thomas Heywood executors of her will.

On the 16th of May 1848, Mary Drayton died, and on the 16th of November following her will was proved by both the

executors. Mary Drayton received the income during her life, but Messrs. Ventom and Overton, after her decease, insisted that under the limitation contained in the marriage settlement, she had no power to appoint the settled property by a will executed after the death of her husband, and consequently that the trust fund was divisible amongst all her children as in default of appointment.

This claim was then filed by Mary Henry Holliday, widow, Julia Henry Oukama, widow, and Laura Henry Heathcote, spinster, three of the children of Mary Drayton by a former marriage, against Messrs. Ventom and Overton, to establish the validity of the appointment. It appeared that there were six children of Mary Drayton by her former marriage, the three plaintiffs, Sabina H. Wenman and Henry Spencer Heathcote deceased, and Caroline H. Kuckenthal also deceased. Henry Spencer Heathcote died on the 21st of April 1844 intestate as to real estate, leaving the defendant, Alfred Spencer Heathcote, his heir-at-law, and having appointed his wife, the defendant Ann Heathcote, his executrix. Caroline Henry Kuckenthal, the remaining child, died on the 6th of June 1826 intestate, leaving the defendant Henry Philip Kuckenthal, her husband, and the defendant Henry Kuckenthal, her heir-at-law, her surviving, and letters of administration to her were granted to the defendant Charles Wenman.

On the 24th of January 1832, Mrs. Drayton, in the life of her husband, executed a will, and also a codicil, dated the 11th of April 1843, by which, in pursuance of the power contained in the settlement, she appointed all the trust estates and premises to the plaintiffs, and the defendant Sabina Henry Wenman, in a manner similar to the appointment made by her will of the 13th of November 1845, and both the will and codicil were unrevoked and uncanceled after the decease of Mr. Drayton, her husband; but having been advised that Julia Henry Oukama could not take any benefit under either the will or codicil in consequence of her husband and herself being attesting witnesses to the will, Mrs. Drayton destroyed both the will and codicil which she had made in her husband's life, and executed the will of the

13th of November 1845, which the plaintiffs now asked might be declared a valid testamentary execution of the power of appointment contained in the indenture of the 23rd of September 1825, and that the plaintiffs and the defendant, Sabina Henry Wenman, or she and her husband in her right, might be declared entitled in equity to the trust estate, monies and premises comprised in the indenture of settlement, and to the rents, interest, dividends and profits thereof which had accrued due since the death of the testatrix.

Mr. Lloyd and *Mr. Speed*, for the plaintiffs. — The property in respect of which the power was reserved, belonged to the wife, and, notwithstanding the determination of the coverture, could still be exercised by her. When she married Mr. Drayton she was a widow, having children living by a former husband. She was desirous of reserving to herself the power of dealing with her property, and in stating the purposes of the settlement, there was nothing to limit the time within which the power was to be executed. The words "testamentary considerations only" had reference merely to the gifts to be made during the coverture, upon the determination of which she was remitted to her right of dealing with her own property as she pleased—*Onions v. Tyrer* (1).

Mr. R. Palmer and *Mr. Sheffield*, for Richard Wenman and Charles Wenman. — The words of the power give to the testatrix a double power of appointment. First, by will without any restrictions whatever; and, secondly, by an instrument testamentary, which was to be executed upon testamentary considerations only during the coverture. The will of a married woman was a testamentary instrument which, in accordance with the law, was in this case directed to be executed by three witnesses.

Mr. Amphlett, for Ann Heathcote and Alfred Spencer Heathcote, and

Mr. Cairns, for the trustees, were not heard.

THE MASTER OF THE ROLLS.—I cannot make a distinction between the two modes of appointment. The words "during

(1) 2 Vern. 742.

coverture" are applicable to the whole clause; and I cannot from any consideration of inconvenience restrict it to the other part only. I am of opinion that the power of appointment has not been exercised, and I must make a declaration accordingly. I direct an inquiry as to who has received the rents.

Feb. 21.—The cause was again brought on to consider who were the parties entitled, as the limitation to the children of Mary Drayton, in default of appointment, was without words of limitation.

It was contended, on behalf of the plaintiffs and the defendants, Richard Wenman and Sabina Henry, his wife, that they were entitled only to a life estate, and that subject to that, the fee vested in Mrs. Drayton, and consequently passed under the devise in her will to the defendants, Richard Wenman and his wife.

Mr. Amphlett.—Previous to the Statute of Uses, 27 Hen. 8. c. 10, a use might have been raised without any words of limitation, and the words used in this case would have carried the fee—*Shelley's case* (2). Yet, since the statute, a contrary opinion prevailed—*Shep. Touch.* 522; but if this Court finds a contract to have existed between parties based upon a valuable consideration, and that it has been carried out contrary to the intention of the parties, it is the constant rule of this Court to give effect to the contract. The recitals in the deed clearly shew an intention to deal with the fee—*Fletcher v. Lord Sondes* (3); and as the settlement was made by a declaration of trust instead of a conveyance of the legal estate, there was no necessity for rectifying the deed. It was, therefore, apparent that the parties intended the consideration for the settlement upon the second marriage to extend to the children by the first.

Newstead v. Searles, 1 Atk. 264.

Challenger v. Shepherd, 8 Term Rep. 597.

Moore v. Cleghorn, 10 Beav. 423; s. c. 16 Law J. Rep. (N.S.) Chanc. 469.

Knight v. Selby, 3 Sco. N.R. 409; s. c. 10 Law J. Rep. (N.S.) C.P. 263.

(2) Co. 100.

(3) 1 Bligh, N.S. 144.

Mr. Lloyd, in reply.—This Court will not apply a construction to equitable estates different from that applicable to legal estates. If the parties had any intention apparent which has not been yet carried out, that is a ground for rectifying the settlement. The children of the first marriage were no parties to the deed: can they, therefore, raise any equity from the recitals in the deed? None of the cases cited arose upon a deed. The parties have no ground for applying to rectify the settlement. A father may be under a moral obligation to provide for his children, but there is no case extending it to the mother; and a merely meritorious consideration is insufficient.

The MASTER OF THE ROLLS. — The question raised by this claim was, whether the power given to the wife by the deed made upon her marriage could be executed by her when not under coverture, and upon the words of the deed, I was of opinion that the exercise of the power was limited to the coverture. There appeared, however, to be a gift over in default of appointment arising upon the words "in trust for the children of Mary Heathcote, equally to be divided between them, share and share alike, as tenants in common and not as joint tenants," which, however, did not contain any words of inheritance, which, by the ordinary rules of construction, would restrict the interest of the children to estates for life.

It has been argued that the rules governing executory instruments apply to this case on the ground that it was a contract to convey the fee, and that the children were purchasers within the contract. But there is nothing executory on the frame of this instrument: it is a deed executed, and requires nothing additional to give it validity.

The true construction was then said to be, that the children were to be considered as purchasers, and that such a construction of the declaration of trust would vest the fee in them without words of inheritance. The passage cited from *Shep. Touch.* 522, is in effect, that in the case of a purchaser for value, a declaration of the use to the purchaser, omitting the word "heir," would

not deprive him of the fee. The passage in *Shelley's case* is to the same effect. It refers to a case where the words of the instrument are governed by the interest of the parties to shew that a use before the 27 Hen. 8. was merely regarded as a trust. It is to this effect—"that a man shall not have a fee simple by a feoffment or grant without these words, 'his heirs.' And yet the law is plain, that if a man had before the statute of 27 Hen. 8. bargained and sold his land for money without these words, 'his heirs,' the bargainee hath a fee simple. And the reason is, because by the common law nothing passeth from the bargainor but a use, which is guided by the intent of the parties, which was to convey the land wholly to the bargainee; and forasmuch as the law intends that the bargainee paid the very value of the land, therefore in equity, and according to the meaning of the parties, the bargainee had the fee simple without these words 'his heirs,' as it is held in," &c., and then he refers to several cases in the Year Books to establish that proposition. If these children, mentioned in the settlement, could be considered as purchasers within the meaning of the words employed in these passages, some arguments might be founded upon those authorities; but the observation, that the children are purchasers within the meaning of the settlement, does not advance the argument a single step. They are not purchasers of the fee simple or of any estate of inheritance under any contract; though they may be purchasers within the consideration of the marriage contract, they are purchasers only of such contract as the settlement gives them, which brings it back to the question of what is the interest which is given to them by that settlement, and this is a mere question of intention. *Newstead v. Searles* does not advance the case beyond what I have already stated.

It is then attempted to controul the effect of the limitations contained in the deed by force of the recital in the earlier part of the deed; but even if this were admissible, it would not advance the argument, for in the recital there is, in my opinion, nothing leading to the conclusion that the children were to take the fee. On the contrary, the recital is simply for the purpose of making a provision for the children upon

the trusts after mentioned. The recital is for the purpose of making a provision for the children by a reversion of principal. It is then limited upon the trusts, and according to the provisions and declarations contained in the subsequent part of the instrument. This obviously leaves the trusts, declarations, powers and provisions to be construed according to such import as the Court shall consider ought to be applied to these words when you look at the limitations themselves.

The cases of *Challenger v. Shepherd*, *Knight v. Selby* and *Moore v. Cleghorn* were all cases of wills where the Court held that the fee passed to the devisee, although the word "heirs" was omitted; but the rules applicable to the construction of wills or executory instruments are not applicable to the present case, which is the simple case of a deed executed, where I am bound by the strict rules applicable to a case of that description. I must, therefore, hold that the children only take life estates in these limitations in default of the due execution of the power, but I am very much disposed to believe that it is a slip in making the settlement.

June 9.—Upon appeal, the LORDS JUSTICES affirmed the decree, deciding that the power of appointment could be alone exercised by Mary Drayton during her coverture.

L.C. }
April 16. } EVANS v. PROTHERO.

Evidence — Contract for Sale — Unstamped Receipt.

A document, purporting on the face of it to be a receipt for purchase-money, but inadmissible as evidence of the payment of the money for want of a sufficient stamp, is nevertheless admissible as evidence of the agreement for sale, if it contain the requisite terms—semble. Vide s. c. 20 Law J. Rep. (N.S.) Chanc. 448, contra.

The facts of this case are fully stated in the report of the motion for a new trial—20 *Law J. Rep.* (N.S.) Chanc. 448. On that occasion Lord Cottenham was of

opinion that the following document, purporting to be a receipt for the purchase-money, but which was, originally, impressed with a sixpenny receipt stamp only, had been improperly admitted as evidence of the contract; and he granted a new trial accordingly.

"Received this 25th day of August 1827 of Mr. Jenkyn Richards, now and before, the sum of 21*l*., being the amount of the purchase for three tenements sold by me, adjoining the river Taff. Received the contents, + Evan Richards."

"Witness, John Swaine."

The case came on for trial, in July 1850, before Baron Parke, when the plaintiff's counsel tendered the document in evidence, but its reception being objected to, the objection was allowed by Mr. Baron Parke. The jury, notwithstanding, found in favour of the plaintiff on both issues.

A motion was then made, before Knight Bruce, V.C., for a new trial of the issues, and was refused. The defendants now appealed from that order. The grounds of the motion were, that, after the decision of Lord Cottenham, the plaintiff ought not to have tendered this document; and that, notwithstanding the objection was allowed by the Judge, the minds of the jury had been unduly influenced by its production.

Mr. Walker and *Mr. Pulling*, for the defendants, contended that to render the document admissible for any purpose it ought to have been stamped according to its legal character; and they referred to Lord Cottenham's observations (20 *Law J. Rep.* (N.S.) *Chanc.* 450), distinguishing the present case from *Matheson v. Ross* (1). They cited also—

Beeching v. Westbrook, 8 *Mee. & W.* 411; s. c. 10 *Law J. Rep.* (N.S.) *Exch.* 464.

Hawkins v. Warre, 3 *B. & C.* 690.

Jones v. Ryder, 4 *Mee. & W.* 32; s. c. 7 *Law J. Rep.* (N.S.) *Exch.* 216.

Doe d. Wyatt v. Stagg, 7 *Scot.* 690; s. c. 5 *Bing. N.C.* 564; 9 *Law J. Rep.* (N.S.) *C.P.* 73.

Mr. W. M. James, for the plaintiff, was not called upon.

(1) 2 *H.L. Cas.* 286.

The LORD CHANCELLOR,—after observing upon the facts of the case, and reading the document purporting to be a receipt for the purchase-money of the property in question, proceeded to the following effect:—This document, if receivable in evidence, would have proved the plaintiff's case undoubtedly. I am strongly of opinion that this document was admissible as evidence of the agreement; for, on the face of it, it has every ingredient necessary to constitute a valid agreement within the Statute of Frauds. It contains the names of the seller and buyer, a description of the property sold, and the amount of the purchase-money. If I were to direct a new trial, I should not exclude this document, holding the opinion I have expressed, that it is admissible as evidence of the agreement. Two questions were sent to the jury: first, whether there was a contract for sale; and, secondly, whether any money was paid. This document having been rejected for want of an additional sixpenny stamp, and the defendants having brought forward a cloud of witnesses as to conversations, the Judge put the case to the jury thus:—"If you believe the evidence for the defendants, there is an end of the plaintiff's case." The verdict was for the plaintiff, shewing that the jury disbelieved the defendants' witnesses. My firm impression is, that if I sent the case for a further trial, the jury would come to the same conclusion. I am perfectly satisfied that in refusing this motion, I am not only saving the parties from ruinous litigation, but am furthering the ends of justice upon the merits. The motion must be refused, with costs.

PARKER, V.C. { *In re* THE LIVERPOOL
June 1. { MARINE ASSURANCE
COMPANY, *ex parte*
GREENSHIELDS.

Company—Winding-up Act—Partnership—Bankruptcy.

A, a shareholder in a joint-stock company, was made a bankrupt in October 1848. In November 1850, the company ceased to carry on business, and was shortly afterwards ordered to be wound up. The assignees disclaimed the shares. The

Master put on the list of contributories the assignees of A, in respect of losses incurred before the bankruptcy, and A, in respect of losses incurred after the bankruptcy. The Court ordered the name of A. to be erased from the list of contributories.

The above-mentioned company was a joint-stock company formed under a deed of settlement.

On the 30th of October 1848, Mr. Greenshields was made a bankrupt; and on the 26th of June 1851 he received his certificate. Mr. Greenshields, at the time of his bankruptcy, had 100 shares in the above-mentioned company. In November 1850 the company ceased to carry on business, and in November 1851 an order was made for winding it up.

In December 1851, Sir George Rose, the Master charged with the winding up of the company, placed the assignees of Mr. Greenshields on the list of contributories, in respect of losses incurred up to the date of the fiat. The assignees disclaimed all interest in the shares.

On the 27th of March 1852, Sir George Rose made the following order:—

"I, the Hon. Sir George Rose, the Master, &c., hereby certify that on reading the deed of settlement and the certificate of conformity of John Greenshields, a bankrupt, and the assignees of his estate and effects having disclaimed all interest in the shares held by the said bankrupt, I have not fixed the said bankrupt with any liability in respect of any debt or demand arising or existent at, and previously to, his bankruptcy, but have left the same to be tendered as a proof against his estate, and that I have held the said John Greenshields to be personally liable, notwithstanding his certificate, for any demand or call that may have been made subsequent to the fiat against him, and have included him, or shall include him, in any call accordingly."

This was a motion, on the part of Mr. Greenshields, that he might be excluded from the list of contributories.

The 45th clause of the deed of settlement of the company enabled assignees of bankrupt shareholders to sell their shares under certain conditions. The 49th clause alluded to sales by assignees. The 73rd

and 74th clauses provided for the dissolution of the company. These were the only clauses that related to the question before the Court.

Mr. J. V. Prior, for the motion, contended, that the liability of the bankrupt in respect of the shares, ceased on his bankruptcy. He referred to *The South Staffordshire Railway Company v. Burnside* (1) as a case which could be cited in support of retaining Mr. Greenshields' name on the list; and contended that that case did not apply, as, in the case before the Court, it must be considered that the partnership had been dissolved.

Mr. Selwyn, for the official manager, relied on *The South Staffordshire Railway Company v. Burnside*. The bankruptcy did not extinguish the shares, and after the bankruptcy they must have been in existence. They could not be in the assignees, as they had disclaimed. They must then be in the bankrupt, and, being in him, he was liable in respect of them for all losses since the fiat, notwithstanding his certificate. He also referred to the 45th and 49th clauses of the deed of settlement.

PARKER, V.C. — As a general rule, bankruptcy dissolves a partnership. It is true, that, in most cases, partnerships are for limited terms; and here the partnership was to be for an indefinite term, and was to continue until dissolved under the provisions of the deed of settlement. This, however, I think, makes no difference; and I must consider that, so far as regards the bankrupt, the partnership was dissolved by his bankruptcy. The position of the parties, then, was this: the bankrupt had a right to have the accounts taken, the affairs wound up, and the results ascertained. If, on these investigations, it should appear that there was a debt due from the bankrupt, there would be a right of proof against his estate. If, on the other hand, anything should be found due to the bankrupt, the assignees would be entitled to receive it. Under one of the clauses of the deed of settlement, the assignees might have parted with the shares, if they could have found any one to take them,

(1) 5 Exch. Rep. 129; s. c. 20 Law J. Rep. (N.S.) Exch. 120.

and the person so taking them would have become a shareholder. If this, however, was not done, the partnership was dissolved so far as relates to the bankrupt. I do not see what right the company had to incur debts affecting the bankrupt after the bankruptcy. Suppose a case not affected by the Winding-up Act; as, for instance, that there were six bankers in partnership, and that one became bankrupt, it could not be said that liabilities could be incurred by the bankrupt in respect of the business being carried on by the other parties after the bankruptcy. The case in the *Exchequer Reports* has, I think, no application to the present. That was not a case of an ordinary partnership, but of a company existing under an act of parliament, the shares of which were of a continuing nature, and remained after the bankruptcy, and which, if the assignees did not take them, must have belonged to the bankrupt, who must, therefore, have been liable on his covenants in respect of them. The principles of an ordinary partnership do not apply to such a case. I think, however, that they apply to this. On the principle that the partnership was dissolved by the bankruptcy, and that the bankrupt ceased to have any interest in it, except for the purposes of ascertaining what was due from or coming to him, the Master's order must be discharged.

PARKER, V.C. }
June 8, 9. } WRIGHT v. WRIGHT.

Will—Construction—Condition—Direction to pay.

A testator gave the residue of his estate to trustees, upon the usual trusts for conversion and investment, and directed them to pay such sums for the maintenance and education of his sons M. and N, during their minorities, or for apprenticing them, as his trustees should think proper; and declared that, when his sons should have attained their ages of twenty-one years, his trustees should pay the then residue of the monies unto his two sons, provided that they should be, in the opinion of his trustees, of competent understanding and sufficient discretion to manage and take due care thereof. M. and

N. were both lunatic at the time of their attaining their majority:—Held, that the qualification as to the sons being of competent understanding did not make the gift to them conditional, and that the testator's estate vested in them absolutely.

William Wright, by his will, dated the 3rd of September 1813, devised and bequeathed all his real and personal estate to Lupton Wright, William Wright, and John Lambert, their heirs, executors, and administrators, upon the usual trusts, for sale and conversion into money, and directed that, out of the monies arising thereby, certain legacies therein mentioned should be paid to his daughters Hannah and Isabella. The will then proceeded as follows:—“And also that they, my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, shall, from and out of the said monies, pay and apply such sums of money for the maintenance and education of my said sons Joseph Wright and Jonathan Wright, during their minorities, and for apprenticing them to any trade or business, and paying any fee or fees in respect thereof, as they, my said trustees, shall think most proper and for their advantage; and when they, my said sons, shall have attained their said respective ages of twenty-one years, then, upon trust, that they, my said trustees, and the survivors and survivor of them, and the executors and administrators of such survivor, shall pay all the then residue of the monies which may have arisen from my said real and personal estates as aforesaid unto my two sons, Joseph Wright and Jonathan Wright, in equal parts and proportions, share and share alike, as tenants in common, for their own respective use and benefit; provided that they, my said sons, shall be at that time, in the opinion of my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, of competent understanding and sufficient discretion to manage and take due care thereof; and, if it shall happen that either of my said sons shall die during his minority, then my will is, that the part and share of such son so dying shall be paid unto the survivor of them my said sons, upon his attaining his said age of

twenty-one years, provided he shall then be of sufficient discretion to manage and take proper care thereof. And my will is and I do hereby direct that my said trustees and the survivors or survivor of them, and the executors and administrators of such survivor, shall, from time to time, as occasion shall require, during the minority of my said children, place out at interest, upon some sufficient mortgage security or securities, all the monies which they may receive from and in respect of my said real and personal estates, except what may be then paid and applied in discharge of my debts, funeral expenses, and the charges of my will, and in the maintenance and education of my said children during their minorities, or in the payment of any apprentice fee or fees to be paid upon the apprenticing of my said sons to any trade or business as aforesaid."

The testator died soon after the date of his will. Joseph Wright attained his majority in 1819 and Jonathan in 1823. Jonathan Wright afterwards died.

The will was proved by Lupton Wright, William Wright, and John Lambert. William Wright died in 1825, and John Lambert in 1840. Joseph Wright had been found a lunatic.

The bill was filed in 1851 by Joseph Wright, by his committee, and the administratrix of Jonathan Wright, against the surviving trustee and the representatives of the deceased trustees, for the administration of the estate of the testator.

It appeared that Joseph Wright and Jonathan Wright were both lunatics at the time of their attaining their majority, and it was stated in an affidavit of Mr. Lupton Wright, the surviving trustee, that, in his opinion, and, as he believed, in the opinion of his co-trustees, they were not of competent understanding and sufficient discretion to manage and take due care of property on their attaining their majority.

Mr. Rolt and *Mr. Prior*, for the plaintiffs.

Mr. Malins and *Mr. Amphlett*, for the defendants.

PARKER, V.C.—The question in this case is, whether Joseph and Jonathan Wright, who both attained their majority, took absolute interests under the will, or

whether the gift to them was subject to the condition that, at that time, they should be, in the opinion of the trustees, of competent understanding to manage and take due care of the subject of the gift. Considering the anxious provision which the testator has made for them until their attaining twenty-one, to take effect, not only out of the income, but the *corpus*, the gift over as between themselves in case one should die under age, and the general scheme of the will, it seems to me that the testator was making a complete disposition of his property. I think that the construction of the will which would make the provision for the sons conditional on their being of competent understanding to take care of the property would be against the intention of the testator. I think that the provision as to being of competent understanding was not annexed to the gift, but is a part of the direction to pay. Such a qualification as to the direction for payment does not, in my opinion, make the gift conditional. I think, then, that the two sons took absolutely.

PARKER, V.C. } *Ex parte* THE RECTOR OF
June 10. } LEA.

Investment of Money arising from Sale of Lands belonging to a Corporation to a Company.

Order made on a petition by a rector for the investment of the money arising from the sale to a railway company of a part of the rectory lands. Pending the proceedings in the Master's office the rector died. The new rector consenting that the proceedings should go on, no supplemental order necessary—semble.

On the petition of the Rev. D. Legard, rector of Lea, an order was made that the Master should inquire as to the propriety of a purchase of, and as to the title to, some land proposed to be bought with the purchase-money of some land belonging to the rectory, which had been taken by a railway company.

Mr. Legard having died during the reference to the Master, the Master declined

to go on with it. A new rector was appointed.

Mr. Nalder, on the part of the new rector, now applied for a supplemental order.

PARKER, V.C. said that, assuming the present rector to be a consenting party, he thought that the Master might proceed with the reference without a supplemental order. If any difficulty was felt, the Registrar might draw one up.

PARKER, V.C.	} THACKWELL & GARDINER.
1851.	
Nov. 18;	
Dec. 2, 9.	

Creditor—Defective Execution of a Power—Married Woman—Wilful Default.

The trusts of a bond debt due to A, a married woman, were declared to be for A. for her life, for her separate use, with remainder for such persons as A. should by deed, to be executed by her, in the presence of two witnesses, appoint, with remainders over. B, the husband of A, was indebted to C. A. signed a letter without any attestation, which contained a declaration that she deposited the bond as a collateral security to C. for the debt due to him from B, and the letter and bond were given to C. The body of the letter had been written by C. and given to B, who placed it suddenly before A, requiring her signature, and, in consequence of his urgent request, she signed it. In a suit to enforce C.'s lien on the bond,—Held, first, that A.'s life interest in the bond was bound by the letter; but, secondly, that the Court would not, in C.'s favour, supply the defect in the execution of the power.

A, a woman, being entitled to a bond debt due to her from B, by a settlement made on her marriage, and dated in 1829, assigned it to a trustee upon trust for A. for her life, for her separate use, with remainders over. In 1836, a part of the debt was paid to A. and her husband. In 1842, C. was appointed sole trustee of the settlement. In 1843, A. charged her life interest in the bond debt in favour of D, by way of collateral security

for a debt due from her husband to D. In 1843, B. died, and A. took out administration to B. Bill by D. against C. to enforce the security, charging him with wilful default for omitting to get in the part of the debt paid to A. and her husband, and the residue of the debt due from the estate of B:—Held, that C. was not liable, and the bill was dismissed.

By a settlement, dated the 1st of October 1829, and made on the marriage of R. W. Gardiner with Miss Charlotte Gardiner, a debt of 1,500*l.* due on a bond from Harriett Gardiner to Charlotte Gardiner was assigned to T. Gwillim, upon trust to compel payment of the debt, to invest the proceeds, and to pay the income of the investment to Mrs. Gardiner for her life, for her separate use, and, after her death, to hold the trust funds for the benefit of the children of the marriage, and, in default of children, "in trust for such person and persons and in such manner as Mrs. Gardiner alone, notwithstanding coverture, should, by any deed or deeds, or instrument or instruments in writing, with or without power of revocation, to be by her sealed and delivered in the presence of, and attested by, two or more witnesses, from time to time, direct or appoint, give and bequeath the same;" and, in default of appointment, in trust for her next-of-kin, as if she had died unmarried and intestate.

In 1842, Mr. Gardiner opened a banking account with Messrs. Thackwell, J. Webb, Spencer & Holbrook, bankers at Ledbury, and was, on the 17th of April 1843, indebted to them on his account in the sum of 458*l.*

On the 17th of April 1843, Mrs. Gardiner signed the following letter:—

"Gentlemen,—In consideration of your paying, or having already paid, the cheques of my husband, Mr. R. W. Gardiner, or otherwise advancing him sums of money, I hereby guarantee the repayment thereof upon demand, to the extent of 600*l.*, and I furthermore deposit, as a collateral security, a certain bond bearing date the 1st of March 1827, from Harriett Gardiner to me, which bond I undertake to assign to you at my expense whenever called upon to do so."

The bond and letter were then delivered by Mr. Gardiner to the bank.

In 1846, Mr. Holbrook retired from the partnership, and E. J. Webb and Moore were introduced into it. The business was thenceforward carried on by Messrs. Thackwell, J. Webb, Spencer, E. J. Webb & Moore. On this change, the usual deeds of assignment of debts, &c. were executed.

In 1847, Mr. Gardiner became bankrupt. Mr. Gardiner had continued his account with the bank at Ledbury from April 1843 until his bankruptcy, at which time he was indebted to the new firm in 715*l*. This debt was proved by the bank in the bankruptcy, and, by means of the dividends received on the proof and the proceeds of other securities, was afterwards reduced to 321*l*.

The bill, which was filed by Messrs. Thackwell, J. Webb, Spencer, E. J. Webb and Moore against Mrs. Gardiner, prayed for a declaration that the plaintiffs had a lien on all Mrs. Gardiner's interest in the bond for the sum remaining due to them.

Mrs. Gardiner, by her answer, stated that her husband had placed the letter of the 17th of April 1843 hastily and suddenly before her, saying that he wished her to sign it immediately, and that he was in a great hurry, and that the bank had become very troublesome; and that, in consequence of this urgent request, she signed it. Mr. Holbrook, who was examined by Mrs. Gardiner, stated, in his evidence, that the body of the letter was written by a clerk of the bank, and that it was then delivered to Mr. Gardiner to get signed by Mrs. Gardiner, and, when so signed, was returned to the bank by him, and that all the communications on the subject of the transaction took place with Mr. Gardiner, and that he never saw Mrs. Gardiner on the business at all.

The only evidence of the plaintiffs was proof of the signature of Mrs. Gardiner to the letter.

There were no children of the marriage.

Mr. Bacon and Mr. Bird, for the plaintiffs, contended that they were entitled to Mrs. Gardiner's life interest on the bond, and that they were also to be considered as appointees of the fund in default of children of the marriage.

Mr. Russell and Mr. Torriano, for Mrs. Gardiner, contended that the letter failed as a guarantie under the 4th section of the Statute of Frauds, as no consideration was expressed on the face of it, and that it could not, at any rate, affect the *corpus* as the formalities as to witnesses had not been complied with.

Mr. Willcock and Mr. Haldane, for Mr. Gardiner.

Mr. L. Wigram and Mr. Archibald Smith, for the trustees of the settlement.

Mr. Bacon replied.

The following cases and authorities were cited.—

Owens v. Dickenson, Cr. & Ph. 48.

Hopkins v. Myall, 2 Russ. & M. 86.

Wain v. Warlters, 5 East, 10.

Raikes v. Todd, 8 Ad. & E. 846;

s. c. 8 Law J. Rep. (n.s.) Q.B. 35.

1 *Sugden on Powers*, 94.

PARKER, V.C.—The plaintiffs' title is founded upon a letter of the 17th of April 1843, signed by Mrs. Gardiner, and addressed to Messrs. Webb, Holbrook, and Spencer, which is in these words.—[His Honour here read the letter.]—It is contended by the defendants that this letter contains no consideration moving to Mrs. Gardiner; and that, for that reason, it cannot be put in force as against her; and *Wain v. Warlters*, *Raikes v. Todd*, and other cases were referred to. It is to be observed that the instrument in question is not a mere letter of guarantie. It purports to deposit with the bankers, as a collateral security, the bond, which is the subject of this suit, and it cannot be doubted that a conveyance or pledge made by one man as a security for the debt of another is supported by sufficient consideration. The plaintiffs sue on Mrs. Gardiner's letter as an equitable assignment and appointment; and, viewed in this light, the discussions on the 4th section of the Statute of Frauds do not appear to me to have any material bearing.

The next question is, as to the effect of the instrument. Mrs. Gardiner, under the settlement of October 1829, was entitled to the income of the money secured by the bond for her separate use, for her life, without any restraint on anticipation. To

the extent of this interest she is to be regarded as a *feme sole*, so that her life interest is bound by the security given to the bankers. Subject to this life interest, and in default of issue of the marriage (and it appears there are none), the trust monies were to be held in trust "for such person or persons and in such manner as Mrs. Gardiner alone, notwithstanding her coverture, should, by any deed or deeds, or instrument or instruments in writing, with or without power of revocation, to be by her sealed and delivered in the presence of and attested by two or more witnesses, from time to time, direct or appoint, give or bequeath the same; and, in default of appointment, in trust for her next-of-kin as if she had died unmarried and intestate." It is contended, by the plaintiffs, that Mrs. Gardiner's letter operated as an execution of this power in favour of the bankers, who, it is said, as creditors or purchasers for value, are entitled in this court to have an execution of the power, though defective for want of the formalities prescribed, established in their favour. There is no doubt that this Court will supply a defect in the execution of a power in favour of a creditor or a purchaser, and that it will do so, although the donee of the power be a married woman. But the Court, in such cases, must be satisfied that the formalities, which have not been observed, are no more than matters of form, and that the donee of the power has not, by their non-observance, been deprived of any protection which a due exercise of the power would have afforded him; and the Court looks with especial jealousy on a transaction in which the wife may have acted under the influence of her husband. The case of *Hopkins v. Myall*, referred to in the argument, illustrates the principles of this Court in this respect. In the present case the plaintiffs proved nothing beyond Mrs. Gardiner's signature to the letter. Mrs. Gardiner, by her answer, states "that her husband placed the letter hastily and suddenly before her, saying that it had been written by Mr. Spencer, one of the banking firm, and that he wished her to sign it immediately; and that he was in a great hurry, and that the bank had become very troublesome; and that, in con-

sequence of this urgent request she signed it." In support of this case she has examined Mr. Holbrook, who proves, in substance, "that he and his partner were desirous of having Mrs. Gardiner's guarantee; and that the body of the letter was written by a clerk of the bank, as he believes, in his presence, and that it was then delivered to Mr. Gardiner to get signed by Mrs. Gardiner; and that, when so signed, it was returned to the bank by him; that all the communications on the subject of the transaction took place with Mr. Gardiner; and that he never saw Mrs. Gardiner on the business at all." It thus appears, that Mrs. Gardiner's signature was obtained by her husband, for his own purposes, without that protection against his influence which the power contemplated in requiring any appointment by her to be made in the presence of, and attested by, two witnesses; and I am of opinion that the Court cannot regard the power as duly exercised to bind Mrs. Gardiner, as if she had signed it in the presence of witnesses.

The consequence will be a declaration that the life interest of Mrs. Gardiner was charged by the letter of the 17th of April 1843, in favour of the banking firm of Messrs. Webb, Holbrook & Spencer; and that such charge included any interest, or arrears of interest, then due on the bond. There must be a reference to the Master, to inquire and state to the Court whether any and what balance was due, on the 31st of December 1845, (the time when the banking firm was changed), from Gardiner to the firm of Webb, Holbrook & Spencer, in respect of their having paid or otherwise advanced him any sums of money, and whether such sums, or any part thereof, still remain due.

Another point in the case arose under the following circumstances: Harriett Gardiner was indebted to Charlotte Gardiner in 1,500*l.*, secured by bond. In 1829, Charlotte Gardiner, on her marriage with R. W. Gardiner, assigned the debt to Gwillim, on trust to enforce payment of the debt, invest the proceeds, and pay the income to Mrs. Gardiner for life, for her separate use; and, in default of children of the marriage, to hold the trust

funds for such persons as she should by deed appoint. Gwillim disclaimed the trusts of the settlement. In 1832, 100*l.*, part of the bond debt, was paid to Mr. and Mrs. Gardiner, and the receipt of it was acknowledged by them. In 1836, James Barrett was appointed a trustee of the settlement. Subsequently, in the same year, 645*l.*, further part of the bond debt, was paid to Mr. and Mrs. Gardiner; and the receipt of it was acknowledged by Mr. and Mrs. Gardiner and James Barrett. Harriett Gardiner, the obligor, married James Barrett. In 1841, James Barrett died. In 1842, Brown was appointed a trustee of the settlement. In 1843, Mrs. Gardiner, by a letter addressed to Messrs. Holbrook, Spencer & Webb, bankers, charged the debt due to her with sums advanced by them to her husband, Mr. Gardiner. In 1843, Harriett Barrett, the obligor, died; and letters of administration of her estate were granted to Mrs. Gardiner.

In 1847, Mr. Gardiner became bankrupt.

A bill was filed by the bankers against Mr. and Mrs. Gardiner, for the purpose of enforcing their claims on the bond debt, in respect of Mrs. Gardiner's letter.

Between 1843 and the time of filing the supplemental bill the matter stood thus: Mr. Gardiner, in respect of the payments made to him, of the sums of 100*l.* and 645*l.*, on account of the bond debt, was indebted in those sums to Brown as trustee of the settlement, and Mrs. Gardiner as administratrix of Mrs. Barrett, the obligor, was indebted to Mr. Brown as such trustee in the securities of the debt. Mr. Brown had not taken any steps in the matter. There were no children of the marriage. A supplemental bill was filed by the bankers against Mr. and Mrs. Gardiner and Mr. Brown, stating the above circumstances, and praying that Mr. Brown might be charged with wilful default for omitting to recover the two sums of 100*l.* and 645*l.* from Mr. Gardiner, and the remainder of the debt from Mrs. Gardiner, as administratrix of Mrs. Barrett, and for the administration of the estate of Mrs. Barrett.

PARKER, V.C.—The original bill is filed by the plaintiffs, as bankers, asserting

their title, under an instrument of deposit, against Mr. and Mrs. Gardiner, and seeking to have an interest in the bond. A supplemental bill was filed by the plaintiffs proceeding upon this; and, assuming that they have a title in the bond, seeking, as it were, to realize the amount due on it, partly calling on Mr. Brown, the trustee, to make good some payments that had been made by the obligor on the bond, and partly to administer the estate of the obligor for the purpose of recovering the balance due on the bond, and seeking relief against Mr. Brown, the trustee, on the ground of wilful default. It appears that, long before Brown became a trustee, payment had been made on account of her bond by the obligor to Mrs. Gardiner, in which Mrs. Gardiner had joined with the husband in a receipt. I think that nobody claiming under her can possibly dispute the propriety of those payments. As to this, I can see no foundation of any claim for wilful default.

Then, there is a further case of wilful default made, that Mr. Brown, after his appointment as trustee, allowed the money to remain out in the hands of the representative of the obligor who was dead, and that he ought to have taken proceedings to have compelled the payment. I think, however, that this claim of wilful default admits of the same answer. The bond was to be paid out of the assets of the obligor, Mrs. Gardiner being the personal representative. Of course, any claim in respect of the assets must have been a claim to be asserted against her husband. It must be supposed that, if Mr. Brown forebore to institute proceedings against her and her husband, it was a proceeding which had her concurrence; and, therefore, it appears to me the parties claiming under her cannot complain of Brown's conduct in not taking those proceedings. So far, then, as this bill seeks to charge Mr. Brown with wilful default the case fails, and that part of the supplemental bill must be dismissed, with costs. Mr. Brown, however, is a necessary party, because he is the person to whom the bond was to be made over on the trusts of the settlement.

PARKER, V.C. { *In re* THE SEA, FIRE, AND
June 1. { LIFE ASSURANCE SO-
CIETY, *ex parte* BURTON.

Company — Contributories — Power of Attorney—Revocation of Power.

In July 1849 A. gave B, the secretary of a joint-stock company in the course of formation, a power of attorney authorizing him to execute the deed of settlement in the name of A. for five shares. In August a correspondence passed between A. and B. to this effect: A. desired to terminate all connexion with the society; B. requested A. to pay the calls; A. hoped the directors would excuse him, and B. stated that the directors would not release him. Nothing further took place between A. and B. In October the company was completely registered, and B. executed the deed of settlement in the name of A. The company was wound up:—Held, that A. had not revoked the power of attorney, and was properly placed on the list of contributories of the company, in respect of five shares.

Whether A. could revoke the power of attorney—quære.

On the 30th of July 1849 Mr. Collingridge, the secretary, and one of the directors, of a joint-stock company, then in the course of formation, called "The Sea, Fire, and Life Assurance Society," called at the residence of Mr. Burton, at Monmouth, and proposed to him that he should be one of the agents of the company. There had not been any previous acquaintance between them. Mr. Burton readily acceded to the proposal. Mr. Collingridge then added that, as it was considered desirable that the agents of the society should have some direct interest in its welfare, he must impose the condition that Mr. Burton should take at least five shares in the concern. To this Mr. Burton demurred, but, ultimately, signed a power of attorney, authorizing Mr. Collingridge to execute the deed of settlement of the company in the name of him, Mr. Burton, for five shares.

On the 2nd of August Mr. Collingridge sent a letter to Mr. Burton, informing him that five shares had been allotted to him.

Mr. Burton, having repented of the

course which he had taken, wrote a letter to Mr. Collingridge, dated the 17th day of August, in which he expressed his desire "to terminate all connexion with the undertaking." In reply to this, Mr. Collingridge wrote the following letter, dated August 18th:—

"Sir,—I beg to acknowledge the receipt of your letter of the 17th inst., and the directors accept your resignation to act as agent for the district of Monmouth. I have also to remind you that the amount of 5*l.* on your five shares was due on Saturday, the 11th inst., of which notice was given. I am requested to inform you that the directors require that you pay the same on or before the 25th inst."

In reply to this, Mr. Burton then wrote the following letter, dated August 20th, 1849:—

"Sir,—In answer to yours of the 18th inst., I trust the directors of the Sea, Fire, and Life Assurance Society will not insist upon making me a proprietor of shares, which I certainly should never have thought of applying for, but for the circumstance of being very much urged to take the agency for the district of Monmouth. It was merely to comply with the society's regulations, upon becoming an agent to them, that I applied for them; and, when I requested the favour of being exonerated from the agency, I meant the shares also; and, as the directors have been pleased to excuse me the one, I hope they will also the other."

Upon this the following letter, dated August 21, was sent by Mr. Collingridge:

"Sir,—I have to acknowledge the receipt of your letter of the 20th inst., and am requested by the directors to inform you that they cannot, in duty to the shareholders whom they represent, release you from the shares you subscribed for; but, to meet your convenience, the directors will allow you to nominate another party to pay upon the shares."

No further communication took place between Mr. Burton and the company.

The company was completely registered in October; and, on the 15th of that month, Mr. Collingridge executed the deed of settlement for five shares in Mr. Burton's name.

The company was ordered to be wound up, and the Master placed Mr. Burton's name on the list of contributories for five shares.

This was an appeal by Mr. Burton from the Master's decision.

Mr. Malins, for the motion.—Mr. Burton gave Mr. Collingridge a power of attorney to execute the deed of settlement. This was revocable—*The King v. Wait* (1). Then did Mr. Burton revoke it? In the letter of the 17th he says "I desire to terminate all connexion with the undertaking." This *prima facie* would operate as a revocation. Mr. Collingridge misunderstands, or affects to misunderstand, this letter; and, by the letter of the 18th, discharges him from the agency only. The following letter of the 20th removes all doubt as to the question of the shares; it is as if he had said by the expression "terminate all connexion with the undertaking; I mean both shares and agency." These two together then amount to a complete revocation; and, as the deed of settlement was not executed until after these letters, Mr. Burton is not bound by Mr. Collingridge's act.

Mr. Roxburgh, for the official manager.

Mr. Malins replied.

PARKER, V.C.—I think that the Master has come to a right conclusion. Before the 17th of August, Burton had done all that was necessary to render him liable as a contributory. He had agreed to take shares by a formal instrument, which contained a power of attorney to Collingridge to execute the deed for him; and, upon this, shares were allotted to him. It may be a matter of question whether the power given to Collingridge was revocable by Mr. Burton. However this may be, I think that it was not revoked. In a letter of the 17th of August, Burton asked to have the connexion put an end to. To this letter he received an answer, which discharged him from the agency, but reminded him that 5*l.* was due on his five shares. The reply to that was, "I trust the directors will not insist."—[Here His Honour read the letter of the 20th of

August.] That was a request to be discharged from the liability under which he had come. This request was, by the letter of the 21st, refused, a part of this answer being "to meet your convenience the directors will allow you to nominate another party to pay upon the shares." Nothing more was done. Mr. Burton's silence left the matter where it was. He made a request, which was refused. I think that Mr. Burton is liable, and the motion must be refused, with costs.

LOARDS JUSTICES. }

1852.

July 1, 2. }

MOORHOUSE v. COLVIN.

Marriage Contract—Promise—Portion.

*A father bound himself to give his daughter a marriage portion of 2,000*l.*, and said that she was and should be noticed in his will. He had previously made a will, giving her a lac of rupees; but afterwards he made another will, which, after giving all his property to his wife for life, and then to his two sons, gave the same, if they should die without issue, to his daughter's issue:—Held, affirming a decree below, that there was no contract by the father to give more than the 2,000*l.**

This was an appeal, by the plaintiff, against a decree of the Master of the Rolls, pronounced on the 4th of December 1851, and which, with the whole facts of the case, are fully reported *ante*, p. 177.

Mr. Bethell and *Mr. Toller* appeared for the appellant.

Sir W. P. Wood, *Mr. Willcock*, *Mr. Anderson*, *Mr. G. W. Collins*, *Mr. Giffard*, and *Mr. W. Morris*, for the respondents.

LORD JUSTICE LORD CRANWORTH.—This is a bill filed for the purpose of establishing the right of Mr. and Mrs. Moorhouse to a lac of rupees, that is to say, a sum of not less than 12,000*l.*, out of the estate of the late Dr. Peter Cochrane; and the foundation of this claim was a letter written by Dr. Cochrane, on the 6th of July 1825, to a gentleman of the name of Dr.

(1) 11 Price, 518.

Thomas, in India, on the occasion of Mrs. Moorhouse, then Miss Cochrane, going out to that country with a view to establishing herself for life, the lady being then of the age of nineteen. Dr. Cochrane sent her to India, and simultaneously wrote a letter to Dr. Thomas. By it he bound himself to give her, on marriage, 2,000*l.* in the following terms:—"You may assure the young gentleman who may meet with your and Mrs. Thomas's approbation, that on his marriage with her he shall have 2,000*l.* sterling;" and then he adds, "nor will that be all; she is and shall be noticed in my will, but to what further amount I cannot say, owing to the present reduced and reducing state of interest, which puts it out of my power to determine at present what I may have to dispose of. I hope, however, that he will have no objection to admit of the 2,000*l.*, and whatsoever else may follow, being settled on herself and children. Should she die before him, without issue, he shall have the 2,000*l.* to himself."

Now, the real question is, what is the correct interpretation to be put on that letter? I will assume that the letter was shewn to Mr. Moorhouse previous to his marriage with Miss Cochrane, and on that assumption even I still concur with the judgment of the Master of the Rolls. The letter means this, "I leave you, Dr. Thomas, in charge of my daughter. I wish her to marry, and you have my authority to say she will have 2,000*l.*, with a proviso that it shall be settled; but I further add, I have made a will, and have made a further provision, but to what amount I cannot and will not say; as to the amount of 2,000*l.* I bind myself to pay it, but no more than the 2,000*l.*" Dr. Cochrane, then, having paid the 2,000*l.*, she has no further claim on his estate.

But then it is contended that by his writing to Dr. Thomas "she is and shall be noticed in my will," he had, at any rate, bound himself not to reduce the provision made for her by will below a lac of rupees, or 12,000*l.* to which she was then entitled under a then existing will; but that is not so. The testator, in effect, says, "I have or shall make a will, but I reserve to myself full power either of increasing or reducing by it the provision

for my daughter." It is a case of great hardship on Mr. and Mrs. Moorhouse, who were, doubtless, led to expect a large fortune; but we must not allow any private feelings to make us swerve from our duty. The contract is to give 2,000*l.*, and nothing more, unless it be something which is left entirely to his discretion by will, but he has given nothing. The party might, perhaps, have a right of action, in which nominal damages could be obtained, but that the Court would disregard.

The authorities the counsel for the plaintiff relied on were the case before the House of Lords, *Hammersley v. De Biel* (1) and *Luders v. Anstey* (2); but both cases are distinguishable materially from the present. The question in each of those cases was, whether the expressions made use of amounted to a contract between the parties, and Lord Loughborough, in the one case, and the House of Lords in the other, held that they did. Whether, on the question in *Luders v. Anstey*, all minds would have arrived at the same conclusion, it matters not; but there was no difficulty, assuming that there was a contract in that case, in knowing what was to be done; but in this case the difficulty is, even if there had been an express contract, that the Court cannot tell what sum is to be given. The authorities fail, therefore, in supporting the case of the plaintiff.

On the whole, my opinion is, that this amounts to a contract to do a deed which has been done, that he would give her 2,000*l.* The Master of the Rolls has acted correctly in dismissing the bill.

[*Mr. Toller* asked for a reference as to whether Mr. Moorhouse had the contents of the will communicated to him previous to his marriage, and whether Dr. Cochrane was aware that such communication had been made to him.]

LORD JUSTICE KNIGHT BRUCE.—I am most clearly of opinion that there was no contract beyond the 2,000*l.* The only question which could possibly arise would be whether, notwithstanding our opinion on that subject, a case should be directed on

(1) 12 Cl. & F. 45.

(2) 4 Ves. 501.

the question of contract to a court of law: first, on facts as they stand proved; and, secondly, with the addition of the facts, which it is suggested can be proved. I do not think a case would do the plaintiff any good; but I should disregard my own view as to sending a case to law, if my learned Brother thought it ought to be sent. I am not strongly impressed that a case should be sent, but if Lord Cranworth thinks it should, I shall not dissent.

LORD JUSTICE LORD CRANWORTH.—I do not think a case should be sent.

LORD JUSTICE KNIGHT BRUCE.—We both think it right to dismiss the appeal; but it must be dismissed, without costs, and the deposit must be returned.

KINDERSLEY, V.C. } In re WARING.
July 9.

Baron and Feme — Covenant to settle — Trustees Relief Act — Costs.

Upon the marriage of an infant the husband by an ante-nuptial settlement covenanted that upon his wife attaining the age of twenty-one he would join and concur with her, if she would consent thereto, in settling upon her and the children of the marriage certain property to which she would become entitled for her separate use. The wife attained her age of twenty-one, and refused to join in settling the property:—Held, that the settlement was inoperative.

After the wife had attained her majority, information was given by her, to the trustees of the will under which she was entitled to the above property, that a bill would be filed against them charging them with breaches of trust and seeking an account. The trustees, after this notice, paid her share into court, under the Trustee Act. Upon petition for payment of the money out of court, the trustees were refused their costs.

This was a petition for the payment out of court of a sum of money paid in under the Trustee Act by John and James Tellwright, the trustees under the will of William Tellwright, dated the 18th of October 1841, who gave the residue of his estate to his two sons John Tellwright and James Tell-

wright, upon trust to sell and convert the same into money, and to divide the proceeds amongst his children equally, the shares of sons to be paid on their respectively attaining the age of twenty-one years, and the shares of daughters on their respectively attaining that age or being first married. And the testator directed that the shares of his said daughters respectively should be paid to their separate use, and should not be liable to the debts or controul of their respective husbands, and their receipts alone to be sufficient discharges for the same.

The testator died in 1841, and his daughter Martha, while under the age of twenty-one, married William Waring; and by the settlement made previously to her marriage, the said William Waring covenanted with the said John Tellwright and James Tellwright, that he would, as soon as conveniently might be, after the said Martha Tellwright should attain the age of twenty-one years, if she should be then living, join and concur with her, if she would consent thereto, and would also use his utmost endeavours to procure her to join and concur with him, or in case she should have departed this life, then that he would alone duly execute all such deeds, conveyances, and assurances as should be advised for conveying and assigning all and singular the part or share to which the said Martha Tellwright, her executors or administrators, or the said W. Waring in her right, should or might become entitled under the said will, unto the said John Tellwright and James Tellwright, upon certain trusts therein mentioned for the benefit of Martha Tellwright and William Waring and the children of the marriage.

Martha Tellwright attained the age of twenty-one in the year 1851, and shortly afterwards information was given to John and James Tellwright that a bill would be filed against them by Martha Tellwright and her husband, charging them with breaches of trust and seeking an account in respect of the estate of the testator.

The bill was accordingly filed on the 13th of March 1852, after which a notice was served upon the said Martha Tellwright by the said John and James Tellwright, that they had transferred into court, under the Trustees Relief Act, the sum of

1,112*l.* consols. as her share under the will. An affidavit was at the same time filed by the said trustees, setting out the accounts of the testator's estate.

The petition now presented was by Mrs. Waring, praying a declaration that the settlement made upon her marriage might be declared void, and that the sum so paid into court might be transferred to her upon her separate receipt.

Mr. Lewin, in support of the petition, contended that the settlement was inoperative. The covenant on the part of the husband was to the effect that he would settle the future property of the wife in case she consented to its being so settled. It now appeared that she refused to consent, and therefore the settlement could have no operation in respect of the wife, who was an infant when the settlement was executed. The property, therefore, remained impressed only with the trusts under the will for her separate use, and she was now entitled to have it paid to her—*Simson v. Jones* (1). It was also submitted, that the trustees had no right to pay this money into court after notice had been given to them that a bill was to be filed, and, under such circumstances, they ought to bear the costs of their improper conduct.

Mr. Hadden appeared for the trustees, and contended, that the settlement ought to be executed, and that the trustees were entitled to their costs—*Lloyd v. Williams* (2).

Mr. Jessel appeared for the husband and for an infant child; and

Mr. Malins, for other parties.

KINDERSLEY, V.C.—I regret to be under the necessity of deciding that this settlement cannot prevent the petitioner from having the benefit of that which is her separate estate. If there had been no settlement, then there could have been no question but she would have had it for her separate use. If in that state of things the trustees had paid the money into court, the petitioner would at once have been entitled to have it paid out to her. The question, therefore, is, whether the fact of

a settlement having been made when she was an infant alters the case. I must say I think it is no more than mere waste paper as against her. I cannot treat it otherwise without overruling every principle which has been laid down with regard to infants. The only reason which could ever make such a settlement binding would be, that inasmuch as the husband binds himself he binds the fund, because it would be his if he did not, but that applies only to a case where the husband would be entitled *jure mariti*, but not so under a case where the property was given to the wife so as to exclude the *jus mariti*. The fact of the property being given to the separate use of the lady I consider to be decisive, and, therefore, I regret to be obliged to decide according to the prayer of the petition. There is certainly one thing which does away with my regret in thus deciding, and that is that I am informed the husband and wife intend to re-settle the whole of this fund, with the exception of 300*l.* or 400*l.*

Then, as to the costs. It is quite evident that the intention of the legislature in passing the Trustees Relief Act was only to enable the trustees to pay into court a legacy or share of a trust fund under peculiar circumstances. The object was to relieve trustees; that is, to relieve them from the position of having in their hands money which they do not know what to do with: as, for instance, where a legacy is given to A. B, and the trustees cannot find the A. B. to whom it is made payable, or where trustees cannot take upon themselves the responsibility of distributing a fund, or cannot take upon themselves to decide all the questions of law raised, and then the trustee is required to file an affidavit stating, not the whole history of the administration of the trust, to shew that the residue after administration was so and so, but that he admits it to be the residue under such a settlement or will. Then, that act being passed for the relief of trustees, would it not be absurd to apply it to cases where it was not for the relief of trustees? If the trustees are informed that a suit is to be instituted, the effect of which will be to try the question, and that it will at the same time call the trustees to account for the sums received about the trust, surely under such circumstances the trustee ought

(1) 2 Russ. & M. 365; a.c. 9 Law J. Rep. Chanc. 106.

(2) 1 Madd. 450.

not to avail himself of the act to avoid the responsibility of accounting. It appears to me that a trustee abuses the act of parliament, if in such a case he pays the money into court. At the same time the legislature has, no doubt, enabled him to do so. I think it would have been better if the legislature had required the affidavit to contain some indication that he has no reason to believe that a bill has been filed; but where a trustee knows that a bill is to be filed, and then pays the money into court, that looks as if it were not for the purpose of escaping from the responsibility of the trust fund, but of escaping from the liabilities which might be incurred under the charges in the bill. In this case information was sent to the executors that a bill was about to be filed. It is said that the whole question arises out of the refusal of these gentlemen, as trustees, to pay a small sum of money to the petitioner independent of the settlement. I sympathize with the wishes of the trustees to keep the trust fund safe; but at any rate notification was made to them that a bill was about to be filed, and it was notified to them that their accounts would be investigated, and that they would be charged with fraud: and then without any notice this money is paid into court under the Trustees Relief Act. It appears to me that if the legislature had contemplated just such a case as this, it would have prevented the money being paid in at all, and I think it would be a very great improvement if the trustees in paying in money, were compelled to make an affidavit that they did not know of any litigation about to be instituted. How then, under these circumstances, am I to deal with this case? In the case of a simple legacy, the trustees are not necessarily entitled to costs, but then the expense of paying in the money is part of the act of administration; but this is the share of a residue, and in that it differs materially. Finding, therefore, as I do that this money was paid in, in abuse of the act of parliament, where it was not necessary for the relief of the trustees that it should be paid in,—where a proceeding was communicated to the executors for the purpose of exonerating them from the responsibility, under such circumstances I should be doing wrong if I gave the executors any costs; but the

other parties who have appeared in order that the petition might be presented must have their costs out of the fund.

KINDERSLEY, V.C. } PIDDUCK v. BOULTBEE.
April 19.

Motion by Next Friend—Irregularity.

In a suit by adult plaintiffs and infant plaintiffs, an order was obtained for changing the next friends of the infants. The order was drawn up and entered. The adult plaintiffs obtained at the Rolls an order for changing the solicitor to the suit, and alleged that the order appointing a new next friend had not been drawn up and entered. The new next friend moved to discharge the order obtained at the Rolls:—Held, that the order for changing the solicitor was irregular; but that the motion to discharge ought to have been by the infants by their next friend, and not by the next friend in his individual capacity.

Application refused, but leave given to amend notice of motion.

This bill was filed, by two adult plaintiffs and by three infants, by Elizabeth Mary Pidduck, their next friend. In November 1851 an order was made by this Court for changing the next friend, and Dr. Wardell was substituted for E. M. Pidduck. The order was drawn up and entered, and counsel appeared at the time the order was made for E. M. Pidduck.

An order of course was subsequently obtained at the Rolls Court, upon the petition of the adult plaintiffs, by which it was ordered that the petitioners might be at liberty to change their solicitor by appointing R. Pugh as such solicitor in the place of Messrs. Crosby & Co. That petition was intituled in a cause in which the two adult plaintiffs and the four infants, by their next friend E. M. Pidduck, were plaintiffs; and it was stated that the order made by this Court for changing their next friend had not been drawn up and entered.

Mr. Stuart now moved, on behalf of Dr. Wardell, the new next friend, to discharge

the order made at the Rolls for leave to change the solicitor on the ground of irregularity, it having been made without notice to Dr. Wardell, and having falsely stated that the order appointing Dr. Wardell was not drawn up and entered. Evidence was produced to shew that the order had been properly drawn up and entered.

Mr. Follett appeared for the defendants in the same interest.

Mr. Willcock, for the plaintiffs, contended that the order made at the Rolls was not irregular, since the order for changing the next friend had been made without the consent of E. M. Pidduck, the original next friend. This statement was supported by an affidavit made by E. M. Pidduck. It was also submitted that this motion could not be made by Dr. Wardell alone in his individual capacity, but should have been on behalf of the infants by their next friend.

Mr. Stuart, in reply.

KINDERSLEY, V.C. — I cannot help thinking that some rational course ought to be taken to prevent the waste of time occasioned by all these nonsensical proceedings. All this is about the machinery of the cause, and not the merits. With regard to the question whether the order of the Rolls was regular or not, my opinion is that it was irregular. It was an application for changing the solicitor in the cause, on a suggestion that delay had taken place, and on a representation that E. M. Pidduck was the next friend of the infants, when in fact she was not, the order appointing Dr. Wardell having been drawn up and entered. Being of opinion, therefore, that the order was irregular, I should discharge it, provided the party moving to discharge had a right to do so.

Then comes the question, whether the next friend coming to the Court as an individual has a right to discharge the order. I will not say that a next friend merely in his own individual capacity may not be entitled in some cases to ask for such an order, but as a general rule the next friend asks because the application is by the infants by their next friend. Now, in this case, after the order of November 1851, Dr. Wardell became the next friend

of the infant plaintiffs, and the suit was thus constituted: there were two adult plaintiffs and four infant plaintiffs by Dr. Wardell as their next friend. Some of these plaintiffs, that is, the adult plaintiffs, behind the back of the next friend of the infants, go to the Rolls and obtain an order to change the solicitor, who is solicitor for all the plaintiffs. Now, as the solicitor is instructed by the adult plaintiffs and by the next friend of the infants as such next friend, what right have the adult plaintiffs to get such an order behind the back of the next friend? It was infringing on the rights of the infants as well as their next friend. The infants, therefore, should come to discharge the order by their next friend, and not the next friend in his individual capacity.

Upon these considerations, I think the objection is valid, and I cannot grant the motion. On a proper application by the infants by their next friend, I should discharge the order, but as it is I must refuse the motion.

Leave was then asked to amend the notice of motion.

KINDERSLEY, V.C. said, if amending the notice would save expense, he would allow it.

LOKDS JUSTICEA.

1852.

July 10.

WRIGHT v. CALLENDER.

Will — Construction — Annuity — Deficiency — Appropriated Fund — Residue.

A testator directed the investment of personal estate sufficient to pay 2l. a week to J. W, during his life; and after his death, the capital to fall into the residue. He directed that when his youngest child attained twenty-one, the residue of his personal estate should be divided equally among his, the testator's children, except J. W, and in like manner, on the death of J. W, to divide the fund invested for the annuity among all the testator's other children then living, and the issue of such as were then dead equally. The residue was invested, and was not sufficient for payment of the annuity. The Court below held, that, as the corpus was given in a subsequent clause of the

will to different persons than the residue, the annuitant was only entitled to the dividends of the fund, for that there was no specific gift of the annuity charged on the whole personal estate; but, on appeal,—Held, that the annuitant was entitled to his annuity in full, and to have the arrears and future payments made good by a sale, from time to time, of the capital of the appropriated fund.

This was an appeal from a decree upon a claim made by Vice Chancellor Kindersley. William Wright, the testator, by his will, dated in July 1851, bequeathed a legacy of 100*l.*, and directed his executors to pay his debts and funeral and testamentary expenses out of his personal estate, and directed them to get in such personal estate, and to stand possessed thereof as follows:

"Upon trust to invest a sufficient portion thereof in the public funds of Great Britain, or upon other government securities, to produce an income of 2*l.* a week to be paid by my executors to my son James Wright during the term of his natural life, to and for his own use and benefit, for his support and maintenance; the said annuity to be in bar and satisfaction of all claim, right, or title to my real and personal estate, or any part thereof; and from and after the decease of my said son James, the said sum so invested to fall into and become part of the residue of my said personal estate." (The will, after reciting that the testator was seized and possessed of certain freehold and leasehold estates therein mentioned, and giving the same in specified allotments to the testator's other children, Thomas, Isaac, Rebecca, and Hannah absolutely, at the age of twenty-one respectively, concluded with the following clause.)—"And whereas when and as soon as the youngest of my said children shall attain that age, upon trust that my said executors do and shall pay and divide my said residuary estate (all such parts of which as do not already consist of public stocks, funds, and securities, I direct may in the mean time be invested in the public funds or on government securities), after deducting the several payments aforesaid, and all due allowances to my said executors, unto and amongst all and every of my said children, except my said son James Wright, share

and share alike, to and for their own absolute use and benefit. And in like manner, I direct that upon the decease of my said son James, the sum to be invested to produce and pay his annuity of 2*l.* a week shall be divided unto and amongst all my other children who shall be then living, or the issue of such of them as may be dead, share and share alike.

The testator died on the 20th of July 1851; and the executors having proved the will, paid his debts and funeral and testamentary expenses, and the legacy of 100*l.* They also assigned over the leasehold estates to the children of the testator, to whom they were respectively bequeathed by the will. The residue of the testator's personal estate they invested in the purchase of 2,200*l.* 17*s.* 6*d.*, 3*l.* per cent. consols, which was all that it was adequate to purchase. The dividends of this sum were regularly applied in payment of the 2*l.* per week in respect of the annuity given to the testator's son James Wright, until January 1852, the deficiency of such dividends for payment of such annuity being from time to time made up out of the capital. From that time, however, the executors declined to pay more than the actual dividends of the fund; whereupon James Wright filed his claim, praying that a sufficient sum might be set apart out of the personal estate of the testator, and invested in the public funds or upon government securities, pursuant to the terms of the will; or otherwise to have the annuity valued, and the sum at which the same should be valued, paid to the annuitant out of the testator's personal estate.

The case was heard before Vice Chancellor Kindersley, on the 24th of April, who held that the plaintiff was entitled to no more than the dividends of the fund after payment of the costs of the suit (1), and from this judgment the plaintiff now appealed.

(1) The judgment of his Honour (from Mr. Gunning's note) was in substance as follows.—

"The main question is, whether this is a simple gift of an annuity to James Wright, or whether it is a gift of such a sum of stock as will produce the sum to be paid to him for life; and after his death the specific stock is given over to persons who are

Mr. Malins and Mr. Drewry, for the appellant.—The annuity in this case is charged upon the whole personal estate, and the legatee's right to be paid the entire annuity cannot be affected by any appropriation — *Gordon v. Bowden* (2). The fund to be appropriated to secure the annuity is directed to sink into the residue after the death of the annuitant, and the residue is afterwards given to the children of the testator other than the annuitant. By a subsequent clause, the appropriated fund is given, "in like manner," for the benefit of the children other than the annuitant of the testator and their issue; a bequest differing as to those benefited from the bequest of the residue. Vice Chancellor Kindersley considered this material, but it is, in truth, nothing more than an inartificial and untechnical mode of expressing what the tes-

just as much the objects of the testator's bounty as the tenant for life. * * If a testator says, 'I give an annuity of 20*l.* to A,' A. has a right to say, 'pay me the annuity, whether it exhausts the assets or not;' but if the testator says, 'invest so much stock as will produce 20*l.*, and pay it to A. for life, and after his death that particular fund is not to fall into the residue, but is to go over to B., or to a class,' it appears to me that it does not come within those cases where, on the mere gift of an annuity, the annuity may exhaust the *corpus* of the fund. The only case where that was not so was *May v. Bennett*. It is true the testator there does not begin by giving an annuity, but he says that the executors shall lay out as much as will produce one; so that the conclusion of the Court was, that it was in effect a gift of an annuity payable out of the estate generally, and it appears that in that case there was a residuary legatee, but *non constat* whether there had been any other assets than the particular fund. If there had been any other assets, they would have been paid over to the residuary legatee. The Court said, if there were any other assets, the annuitant was entitled to have the fund to secure the annuity; but if no other assets, then the annuitant would be entitled to all. But in *May v. Bennett* there was no specific gift of the fund to answer the annuity. It appears to me that makes the difference. I am, therefore, of opinion, that, if the plaintiff chooses, he is entitled to an account of the assets; *i. e.* to ascertain whether there were any other assets, which, with the 2,200*l.*, would make up a fund sufficient to produce the annuity. If the plaintiff chooses to waive that account, then, without the necessity of any further discussion, I shall declare, the plaintiff waiving a decree for an account, that he is only entitled to the dividends of so much of the stock as shall remain after payment of the costs."

The account was waived, and the decree made as above.

(2) 6 Madd. 342.

tator had previously signified to be his intention; namely, that the appropriated fund should go with the residue. The annuity bequeathed is not the income of a particular fund, but an annual income of a given amount; and although the executors are directed to set apart a sum of money sufficient to produce the income, the annuity is a charge upon the whole personal estate, as well as upon the sum so appropriated. In substance, the gift is a gift of an annuity, the direction for investment being merely a means of securing the annuity. That being so, the plaintiff is entitled to have the annuity valued, and to be paid the amount of the valuation—*Wroughton v. Colquhoun* (3), *Carr v. Ingleby* (4), *Long v. Hughes* (5); or if not entitled to a gross sum, the amount of a valuation, he is, at all events, entitled to have the deficiency in the dividends of the appropriated fund to meet the annual payments in respect of the annuity made good, from time to time, by a sale of part of the capital of the fund; as in the case of *May v. Bennett* (6), where a testator directed his executors to lay out, in what government security they pleased, as much money as would produce a certain annual interest for his wife's use during her life. The executors invested in the 5*l.* per cents. a sum which yielded dividends equal to the sum mentioned. These were afterwards diminished by the conversion of the stock into 4*l.* per cents., and Lord Gifford, the Master of the Rolls, ordered that the deficiency should be made up to the grantee out of the general estate, or by the sale, from time to time, of portions of the appropriated stock. The learned counsel then cited and commented on *Davies v. Wattier* (7).

Mr. Stuart and Mr. Shebbeare, for the executors.—The testator directs his executors to invest a sufficient portion of his personal estate in the public funds to produce an income of 2*l.* a week to be paid to his son James, after whose decease the fund is directed to fall into the residue of the

(3) 1 De Gex & S. 36, 357; s. c. 16 Law J. Rep. (n.s.) Chanc. 70.

(4) 1 De Gex & S. 362.

(5) Ibid. 364; s. c. 7 Law J. Rep. Chanc. 105.

(6) 1 Russ. 370.

(7) 1 Sim. & S. 463.

testator's estate. By a subsequent clause, however, the fund is given, not to the testator's other children, to whom alone the residue is given, but for the benefit of those children and their issue, and is thus disposed of in a manner different from the residue. The last clause affecting the appropriated fund after the death of the annuitant is different from the first clause directing it to fall into the residue; and where there are two inconsistent clauses in a will, the rule is to reject the first, and give effect to the last.

[LORD JUSTICE KNIGHT BRUCE.—Whatever may be the order of the clauses of the testator's will, every part of the instrument becomes the testator's will at the instant of execution by the testator. The rule of construction you rely upon is never applied till every other resource has failed. Your point is, that the general residue of the personal estate is given in one way, and the capital of the appropriated fund in another, notwithstanding the introductory words "in like manner" to the latter clause, and notwithstanding the direction of the prior clause that it shall become part of the residue.]

It is submitted that that is so, and that the effect of the two clauses is a gift of the fund to James for life, with remainder for the benefit of others; in fact, that all that the plaintiff can take is, the income of the particular fund. The other children of the testator were objects of his bounty as much as James, and it could never have been intended that the capital of the appropriated fund should be sunk in the purchase of a government annuity, or in the payment of a gross sum equivalent to the price of such an annuity.

Mr. Drewry was heard in reply.

LORD JUSTICE LORD CRANWORTH.—I do not express a very confident opinion. On a will so obscurely worded it is not to be wondered at that different minds arrive at different conclusions. I am, however, bound to confess that I do not concur in the view taken by the Vice Chancellor. The view he took is this:—The testator has, by his will, given to his son James an annuity of 104*l.* per annum, and has directed that such annuity shall be secured by means of a fund out of which it may be

paid. He left assets insufficient to raise a fund of which the dividends could be applied to pay the annuity in full; in fact, it would not be sufficient for the payment of more than 60*l.* or 70*l.* per annum. The question then arises, what is to be done under these circumstances? It is hardly controvertible that if there had been a mere gift of the annuity, and afterwards a simple gift of the residue, the annuitant would be entitled to be paid in full. The Vice Chancellor, however, proceeded upon this distinction, that the fund to be appropriated to secure the annuity, though directed by the will to fall into the residue of the testator's estate, is, by a subsequent clause of the will, in effect given to a different class of persons from those who are to have the residue. So far, I go with the Vice Chancellor in thinking that the same persons do not take the appropriated fund and the general residue, but that does not affect the question. The testator, in substance, says that an annuity of 104*l.* shall be secured to his son James, and, as a means of doing it, directs an investment in consols; now, that is nothing more than the law itself would direct to be done. There is nothing in the terms of the gift over shewing that the testator intended the fund to be preserved in its integrity during the life of James. It is a gift over in that event of so much as shall then remain. There is, in reality, no distinction between this case and that of *May v. Bennett*. There, as in the case before the Court, the question arose between the annuitant and the residuary legatees. The testator in that case having directed his executors to lay out in what government security they pleased as much money as would produce an annual interest, and having given that annual interest to his wife during her life, in case she did not marry again, the executors invested in the 5*l.* per cents. a sum which yielded dividends exactly equal to the specified income. Eighteen years afterwards the dividends were diminished by the conversion of the 5*l.* per cents. into 4*l.* per cents., and became, therefore, insufficient to meet the annuity. Lord Gifford (Master of the Rolls) held that the setting apart the fund was only a means to the end, and that if that means failed the intention was, that the nominal amount of the security

should be made up out of the other assets. What Lord Gifford said is this: "If there is any difficulty in making good the difference out of the general estate of the testator, the widow must have the deficiency raised, from time to time, by the sale of parts of the appropriated stock." Now, that is, in my opinion, equity, and the only equity which the annuitant in the principal case has.

I cannot agree that the law is as has been stated by the counsel for the appellant, viz., that where the question arises between the annuitant and those entitled to the residuary estate, the annuitant is entitled to have the annuity valued, and to be paid the amount of the valuation in respect of his annuity. In all the cases which have been cited in support of that view of the law, the question has arisen, not between the annuitant and the residuary legatee, but between the annuitant and pecuniary legatees. But as between an annuitant and pecuniary legatees, the Court holds that there must be an abatement *pari passu* in case of deficiency of assets, and knows of no other way of dealing with the subject but by means of a valuation. The case is different where the claimant is entitled as against the residue to an annuity, and something else; namely, the investment of a fund as a means to secure the payment of the annuity.

Then, all that can be asked is, payment of the annuity, and an investment of the fund by way of security; and in the event of the dividends of that fund being insufficient to meet the annual payment in respect of the annuity, then to have the deficiency made good from time to time, either by a sale of portions of the appropriated stock, or out of any other part of the residue which can be made available. It may happen, certainly, that by this means the whole appropriated fund would in the end be exhausted, if the annuitant lived long enough. In that case, the annuitant will only be in the situation of any other person to whom a testator bequeaths a benefit without leaving assets to provide for it.

LORD JUSTICE KNIGHT BRUCE. — In electing between the two different constructions which have been put upon the lan-

guage of the will in question, I arrive at the same conclusion as Lord Cranworth; different from that of the Vice Chancellor. The opinion which I formed when I first read the will, and which has continued unchanged during the argument, is, that the plaintiff is entitled to have the will read as if he was named in it simply and merely as a legatee of an annuity of 2*l.* per week for life. I certainly am not at present disposed to direct that the annuity should be valued, or to do more than allow the annuitant, from time to time, to break into the capital of the appropriated fund, for the purpose of making good any deficiency in the dividends to pay his annuity. If the parties can agree upon that mode of raising the deficiency, the case may, as to that, be mentioned again to the Court.

The order ultimately made declared that the plaintiff was entitled to be paid his annuity in full, and to have the arrears then due, as well as any deficiency in the dividends of the appropriated fund to meet the future payments, raised by sale, from time to time, of part of the capital of such fund.

L.C.
1852.
March 2;
July 12. } SPOONER v. PAYNE.

Insolvent—Property—Annuity by way of Compensation to a Country Commissioner of Bankrupts—1 & 2 Vict. c. 110. s. 56.

An annuity awarded to a country Commissioner of Bankrupts, under the 5 & 6 Vict. c. 122, passes to his assignee in insolvency; and is not within the excepted cases mentioned in the 56th section of the 1 & 2 Vict. c. 110.

Where the insolvent refused to make the requisite affidavit that he did not hold any public office or employment in the terms of the 58th section of the 5 & 6 Vict. c. 122, the Court allowed other evidence to be given of that fact to enable the assignee to receive the annuity.

The question raised by the proceedings in this case was, whether an annuity of 19*l.* granted to a Commissioner of Bank-

ruptcy under the 1 & 2 Will. 4. c. 56. passed to his assignee under the Insolvent Acts. The cause coming on for hearing, Knight Bruce, V.C. sent a case for the opinion of the Court of Exchequer, which Court certified that under the Insolvent Act and the proceedings had therein, all the defendant's right and title to the annuity vested in the plaintiff, as his assignee. See 18 *Law J. Rep.* (N.S.) Exch. 401, where the facts of the case and the sections of the acts of parliament are fully set out.

The cause coming on for further directions, the Vice Chancellor made a decree, whereby it was declared that the plaintiff was entitled to receive the payments then due and thereafter to accrue due in respect of the annual sum of 199*l.* granted by the Lords of the Treasury to the defendant Payne. Subsequently, the defendant Payne was applied to to make the affidavit required by the order of the Lord Chancellor of the 28th of February 1844, for the purpose of enabling the assignee to receive the arrears; but he refused to do so: and the Accountant General in Bankruptcy refused to pay to the plaintiff without the production of that affidavit. The plaintiff then presented a petition to the Lord Chancellor, praying that the Accountant in Bankruptcy might be ordered to pay to the plaintiff, as such assignee, the annuity and arrears, upon proof to the Accountant in Bankruptcy by the affidavit of the plaintiff, that, according to the best of his knowledge and belief, the defendant Payne had not held, and did not hold, any such employment as in the act and certificate mentioned, or upon such other proof thereof as the Lord Chancellor should think proper to direct. The Lord Chancellor declined to interfere, on the ground that he had no jurisdiction to dispense with the requisitions of the certificate of the Lords of the Treasury; but he directed the petition to stand over, to give the petitioner an opportunity of presenting a memorial to the Lords of the Treasury. A memorial was presented, but the Lords of the Treasury declined to interfere.

The defendant Payne now appealed from the decree of the Vice Chancellor.

Mr. Bacon and *Mr. Faber* appeared for the respondent, the plaintiff.

Mr. Daniel and *Mr. Wright*, for the appellant, contended, first, that the affidavit by the grantee was a personal condition, and could not be supplied by the affidavit of another person; and that where the Court could not give to the assignee the necessary directions consequential upon his right, it would not restrain the grantee from receiving the annuity; and, secondly, that it was contrary to public policy that the annuity should be assignable.

Mr. Stuart, for the Accountant General in Bankruptcy.

Mr. Bacon replied.

The LORD CHANCELLOR.—The question is a simple one. *Mr. Payne*, as a country Commissioner in Bankruptcy, became entitled to compensation. That compensation became vested in him, and, unless upon some special grounds either of public policy or arising out of the act, that property would pass to his assignees, as part of his general estate, unless the words of the 56th section of the 1 & 2 Vict. c. 110. should except this peculiar property out of the operation of the act. It is quite clear that this case is not within the principle of *Wells v. Foster* (1), because the ground of that decision was, that there was a continued right to the service of the persons to whom the pension was assigned; and therefore the Crown had a right to insist upon the payment to him. There is no doubt of the propriety of that decision, but it would be difficult to apply the principle of it to the present case. The Vice Chancellor thought originally that there might be grounds of general policy affecting this case in a somewhat similar way, namely, as this particular compensation was to cease, either wholly or *pro tanto*, according to the income the party might hereafter acquire, and that as he might have an office conferred on him, the public, who were interested that the compensation should cease, might also have an interest in keeping up his respectability by means of this annuity, so as to qualify for holding any such office. I do not, however, understand the learned Judge to have persevered in that opinion. I rather collect from what passed afterwards

(1) 8 Mee. & W. 149; a. c. 10 *Law J. Rep.* (N.S.) Exch. 216.

that he withdrew it; and my impression is that it cannot be maintained.

It is then said, that this compensation cannot be assignable, because it has not the incidents of property. With regard to Mr. Payne, it is said, that until the year has expired, and he then makes an affidavit that he has not an office, the money does not become payable, and that it is only payable when he has made an affidavit; and it is argued that, until the affidavit is made, there is no payment due, and consequently no property vested. But from the moment this grant was made, this was property existing in Mr. Payne beyond all possibility of doubt, and to which he or his personal representatives were or would be entitled; though, in order to shew that he has not forfeited or lost, or been compensated for the annuity, he is to swear that he has not received from the Crown or the Government certain other payments, that is to verify the fact, that the case had not occurred which is provided for by the condition annexed to the grant. That fact must be proved; and if Mr. Payne dies without proving it himself, the fact must be proved by some other evidence. Suppose he were to die when there was a half-year's compensation due to him, that amount would form part of his assets, and there would be some other proof; and upon that other proof being given the money would be paid to his personal representatives.

Then, does it vary the case because the right to the property has passed to an assignee? I think it only amounts to this: that there is no condition imposed upon this property which makes it personal in Mr. Payne; there is no condition to be performed which is not capable of being performed; there is no clog upon the alienation of the property itself. It is quite a different thing to say that Mr. Payne cannot assign the property *quod* property, and to say when he has assigned it, he may, by withholding a document which is necessary to get possession of it, prevent the assignee from receiving it. Now, suppose the property were to accumulate in the way in which it has accumulated; suppose that from want of power (which I hope it will be found does not exist) the Court cannot enforce the payment of the money

to the person to whom it belongs: when Mr. Payne dies, beyond all question, if the property has passed to the assignee, then the assignee will not be prevented from taking it, because the impediment is removed, and other evidence will be admissible to shew that he never did hold any other office. Suppose, also, the case of lunacy: would any one say that Mr. Payne was to be deprived of the property because an act of God had visited him by which he had been deprived of the power of making an affidavit? Therefore, I apprehend, clearly, that the property, although it may accumulate, when so accumulated will belong to the assignees. Upon all general principles, I should say it would pass to the assignee; and by the provisions of the Insolvent Debtors Act, it would pass under the first part of the act.

And then the question comes, whether or not it falls within the 56th section.—[His Lordship here read the section].—The words are, “being or having been an officer of the army or navy, or an officer or clerk, or otherwise employed or engaged in the service of her Majesty in the Customs or Excise, or any civil office or other department whatsoever.” Those last words are clearly still governed by the words “service of her Majesty.” Well, then, it is to be an employment in the service of her Majesty. And then it says the act shall not extend to that. But I am clearly of opinion that this person was not in the service of her Majesty, and, therefore, not within the exception. But the section, instead of taking the property out of the general operation of the act, and making it depend upon the act of the debtor, whether his creditors shall be entitled to it or not, provides that the assignee shall be entitled to a portion upon application to the heads of that department to which the officer shall be attached. It is not intended, therefore, by the act, that an officer, for example, because his half-pay could not be assigned, should be entitled to retain the whole of it; but the parties who represent the government have the duty imposed upon and the power given to them to apportion the half-pay between the creditors and the officer. Where is the provision with regard to Mr. Payne which is to exempt him from the operation of the act? Can anybody sup-

pose that a person in the situation of Mr. Payne, a country commissioner of bankrupts, with 200*l.* a-year compensation, is to retain the whole of the income without making any compensation, or the least contribution to his creditors, when all persons of the highest grades in the military or naval service, although the half-pay is protected on the ground of public policy, are obliged to give up a portion of it to their creditors? I am clearly of opinion that this case falls within the general provisions of the Insolvent Debtors Act, and that it is utterly impossible to include this person in the exceptions of the 56th section of that act.

If, therefore, as it appears to me, this property was assignable, then the consequence is, that the assignees would be entitled to take it. I believe that Mr. Payne, who, by the nature of his office must know what his duty is, when he learns what the decision of the Court is, will give his assistance to enable his assignee to receive the fund in order to distribute it among his creditors. This petition, therefore, must be dismissed, but without costs, as this gentleman sues in *formd pauperis*.

July 12.—Mr. Payne subsequently refused to make the affidavit required by the Lord Chancellor's order of the 28th of February 1844; and, upon the application of the assignee, the Lord Chancellor made an order that upon the affidavit of the assignee that Mr. Payne had declined to make an affidavit, and that he, the assignee, had made inquiries, and that to the best of his belief Mr. Payne did not hold any office (in the words of the act), notwithstanding the former order, such affidavit should be received as evidence of the right of the assignee to receive the money, and that the money should be paid accordingly; and as to accruing payments, the assignee was to furnish the Lord Chancellor with a similar affidavit in substitution for Mr. Payne's, without the necessity of presenting a formal petition, and thereupon the order for payment was to be made from time to time, with liberty to the Accountant in Bankruptcy to apply.

PARKER, V.C. }
July 15, 16. } BARKER v. BARKER.

Will—Construction—Period of ascertaining a Class—Issue of deceased Child—Vesting—Direction to pay.

A testator gave to trustees a sum of money on the usual trusts for investment, and directed them to pay the income to A. for life, and, after his death, to divide the principal between the children of A. who should be living at the time of his (A.'s) death, and the issue of such as should be then dead, leaving issue, so that the issue of such child so dying should take the part which their deceased parent would have taken if living, to be paid to such children and issue, upon their attaining, and in case they should live to attain, twenty-one. A. had a child B, who died in his lifetime, leaving four children. Two of these children died in their infancy, in the lifetime of A.—Held, that the class to take was all the children left by B, and that the gift had vested absolutely in all those children.

This was a special case under Sir George Turner's Act.

P. Protheroe, by his will, dated the 30th of August 1803, made the following bequest:—

"I give and bequeath unto my said sons E. Protheroe and P. Protheroe, my executors hereinafter named, the sum of 22,000*l.* of lawful money aforesaid, upon trust to place the same out at interest on such security or securities as they shall think proper and approve, and to pay the interest and income arising therefrom, as the same shall be received, unto my daughter Elizabeth Barker, wife of the said William Barker, for and during the term of her natural life, to and for her proper use and benefit; and from and after her decease, then in trust, as to the said principal sum of 22,000*l.*, to divide the same equally between all and every the children of my said daughter Elizabeth Barker, who shall be living at the time of her decease, and the lawful issue of such of them as shall be then dead leaving issue, so as that the issue of such child so dying shall take the part or share which their deceased parent would have taken if living, and so as that such issue of each child shall take equally

share and share alike, to be paid to all such children and issue, upon their respectively attaining, and in case they should live to attain, the age of twenty-one years; and, in the mean time, I order and direct that my said executors shall apply all or any part of the interest and income of the same sum of 22,000*l.* for and towards the support and maintenance and education, or otherwise for the use and benefit, of such children and issue respectively, as my executors shall think fit.

The testator died in September 1803.

Mrs. Barker died in 1844.

Mrs. Barker left only two children who survived her, Mrs. Miller and Susan Barker.

Mrs. Barker had another child, Philip, who died in 1838, in his mother's lifetime, having had five children. One of these children died in the lifetime of his father. Two died in their infancy, after the death of their father, and before the death of Mrs. Barker, the tenant for life. The other two survived their father and Mrs. Barker.

The opinion of the Court was desired as to the interests which the children of Philip Barker took in the fund.

Two questions were argued: first, at what period the class of the issue of Philip Barker was to be ascertained; and secondly, whether the vesting of the share of each child was contingent on his or her attaining twenty-one years.

Mr. Russell and *Mr. Metcalfe*, *Mr. Elmsley* and *Mr. Carter*, *Mr. Bacon* and *Mr. Charles Hall*, *Mr. Piggott*, *Mr. Walker* and *Mr. Hanson*, for the different parties.

The following cases were cited—

On the question of the time at which the class was to be ascertained—

Kevern v. Williams, 5 Sim. 171.

Bennett v. Merriman, 6 Beav. 360.

Beck v. Burn, 7 Beav. 492; s. c. 13 Law J. Rep. (N.S.) Chanc. 319.

On the question of vesting—

Bolger v. Mackell, 5 Ves. 509.

Knight v. Cameron, 14 Ves. 389.

Lister v. Bradley, 1 Hare, 10; s. c. 11 Law J. Rep. (N.S.) Chanc. 49.

Massey v. Hudson, 2 Mer. 180.

Packham v. Gregory, 4 Hare, 396; s. c. 14 Law J. Rep. (N.S.) Chanc. 191.

Bull v. Pritchard, 5 Hare, 567; s. c. 16 Law J. Rep. (N.S.) Chanc. 185.

Masters v. Scales, 18 Beav. 60.

PARKER, V.C.—There are two questions in this case. The first is, what is the class of persons who take under the gift contained in the will; and the second, whether the individuals of that class did or not take interests which vested at the death of the tenant for life. The gift is, after the death of the tenant for life, to be equally divided between all the children of the tenant for life who should be living at the time of her death (as to whom no question arises) and the lawful issue of any child then dead leaving issue. Two constructions have been contended for: one, that the issue of a child are a class to be ascertained at the death of the child whose death is contemplated; the other, that the class is to be ascertained at the death of the tenant for life. I reject the construction which would include a child dying in the life of the person whose death is contemplated, for the gift seems to be confined to the class of issue left by the child. The Court has to determine between the two constructions which I have mentioned, and it is a question of considerable doubt and difficulty.

The general rule of law is not to import a contingency into gifts of this kind; and there can be no doubt that, if the gift had stood alone to the lawful issue of such child as should die in the life of the tenant for life leaving issue, the class would include all the children left by the child who died, and would not be confined to the children only who happened to be in existence at the time of division. That is the general rule. The question is whether, in the words of the will, there can be found enough, not upon a conjectural ground merely, to make the death of the tenant for life the period for ascertaining the class, and not the death of the *stirps*, concerning whose issue there is this question. I do not think there is enough in this will so to confine the gift. If the words "leaving issue" could be read as referring to issue living at the death of

the tenant for life, then, no doubt, that might be the period for ascertaining the class. Having considered the words as carefully as I can, I think that the words "leaving issue" mean the issue at the death of the child in question, and not at the death of the tenant for life, and that, consequently, the time for ascertaining the class is the death of such child. No doubt the testator, with respect to the children of the tenant for life, says that those only are to take who are living at the period of the division of the property. It might very well happen that grandchildren whose parents were dead might have had issue in the life of the tenant for life, and making the gift to the grandchildren conditional in the same way would take it away altogether. In that event, without substituting their issue, I cannot see how to import this additional contingency into this gift. The persons then to take are the children left by Philip at the time of his death: Mrs. Miller and Susan Barker take each one-third, and the children of Philip take the remaining one-third between them.

The next question is, whether the children left by Philip took vested or contingent interests, there being a clear gift to them. I think that this is the ordinary case of a gift with a direction to pay super-added to it, which has not the effect of divesting the gift, although words of contingency are attached to the direction to pay at the age of twenty-one years. A gift to parties to be paid to them at twenty-one is not materially different from a gift to be paid to them, if they attain twenty-one, or in case they attain twenty-one. I therefore think that these interests vested in the children of Philip who survived him. I may observe, that it seems hardly possible to distinguish this case from *Masters v. Scales*, but I must say that I consider that the questions upon this will are very doubtful.

PARKER, V.C. }
April 28, 29. } WARWICK v. HAWKINS.

Will—Construction—Separate Use.

A testator, by his will, gave to A, a married woman, an annuity for her life for her

*separate use, and, by a codicil, gave to A, in addition to the legacy mentioned in his will, the sum of 300*l.* No legacy had been given to A. by the will:—Held, that A. was entitled to the 300*l.* for her separate use.*

William Bayley, by his will, dated the 4th of July 1846, gave to Ann Warwick an annuity of 100*l.* a-year for her life for her separate use, free from legacy duty. The testator, by a codicil dated the 5th of November 1850, directed his executors to pay to Ann Warwick, in addition to the legacy mentioned in his will, the sum of 300*l.* to be paid to her free of legacy duty.

No legacy had been given by the will to Ann Warwick.

The testator died in November 1851.

Mrs. Warwick was married, but her husband was out of the jurisdiction.

This was a claim, by Mrs. Warwick, against the executors of the testator, for the purpose of obtaining the legacy of 300*l.*

The only question on the claim was, whether the legacy given by the codicil was given to Mrs. Warwick for her separate use.

Mr. Glasse and Mr. Faber, for the claim, cited *Day v. Croft* (1).

Mr. Malins and Mr. Dawney, for the trustees.

PARKER, V.C. said that, on the authority of the case which had been cited, the plaintiff was entitled to the legacy for her separate use.

LOARDS JUSTICES. }

1852.

July 28 ;

August 4. }

FLOWDEN v. HYDE.

Will—Revocation—Conveyance of Equity of Redemption.

Where real estate is contracted to be purchased, and the purchaser then makes a will devising all his real estate which he had contracted to buy, upon trusts for sale, and subsequently takes a conveyance to the ordinary uses to bar dower,—Held, affirming the decree below, that the conveyance

(1) 4 Beav. 561.

operates as a revocation of the devise of this estate.

Where an estate stood limited to the ordinary uses to bar dower, and the owner mortgaged it in fee, with a proviso for redemption, that on payment the estate should be conveyed to the mortgagee, his heirs, appointees, or assigns, or to such uses as he or they should direct, and he then made his will, devising all his real estate upon trust for sale, and afterwards the mortgagee re-conveyed to the mortgagor to the ordinary uses to bar dower,—Held, reversing the decree below, that the re-conveyance was not a revocation of the will as to this estate.

The facts of this case are fully reported, *ante*, p. 329. The appeal was presented against the dismissal of the petition.

Mr. Willcock and Mr. Jessel appeared for the petitioners, the appellants.

Mr. Malins, Mr. Hetherington, and Mr. Erskine were for respondents in the same interest as the appellants.

Mr. Russell and Mr. Lewin appeared for the heir-at-law.

Sir W. P. Wood, Mr. Daniel, Mr. Glasse, Mr. H. Stevens, and Mr. F. Wood, for other parties.

The following authorities, in addition to those cited below, were referred to and commented on—

Brydges v. the Duchess of Chandos, 2 Ves. jun. 417.

Williams v. Owens, Ibid. 595.

Harmood v. Oglander, 6 Ibid. 222.

Welby v. Welby, 2 Ves. & B. 187.

Lock v. Foote, 5 Sim. 618.

Youde v. Jones, 14 Ibid. 163.

Poole v. Coates, 2 Dru. & War. 497.

Tennant v. Tennant, Ll. & G. temp. Plunkett, 516.

Ruscombe v. Hare, 6 Dow, 1; s. c. 2 Bligh, N.S. 192.

Aug. 4.—LORD JUSTICE KNIGHT BRUCE.
—The question of revocation, the only question argued before us in this case, relates to two distinct portions of the real estate of Mr. Henry Chicheley Plowden, the testator in the cause: one included in the mortgage of the 1st of May 1811, and a conveyance of the 7th of December 1813,

the other included in neither of those instruments, but comprised in a deed of the 9th of November 1811. With regard to the latter portion, I am unable to distinguish this from the case of *Rawlins v. Burgis* (1), which was decided in 1814, by a careful Judge, since followed in more than one instance, and never, so far as I am aware, overruled. I do not think that we ought to refuse to follow it now. Whether, if the point of revocation that it determined were new, I should have held an opinion in conformity with that decision or not, is a question as to which it is unnecessary for me to say anything.

With respect to the other portion, the title stands thus: the hereditaments of which it consists having been acquired by the testator, were, by his desire, conveyed, on the 23rd of April 1811, in this manner, "To such uses as the testator should by deed or will appoint, and in default of, and until such appointment, to the use of the testator for his life, with remainder to the use of Mr. Dyneley, his executors, administrators and assigns, during the testator's life, in trust for the testator, with remainder to the use of the testator, his heirs and assigns for ever." Very soon afterwards, namely, on the 1st of May 1811, he mortgaged those hereditaments in fee, Mr. Dyneley, as his trustee, joining in the mortgage to the mortgagee, Mr. Newton, whom, in December 1813, the testator paid off, whereupon, by his direction, Mr. Newton, on the 7th of December 1813, conveyed the mortgaged hereditaments to the testator and his heirs, "to such uses as the testator should, by deed or will appoint, and in default of, and until appointment, to the use of the testator for his life, with remainder to the use of Dyneley, his executors, administrators and assigns, during the testator's life, in trust for the testator, with remainder to the use of the testator, his heirs and assigns for ever."

The testator's will, devising these hereditaments, having been made on the 15th of May 1811, the point has arisen whether the effect of the conveyance of the 7th of December 1813, was, or was not to render the will inoperative as to them;

(1) 2 Ves. & B. 382.

a suggestion, which, however startling to common sense, however foreign to natural equity, is yet rendered plausible, if not sound, by the state of the law of England, as it stood before the testator died in 1821, —a state upon this particular subject which was discreditable to a civilized country. It has since been altered, but not with reference to the property of men who had ceased to live before 1838. Their property is subject to the old law, which, however, was such that, upon the present point, no man, I suppose, would be willing, without absolute necessity, to treat a case as falling within it. Does the necessity exist here? I think not. I am of opinion that the object, the intention of the deed of the 1st of May 1811, was to make the mortgage in fee, and not otherwise, to affect the title of the mortgaged property; and the conveyance of the 7th of December 1813, having been to the same uses and for the same purposes as the uses and purposes by which it stood affected immediately upon the making of the mortgage of the 1st of May 1811, my view of the matter is, that the conveyance of 1813 did not, by freeing the property from the mortgage, affect the title to the lands, or the testator's interest in them, or his power over them, otherwise than so far only as to make that wholly or in part legal which before had been merely equitable. It is true that Mr. Dyneley never was more than a mere trustee for the testator: this, however, seems to me to make no difference; for if it is conceded, as in my opinion it ought to be, that by the deed of mortgage the testator meant to mortgage merely, and nothing more, why should it be supposed that he ever intended the lands to be re-conveyed by the mortgagee simply to the uses of the testator in fee,—he himself having before the mortgage, as well as after the mortgage, caused them to be conveyed for his benefit to the uses usual for preventing dower? From the only report (2) that I have seen of the argument before the able Judge in whose court this petition originally was, I collect that neither *Ruscombe v. Hare* nor *Innes v. Jackson* (3), before Lord Eldon, nor

Jackson v. Innes (4), before the House of Lords, nor any of that class, were cited.

[*Mr. Russell* and *Mr. Malins* said they were cited.]

From the only report that I have seen neither of those cases appears to have been cited. This I regret, for I might otherwise not have been placed under the necessity of differing from one whose judgment I estimate at least as highly as my own. He seems to have considered the proviso for redemption without reference to those authorities; that is the effect of the judgment. The judgment does not allude to them, and I am not quite sure that were I to do so myself, (that is, consider the proviso for redemption without reference to that class of cases,) I should not arrive at his conclusion, but neither am I convinced that I should; for, perhaps, if my opinion ought to turn upon the language of the proviso, the expressions used are at least as much in the appellant's favour as against him, the clause being thus worded: "That after the money is paid, the mortgagee will, upon the request and at the costs and charges of the said H. C. Plowden, his heirs, appointees or assigns, re-convey the said capital and other messuages, farms, &c. unto the said H. C. Plowden, his heirs, appointees, or assignees, or to such uses and in such manner as he or they shall direct, free from all incumbrances to be created" by the mortgagee.

On the whole, having, since the argument before us, read the authorities then cited, and every other within my knowledge that it could on this dispute be important to refer to, and thinking that, as to the question of revocation, this case stands exactly on the footing on which it would have stood if the testator, having immediately before the mortgage been simply seised in fee, had, upon paying it off, taken from the mortgagee a simple re-conveyance to himself in fee; because, having immediately before the mortgage held the property, subject to the usual limitations for preventing dower, he, upon paying it off, took from the mortgagee a conveyance or re-conveyance having limitations, the same in form and substance

(2) By reference to the Law Journal Report, p. 331, *ante*, it will be seen that *Innes v. Jackson* was cited.

(3) 16 Ves. 356.

(4) 1 BM. 104.

and object, as existed when the mortgage was made, I am of opinion that it may, consistently with *Tickner v. Tickner* (5), with *Rawlins v. Burgis*, and with every established rule of law, be held, as I do hold, that this testator's testamentary dispositions are equitably in force with respect to the mortgaged portion of his real estate; and that so far, at least, it is not incumbent upon the Court to defeat his wishes, disappoint his intentions, and subvert his will.

LORD JUSTICE LORD CRANWORTH.—I concur in the result at which my learned Brother has arrived, and in a great measure upon the same grounds. It might be unnecessary for me to do more than to express my concurrence; but as we differ from the learned Vice Chancellor, I thought it right, unconnected with my learned Brother, to put my view of the case down, so that I may state that also. It is unnecessary for me to go through the facts, because that has been already done.

The question divides itself into two branches: first, as it regards the South Baddeley land; and, secondly, as it regards the property at Boldre, mortgaged to Mr. Newton. With respect to the former, there is no doubt of the soundness of the opinion appealed from, unless we are prepared (which we are not) to act in opposition to the case of *Rawlins v. Burgis*, decided by Sir Thomas Plumer in 1814. The purchase in this case was made at an auction, and, in the absence of evidence, we cannot assume that there was any special stipulation as to the form of conveyance to be made. The purchaser, therefore, became the equitable owner in fee; and *Rawlins v. Burgis* decides that in such circumstances a conveyance to the purchaser to the usual uses to bar dower operates as a revocation of the previous devise of the equitable fee. As to the lands at South Baddeley, therefore, the present case cannot be distinguished from, and must be governed by, that authority. Indeed, as to those lands, the petitioner can hardly be said to have seriously questioned the correctness of the Vice Chancellor's decision.

The main contention before us was,

as to the messuages and lands at Boldre, mortgaged to Newton. The Vice Chancellor decided; that the devise of this property was revoked by the re-conveyance in December 1813, and my impression during the argument was in favour of that decision, but subsequent consideration of the doctrine applicable to such cases has led me to a different conclusion. Sir Richard Kindersley reasoned thus:—If a person seised in fee made a mortgage in fee in the ordinary way, reserving the right of redemption to himself and his heirs, and then, before the 7 Will. 4. & 1 Vict. c. 26. had come into operation, devised his equity of redemption, a subsequent re-conveyance to him and his heirs, by the mortgagee, upon the mortgage debt being paid off, did not affect the previous devise of the equity; but if the re-conveyance was made, not to the mortgagee in fee, but to him, to the usual uses to bar dower, this effected a revocation, for the same reasons as are applicable to the case of a purchaser. The conveyance in such a case was not merely a uniting of the legal with the equitable estate; it effected and created new rights and incidents in the property, and so operated as a revocation of the devise. Assuming that to be clear in the case of a simple mortgage in fee, with the right of redemption reserved to the mortgagor and his heirs, the Vice Chancellor then proceeded to consider how far that general principle was affected by the special terms in which in this case the redemption was reserved. The re-conveyance is to be “unto the said H. C. Plowden, his heirs, appointees or assigns, or to such other person or persons, to such uses, and in such manner as he or they shall direct.” Even taking these words to indicate the form of re-conveyance, which was the most favourable interpretation for the appellant, still, though such a proviso would have warranted a re-conveyance to such uses as the mortgagor should appoint, and in default of appointment to him and his heirs; and though a re-conveyance so made would not, upon this construction of the proviso, have effected a revocation, yet the language used did not, in the judgment of the Vice Chancellor, warrant a re-conveyance in the form actually adopted; namely, to such uses as the said H. C. Plowden

(5) Cited 3 Atk. 742.

should by deed or will appoint; and in default of appointment, to the use of the said H. C. Plowden for life, with remainder to the use of the said J. Dyneley, for the life of and in trust for the said H. C. Plowden, with an ultimate limitation to the use of the said H. C. Plowden, his heirs and assigns. His Honour was of opinion that these uses differed materially from those warranted by the proviso for redemption; and so that the re-conveyance not having been made in the stipulated mode, operated as a revocation of the previous devise.

Of the correctness of this reasoning, so far as relates to the first branch of it, there cannot, I think, be any doubt. Taking the case of *Rawlins v. Burgis* to be a binding authority, I can discover no distinction in principle between the case of a person entitled in fee to the equity of redemption in lands mortgaged in fee, and that of a person equitably entitled to lands under a contract to purchase them. If a conveyance to the ordinary uses to bar dower caused, before the statute of 1837, a revocation of the will in the latter case, it must have had the same effect in the former. Such a construction is in conformity with what would have happened if the devisee had been the owner of the legal instead of the equitable fee. If a person seised in fee made his will before the statute, and thereby devised his inheritance, and afterwards conveyed his legal estate so as to take it back to himself, not in fee simple absolutely, but to the usual uses to bar dower, this unquestionably was a revocation of the devise, and on this analogy the decision in *Rawlins v. Burgis* was founded; applying to the devise of the equitable fee, the doctrine applicable to a will affecting the legal estate. As I have already stated, I see no reason for thinking that a different rule should be applied to the devise of an equity of redemption, from that governing the case of a person entitled to the fee simple by contract as a purchaser. So far, therefore, I concur in the view taken of the law by the Vice Chancellor.

But as to the second branch of this reasoning, I think there is, at all events, very considerable doubt. I am not prepared to assent to the proposition that, if an equity of redemption in a mortgage in fee had, before the act, been reserved

to such uses as the mortgagor should appoint, and in default of appointment to the use of the mortgagor and his heirs, that a re-conveyance to the usual use to bar dower, would have operated as a revocation of a devise made before the re-conveyance. When the legal owner in fee, after devising his estate, conveyed it by feoffment, or by lease and release, to such uses as he should appoint, and in default of appointment to the use of himself for life, with remainder to a trustee during his life, and with the ultimate use to himself in fee, there was a change of the seisin; but if the owner of an estate had an absolute power of appointment as well as the legal fee, that is to say, if his estate stood limited to such uses as he should appoint, and in default of appointment, to the use of himself in fee, the consequence might be different. In such a case, if the owner, after making his will and devising, had made an appointment so as to take an estate with the ordinary uses and limitations to bar dower, I know of no authority deciding that this would be a revocation of the will; there would in such a case be no change of seisin, and so the principles applicable to a devise by a person having a mere estate in fee simple do not necessarily apply. And if this would not have been a revocation at law, it would seem to follow that it would not have been a revocation in equity, when the subject-matter of the devise was an equity of redemption. Upon this point, however, it is not necessary for me to say that I differ from Sir Richard Kindersley; for, even assuming his view of the law to be correct on this second point, as well as the first, still I think that here there was no revocation. The principle upon which I conceive this case must rest is, that by the deeds of the 6th and 7th of December 1813, the estate was re-conveyed to precisely the same uses to which it had stood limited previously to the mortgage. It is a well-established principle that in the absence of express stipulation to the contrary, a mortgage is to be considered in this court as a mere charge, taking out of the property so much as is necessary for accomplishing the object, and leaving all not so abstracted precisely as it stood before the mortgage. The equity of redemption, therefore, attaches on the

estate of the mortgagor, with all the same rights, restrictions, and qualifications to which his legal estate had been previously subject; when, therefore, the mortgagor pays off the mortgage, and takes a conveyance of the property to the same uses to which it had stood limited previously to the mortgage, he is, in fact, only doing that which has been described as bringing home the legal estate, or as clothing the equitable with the legal estate; and all the authorities shew that there would be no revocation of a devise of the equitable interest made while the legal interest was outstanding. That is precisely what was done here. The estate, previously to the mortgage, stood limited to such uses as the said H. C. Plowden should by deed or will appoint; and in default of appointment, to the use of him for life, with remainder to the use of J. Dyneley, his executors and administrators, during the life of, and in trust for, the said H. C. Plowden and his assigns, and after the expiration of these estates to the use of the said H. C. Plowden and his heirs; when the mortgage was paid off in 1813, the property was re-conveyed to the same uses, bringing the case within the rule to which I have referred. Of course, however, if the mortgagor had expressly stipulated that the right of redemption should be reserved in a manner not according to the previous state of the property mortgaged, the general rule would then give way to such express stipulation; and the only remaining question, therefore, here is, whether there is any such express stipulation to be found on the face of the mortgage. I am clearly of opinion that there is not. I have already adverted to the language of the proviso for redemption. Sir Richard Kindersley reasoned on the assumption that it was intended to point out a peculiar mode of re-conveyance. He did so, because he considered that was the view the most favourable for the party against whom he was deciding; and not because it was the correct construction of the proviso. This, I think, may be fairly inferred from the whole tenour of his observations in this case, in which I concur. There is a profusion of words in the proviso in question; in truth, it is no more than a proviso for repayment of the mortgage money to the mortgagee, and a re-

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conveyance to Mr. Plowden, his heirs or assigns. The word "appointees" can hardly be said to have any meaning beyond the word "assigns," and like those which follow, "such person or persons," are, in fact, tautology. It must, therefore, be treated merely as a re-conveyance to the mortgagor and his heirs, and it does not shew any intention affecting the nature of the estate out of which the mortgage was granted. I am very glad, therefore, consistently with what I consider the principles applicable to this case, to be enabled to support and give effect to the will of this testator.

TURNER, V.C. }
1851. }
Nov. 7, 8, 10. }

DARBY & BAINES.

Ship and Shipping—Jurisdiction—Agreement between Part Owners, Construction of.

Where part owners of a ship differ on the terms of an agreement to manage and charter the vessel, the construction of such agreement is within the province of a court of equity; and the question of its concurrent jurisdiction with the Court of Admiralty cannot be raised.

This was a motion, on behalf of the plaintiffs, Messrs. Darby & Sim, to restrain the defendant, James Baines, from preventing the plaintiffs from receiving, or interfering with them in receiving, the freight due, and from preventing or interfering with the sailing of the ship *Deborah*, in fulfilment of a charter-party made by the plaintiffs for a voyage to South Australia, either by withholding the certificate of registry, then in the defendant's possession, or otherwise; and to restrain the defendant from in any manner preventing the plaintiffs from having the management of the ship under an agreement stated in the bill; and for a receiver and manager.

The bill stated that the plaintiffs were the registered owners of fifty-six sixty-fourth parts or shares of the barque *Deborah*, and the defendant of the remaining eight sixty-fourth shares; and that they had entered into the following agreement:—

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"Liverpool, 19th Nov. 1849.

"It is agreed by the owners of the barque *Deborah*, that the ship shall be managed by Messrs. Darby & Sim (the plaintiffs), who shall receive a commission of 2½l. per cent. on all disbursements, and to James Baines (the defendant) the usual brokerage on any charter he may procure for her; but in case it shall be deemed advisable not to charter the ship on her homeward voyage, he shall only receive a commission of 1l. per cent. for collecting freight, &c., and no other brokerage. It is agreed that Thomas Robinson, Esq. and William Roberts, Esq. shall be appointed auditors to examine the accounts. The insurance of the ship to be effected by Darby & Sim for all the owners. Ship to be valued at 3,500l."

Signed by the plaintiffs and the defendants.

The bill also alleged that the ship returned to London in August 1850, and the defendant's clerk then obtained from the master, and the defendant still retained the ship's certificate of registry by untruly representing to the master, that the plaintiffs had requested the defendant to report the ship to certain brokers; that the defendant had given notice to those from whom the freight was due not to part with it, and alleged that he had chartered the vessel for the next voyage; that the plaintiffs, as managers of the ship under the agreement, had chartered her to the Patent Fuel Company for a voyage to South Australia, which the defendant repudiated, and that the ship could not clear outwards at the Custom House because of the non-production of her registry certificate. The bill prayed in the terms of the notice of motion as above stated.

The affidavits of the defendant and his clerk denied the alleged untrue statement, and the defendant stated that he had entered into a beneficial charter-party, under the above agreement, whereby he was entitled to commission for such chartering; that the plaintiffs' charter-party was not beneficial, and had been made after notice of the defendant's; and that the plaintiffs' object was to obtain the exclusive chartering of the ship, and to procure the defendant's share in the ship at an under-value.

Mr. Bacon and *Mr. W. M. James* appeared for the plaintiffs, in support of the motion; and—

Mr. Rolfe and *Mr. Dickinson*, for the defendant, opposed it.

The argument was divided into two parts: first, whether this Court had concurrent jurisdiction with the Court of Admiralty in disputes between the owners; secondly, whether, under the terms of the agreement, the plaintiffs or the defendant had the right to charter the ship.

Nov. 10.—TURNER, V.C. delivered the following judgment.—The question whether the injunction should be granted or not mainly depends upon the construction of the agreement; and I am of opinion that, upon the true construction of the agreement, the right to charter the barque belongs to Messrs. Darby & Sim. The first clause of the agreement runs thus:—"It is agreed by the owners of the barque *Deborah* that the ship shall be managed by Messrs. Darby & Sim, who shall receive a commission of 2½l. per cent. on all disbursements." And I take the effect of this clause to be to place Messrs. Darby & Sim in the position of managing owners, or, in other words, of the ship's husbands; and the powers and duties of ships' husbands are thus stated in *Abbott on Shipping*, p. 106, 7th edit.: "He is to see that the ship is properly repaired, equipped and manned—to procure freights or charter-parties—to preserve the ship's papers—to make the necessary entries—adjust freight and averages—disburse and receive monies, and keep and make up the accounts as between all parties interested. His acts for these purposes are considered to be the acts of all the part-owners, who are liable on all contracts entered into by him for the conduct of their common concern—the employment of the ship." The defendant, therefore, must, I think, be considered to have given all these powers to Darby & Sim by the first clause of the agreement.

Is, then, the power of chartering thus given to them taken away from them and given to the defendant by the subsequent clauses of the agreement? I am of opinion that it is not. The next clause merely provides that the defendant shall have the

usual brokerage in any charter he may procure for the ship. There is a marked distinction between the absolute language in the first clause, "shall be managed," and the contingent expression in the second clause, "may procure." If the intention had been that the defendant should have the unqualified right to charter, why was not the language in the second clause as absolute as in the first? I am much disposed to think that the second clause had reference to some doubt which was entertained, whether the defendant being part-owner could charge brokerage on any charter he might procure, and was inserted for the purpose of securing to him the right to do so; but whether this was so or not, I think that, at all events, this clause could not take away the right given by the preceding one.

It was said, however, whatever might be the effect of the second clause, the last clause clearly gave the right to the defendant; but I think that it does not; and, on the contrary, that it confirms the construction contended for by the plaintiffs. The terms of the clause are, "but in case it shall be deemed advisable not to charter the ship on her homeward voyage, he shall only receive a commission of 1*l.* per cent. for collecting freight, and no other brokerage." I think the true meaning of this clause is, that in case any charter which the defendant might procure should not extend to the homeward voyage, he should only receive the 1*l.* per cent. commission. I think this must be the true meaning of the clause, because the introductory words import a qualification of the previous clause, providing for the allowance of the usual brokerage, and the words, "no other brokerage," at the end, seem to confine the allowance to be made to the commission only. I think this clause confirms the construction contended for by the plaintiffs, for the words "in case it shall be deemed advisable" cannot be construed to mean in case the defendant shall deem it advisable, but must be taken to refer to the judgment of the parties to whom the power of management was given.

This being my construction of the agreement, I am of opinion that the order for the injunction and manager must be granted. I grant it the more readily, because with-

out reference to the question, whether the certificate was obtained by false representation or not, I think the defendant cannot be entitled to use it in contravention of the agreement. It being the province of this Court to deal with the agreement of the parties, there is no difficulty about the jurisdiction.

Order according to notice of motion.

TURNER, V.C. 1851. Nov. 15, 17. 1852. Feb. 17.	}	SMITH v. MULES.
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Partnership—Dissolution—Construction of Articles.

Under articles of agreement between three partners, the partnership was to be dissolved by notice from any of them, on breach of the articles by the others or other. Notice of dissolution having been given by one of the partners, in consequence of a breach of the articles by another, and the third partner having adopted the notice, it was held that the partnership was dissolved as to all, but without the consequences to the non-offending partner which attached, under another clause of the articles, to a general dissolution.

This was a suit for the dissolution and account of the partnership between the plaintiff and the defendants (solicitors and attornies), for a decree that the defendants might resign certain offices held by them, or either of them, which, according to the articles of partnership ought to be considered partnership offices, and for an injunction against the defendants practising as attornies and solicitors for twenty years within thirty miles of the place of the partnership business, and from removing or keeping otherwise than at the partnership offices the partnership books and papers.

The bill stated to the effect that the defendant, Philip Mules (the father of the defendant Horace Mules), represented to the plaintiff that he was carrying on a lucrative and extensive practice as solicitor at Honiton, to the amount of 1,500*l.* a year, and that the plaintiff advanced the sum of

2,300*l.* for a share of half the profits, under articles of the 22nd of June 1847, to the effect, amongst other things, as follows :— First, the partnership to be carried on under the firm of Mules, Smith & Mules, for the lives of the three partners, or any two of the partners ; secondly, the partners to employ themselves diligently in their professional business, and to communicate to each other, on request, all information concerning the practice ; fifthly, that P. Mules should forthwith use his best endeavours to procure for the firm the several appointments and offices which he then held of clerk to the Honiton Turnpike Trust and to the Honiton and Sidmouth Turnpike Trusts, and clerk and registrar to the Honiton Poor-Law Union, and that H. Mules (the son) should conduct the duties of those offices, and so long as his father, P. Mules, remained co-partner, receive the emoluments as his share of the partnership profits, such emoluments, on the retirement or death of P. Mules, to be divisible as partnership profits between the continuing partners ; sixthly, all other offices compatible with the partnership, and obtained by either partner, to be obtained, if possible, in the name of the firm, and the emoluments divided as partnership profits (P. Mules and the plaintiff being each entitled to one-half share) ; thirteenthly, P. Mules to be at liberty to assign any part of his share in the partnership to H. Mules, who, during the continuance of P. Mules in the firm, was to be interested in such share as sub-partner only ; fifteenthly, in the event of the retirement of P. and H. Mules, or either of them, or upon the death of any of the three partners, their respective shares to accrue to the continuing or surviving partners or partner, in equal moieties ; and in case of the retirement of P. and H. Mules, they should use their best endeavours to secure to the continuing partner or partners the partnership practice and all offices and appointments of the partnership, or either of the said partners, not incompatible with the partnership practice ; and in case of such retirement, the retiring partner should not practise within thirty miles of Honiton for twenty years ; sixteenthly, if either of the partners, except from illness or unavoidable accident, should not diligently employ

himself in the partnership practice, or (amongst other things) should not immediately upon receiving money, &c. duly enter the same in the partnership books, then, and in any of the cases therein specified, the other partners or partner, if they or he should think fit, should be at liberty to dissolve the partnership by giving to the partner so offending or by leaving for him a written notice of dissolution.

The bankers of the partnership became bankrupt shortly after the commencement of the partnership, and it was then discovered that P. Mules was indebted to them in the sum of 5,000*l.* on his own account, and in a much more considerable sum on a former partnership account. In January 1849, P. Mules absconded, and in May following the plaintiff gave both the defendants notice, under the 16th clause of the articles, of dissolving the partnership, for breach of the covenants and agreements by each of the defendants.

The present bill was filed in June following, stating as above ; and, *inter alia*, that, contrary to the special clauses in the articles of partnership, the plaintiff had not been introduced to the clients, nor furnished with means of keeping the accounts ; that the defendants had respectively conducted the partnership business, without giving the plaintiff information, and received money without entering it in the partnership books ; that they had not endeavoured to procure the said offices for the plaintiff, but, on the contrary, had procured them for the defendant H. Mules alone ; and that the defendants had subsequently to the commencement of the partnership procured for themselves two other offices, viz., clerk to the Honiton and Ilminster Turnpike Trust, and clerk to the Land, Assessed and Property Tax Commissioners for the Axminster division.

The Solicitor General (Sir W. P. Wood) and *Mr. Dickinson* appeared for the plaintiff.

Mr. Rolt and *Mr. Eddis*, for the defendant H. Mules, the son.

The defendant P. Mules did not appear, and the bill was taken *pro confesso* as against him.

The following cases were cited—

Bozon v. Farlow, 1 Mer. 459.

Kimberley v. Jennings, 6 Sim. 340; s.c.

5 Law J. Rep. (N.S.) Chanc. 115.

Talbot v. Ford, 13 Sim. 173.

Feb. 17.—TURNER, V.C., after stating the facts, and making a few preliminary observations on part of the evidence, which, in consequence of the bill not seeking to recover the 2,300*l.* paid by the plaintiff, his Honour thought was immaterial, said—The question to be determined is not whether the articles of partnership are valid, but what, in the events which have occurred, are the rights of the parties under them? In determining this question, I think it necessary to distinguish between the several heads of relief which are prayed by the bill, viz., the dissolution of the partnership as from the 14th of May 1849; the injunction to restrain the defendants from practising; and the relief which is asked as to the offices. As against the defendant P. Mules, I am of opinion that a sufficient case for the dissolution of the partnership, under the provisions of the 16th clause of the articles, upon a proper notice given for the purpose, is proved to have existed. The fact of this defendant having absconded in January 1849, and not having returned to the business, constituted a sufficient case for such a dissolution as against him; but I do not think it follows that because a case for such a dissolution existed as to the defendant P. Mules, the plaintiff was, therefore, entitled to dissolve the partnership as against the defendant H. Mules. In order to give him that right, I think the plaintiff was bound to shew that a case for dissolution, under the 16th clause, had arisen as to that defendant also. It is to be considered, therefore, whether he has proved such a case.

There are several events on which the right to dissolve is given by this clause; but two of them only are material to be considered, it not being suggested that the case falls within any of the others. The two events material to be considered are these: first, "If, contrary to the stipulations hereinbefore contained, either of the partners shall not (not being

prevented by illness or unavoidable accident) diligently and faithfully employ himself in carrying on the partnership practice;" and, secondly, "If either of the partners shall not, as often as he shall receive money, bills, notes or other securities, immediately thereupon make or cause to be made due entries thereof in the proper books of accounts of the partnership, and shall knowingly or wilfully make such omission." With reference to the first of these events, I think it is pointed only to the diligent and faithful management by each partner of the business conducted by him; and I think so for these reasons: the provision in terms applies to the partnership practice, and, like the other provisions of this clause, evidently refers to the previous provisions of the articles, and was intended to enforce them; and, on referring to the second clause of the articles to which this provision relates, it will be found that it applies to the diligent and faithful conduct by each of the partners of the professional business of the firm. It was argued, on the part of the plaintiff, that the defendant, Horace Mules, could not be said to conduct the business diligently and faithfully when he did not communicate with the plaintiff upon the subject of the business; but it is to be observed that the second clause expressly stipulates for each partner communicating with the other on matters of business upon request; and I think, therefore, that a request, at all events, was necessary to bring this part of the clause into operation, and finding no allegation or proof of any such request or of any want of diligence or faithfulness on the part of the defendant, Horace Mules, in the conduct of the business undertaken by him, I am of opinion that the case as to him does not fall within this branch of the 16th clause. I am of opinion also that the case as to this defendant does not fall within the other branch of the 16th clause, which has been relied on by the plaintiff. In order to bring the case within that part of the clause, I think it must be shewn, not only that there was an omission to enter receipts, but that the omission was knowingly and wilfully made; and I think that the plaintiff has failed to prove that there was any designed or wilful omission on the part of the defendant,

Horace Mules, in entering his receipts. On the contrary, all the sums which have been pointed out as having been received by him and not entered in the regular books of the partnership were, with one exception only, entered in his diary; and the bill does not allege, nor is it proved, that they were not entered at the time when they were received. With respect to the excepted item, it is of small amount, and it would be going much too far to infer any culpability from the omission of it. One witness, it is true, proves that this defendant admitted that he had received monies which he had not entered; but his evidence does not shew what was the extent of the omission or that the omission was either knowingly or wilfully made. The conclusion at which I have arrived on this part of the case is, that the plaintiff has proved such a case as entitled him, on giving a proper notice for the purpose, to dissolve the partnership under the 16th clause of the articles as against the defendant Philip Mules, but not as against the defendant Horace Mules.

Has, then, the partnership been well dissolved under the 16th clause of the articles? I am of opinion that it has not, and that the notice given by the plaintiff did not work a dissolution under that clause. The clause provides that, in the event of a breach by any partner, the other or others of the partners may give notice to dissolve; and whatever might have been the effect of the plaintiff's notice, if he had established a breach by both the defendants, I think that having failed to establish a breach by Horace Mules, it was not competent for the plaintiff alone, without the concurrence of that defendant, to give a notice of dissolution which should be effectual under the clause. In this state of circumstances, I think that the plaintiff's case for the injunction to restrain the defendants from practising falls to the ground, there being no title to the injunction unless the partnership be dissolved under the 16th clause. It cannot, however, I think, be said that because the partnership was not effectually dissolved under the 16th clause by the notice which was given, it is therefore to be considered as subsisting. The conduct of the defendant Philip Mules was such as entitled the plaintiff to dissolve as to him,

though he could not alone do so under the provisions of the 16th clause. The defendant Horace Mules, by his answer, adopts the notice, and treats the partnership as dissolved; and the plaintiff, having given the notice, cannot, I think, insist that the partnership continues. I am of opinion, therefore, that the partnership must be considered to have been dissolved as on the 14th of May 1849, although not with the consequences attaching to a dissolution under the 15th clause.

It then remains to be considered what is to be done as to the offices. By the 5th clause of the articles the defendant Philip Mules was forthwith to use his best endeavours to procure the appointments to be made and given to the partnership firm, and they were, as between the partners, to be considered as partnership offices. The defendant Horace Mules was to receive the salaries attached to them as his share of the profits of the business so long as the defendant Philip Mules continued in it; and on his retirement or death the emoluments of the offices were to be divisible in the same manner as the other profits of the business. If the appointments to the offices had been procured for the partnership firm according to the covenant, the plaintiff would, upon the dissolution, either have had a share of the profits of the offices or a chance of competing for them; but so far from the defendant Philip Mules having observed the covenant entered into by him, he has acted in direct breach of it; and the defendants are now holding these offices for their exclusive benefit under this breach of the covenant and in fraud of the contract into which one of them had entered and to which the other defendant was a party. I am much disposed to think that the 6th clause of the articles, applying as it does to the offices and not merely to the profits of the offices, is of itself sufficient to constitute them partnership assets as well after the dissolution as during the continuance of the partnership; but whether this be so or not, I think that, under the circumstances to which I have referred, the defendants cannot be permitted to hold these offices for their exclusive benefit. The right of the defendant Horace Mules to receive the emoluments of them ceased with the partnership. The plaintiff not

having succeeded in effecting a dissolution under the 16th clause, is not exclusively entitled to them; and I think, therefore, the proper relief as to these offices is, to charge the defendants with the value of them in the partnership accounts. From the nature of them they cannot be sold, nor can any manager or receiver be appointed to carry them on. I shall, therefore, in the decree, give directions for that purpose as to the three offices mentioned in the 5th clause; but I cannot give such directions as to the other offices, for I do not think they are reached by the 6th clause; and there being no retirement or death or dissolution for misconduct, I do not think the 15th and 16th clauses can be held to apply to them.

The defendant Horace Mules has set up the case of his being a sub-partner, merely relying upon the 13th clause of the articles; but this point was not insisted upon at the bar, and I do not think it can be maintained. The clause in question, as I construe it, applies only to any share which might be assigned to this defendant by the defendant Philip Mules.

Decree accordingly (1).

LORDS JUSTICES. { *Ex parte WRYGHT, in re*
1852. THE GREAT WESTERN
July 20. EXTENSION ATMOSPHERIC RAILWAY COMPANY.

Company—Winding-up Acts—Liability of individual Contributories—Jurisdiction of Master.

Directors of one railway company passed a resolution to lend money to the directors of another company on their personal responsibility, and the money was so lent, and some of the directors signed a guarantie for repayment. Under an order for winding up the company, the directors of which borrowed the money, a claim was carried in on behalf of the lending company, but it was disallowed; and on appeal, it was held,—affirming the decision of the Master,—that where a company

or association is ordered to be wound up, the Master has no jurisdiction under the order to take cognizance of a claim not alleged to be due from the company, but only from individual members of it, and that it made no difference that the money was applied for the purposes of the company.

This was an appeal, presented to Vice Chancellor Parker (1), against a decision of the Master, charged with the winding up the affairs of the Great Western Extension Atmospheric Railway Company, refusing to admit a claim brought in by Mr. Wryghte, the official manager of the Tring, Reading, and Basingstoke Railway Company. The question arose thus: on the 23rd of October 1845, at a meeting of the directors of the Tring Company, a resolution was passed that 2,000*l.* should be lent and advanced to the directors of the Atmospheric Company, upon their personal responsibility, for a time not exceeding three months, at the rate of 5*l.* per cent. per annum; and the solicitor of the company was authorized to carry into effect an arrangement for completing the loan. On the following day, 2,000*l.* was advanced out of the assets of the Tring Company; and the following memorandum, signed by twelve of the twenty-one directors of the Atmospheric Company, was delivered to G. P. Hill, Esq., the solicitor of the Tring Company, by way of security.

“Great Western Extension Atmospheric Railway Company,
October 27, 1845.

“To G. P. Hill, Esq.—In consideration of your lending and advancing to us, the undersigned, the sum of 2,000*l.*, we hereby, jointly and severally, guarantee to you the repayment of the same, with interest at 5*l.* per cent. per annum, within three months from the date hereof.”

On the 28th of November 1845, the directors of the Tring Company passed the following resolution: “Resolved, that the sum of 500*l.* be lent to the Great Western Extension Atmospheric Railway Company, on the guarantie given to Mr. Hill, on

(1) The decree was subsequently varied by the Lords Justices, on appeal, by adding a direction to include the two offices subsequently acquired by the defendants.

(1) This case was heard, among others forming a list of motions from the courts of the several Vice Chancellors, their Lordships having consented to dispose of them, in order to clear off the business before the long vacation.

behalf of the company, the solicitor undertaking to produce the 500*l.*, whenever wanted for the purposes of this company, at a week's notice." On the same day, 500*l.*, part of the assets of the Tring Company, was lent to the Atmospheric Company; and the following memorandum, signed by ten out of the twenty-one directors of the Atmospheric Company, was delivered to Mr. Hill, as solicitor of the Tring Company, by way of security.

"Great Western Extension Atmospheric Railway Company.

"To Mr. G. P. Hill.—In consideration of your advancing and lending to us 500*l.*, we hereby jointly and severally promise and undertake to repay to you that sum, with 5*l.* per cent. interest, on the 1st day of February next. Dated the 28th of November 1845."

The 2,500*l.* thus lent was applied, as one side asserted, and, as to the much greater part, as the other side admitted, to the purposes of the Atmospheric Company.

On the 27th of July 1849, the Atmospheric Company was ordered to be wound up; and on the 23rd of November following, an official manager was appointed, and the Tring Company, having also been ordered to be wound up, Mr. Wryghte, who was chosen official manager, brought into the Master's office an affidavit to prove a debt of 2,500*l.* against the Atmospheric Company, being the sum so advanced under the before-mentioned guaranties, the whole of which then remained due and owing to the Tring Company.

After two appointments for hearing, the claim was, on the 6th of February 1852, disallowed "for want of evidence, and as being barred by the Statute of Limitations." An appeal was presented, and Vice Chancellor Parker sent the case back to the Master, on the question of the Statute of Limitations, to review his decision. On the 6th of June, the case was argued before the Master; and *Lloyd's case* (2) being cited, leave was given to Mr. Wryghte to carry in an amended claim, giving due notice to the parties intended to be charged. On the 17th of the same month he carried in the following: "The said W. C. Wryghte, as such official manager as aforesaid,

claims of the following parties, as contributories in the above-mentioned Great Western Extension Atmospheric Railway Company, that is to say, (the nine persons who signed the first guarantie,) being the persons who signed the guarantie of the 27th of October 1845, and who have been settled on the list of contributories of the said company as contributories thereof the sum of 2,000*l.*, with interest thereon from the 27th of October 1845 until payment, for money lent and advanced on the said 27th of October 1845, by the directors of the Tring, Reading, and Basingstoke Railway Company, to and for the use of the Great Western Extension Atmospheric Railway Company, of which company the said several persons were then directors." The claim then went on in like manner concerning the 500*l.*, and the directors who signed the guarantie of the 28th of November 1845. Notice having been duly served on all parties proper to be served, the matter came on before the Master, and he disallowed the claim, on the ground that the Winding-up Acts did not give him any jurisdiction in respect of claims against individuals; whereupon the present appeal was presented, and was set down for hearing before Vice Chancellor Parker.

Mr. Daniel and Mr. Roxburgh, for the appellant.—This claim was originally made against the company; but, subsequently, it was carried in against the members of the body of directors of the Atmospheric Company, who signed the guarantie; and it was so, on the authority of *Lloyd's case*, decided by one of your Lordships, when a Vice Chancellor, where it is understood to have been laid down that though a claim cannot be proved against a company, it may be proved against the individuals who have made themselves liable. Here some of the directors have so done by signing the guaranties; and who, with the other nine directors, form the body of contributories on the list, as liable for the debts of the company. The same principle seems to be admitted in *Carrick's case* (3). Nothing could be more just than that the parties who signed these

(2) 1 Sim. N.S. 248.

(3) 1 Sim. N.S. 505.

guaranties should be made liable, and nothing could be more inequitable than to hold that they are not liable in proceedings under the Winding-up Acts, merely on the supposed ground of want of jurisdiction, since it is not disputed that the money was applied and expended in the affairs of the company directed under the order to be wound up. Although strictly it is money due from a certain number of individuals who were directors of the Atmospheric Company, still it was in justice one which should be provided for under the winding-up proceedings against that company.

[LORD JUSTICE KNIGHT BRUCE.—It seems admitted that this cannot bind the company. Is there any authority for saying that such a proceeding is within the scope of these acts of parliament? How is it possible to say a man can be admitted as a creditor whose claim is not against the whole company? A claim against a company, for a debt incurred by its agent, with its authority, is a very different thing, and such a claim we should readily attend to.]

It is admitted that the demand is against the directors who signed the guarantee, and not against the association as a body; but still it is no more than just and equitable that, the money having been expended for the whole body of the company, the claim should be admitted under the Winding-up Acts.

[LORD JUSTICE LORD CRANWORTH.—All that I decided in *Lloyd's case* and *Carrick's case* was this, that where an attempt is made to prove against the whole body of contributories a debt which has been contracted by some of them, it is necessary, before the debt can be admitted, to shew that it was authorized to be contracted, either expressly or impliedly, by the whole body. I have never decided that, under a winding-up order, a debt or claim can be proved against one out of a body of contributories, unless the debt has been authorized, so as to bind the whole.]

Certainly the interpretation which has been mentioned in argument must have been impressed on the mind of the Master, when he, upon *Lloyd's case* being cited to him, consented to permit Mr. Wryghte to take in the amended claim.

LORD JUSTICE KNIGHT BRUCE.—The company or association in this case directed to be wound up, is the Great Western Extension Atmospheric Railway Company. It seems, the other company now claim, or at one time supposed themselves, to be creditors of the company to be wound up. That may or not have been so; or, being so, the question is not before us. The question raised before us is, whether, under the order directing the winding up of the company, which I have mentioned, the Master could take cognizance of a demand not alleged to be due from the company, but from some, and only some, of the persons members of it. My opinion is, that the Master has no jurisdiction to enter into such a question. It has been said to be convenient and just that it should be so, inasmuch as in this particular instance the money was applied for the purposes of the company. That circumstance can make no difference in the principle, or in the rights of the persons cognizant of the transaction; and concerning a debt of the company, the purpose for which it is applied is absolutely immaterial. If such a demand is to be admitted, the private debts of every individual contributory might be brought in under the order.

LORD JUSTICE LORD CRANWORTH.—I regret if anything which I may have said extra-judicially in *Lloyd's case* should have led to the construction which has been put upon it. In that case, if I remember rightly, the Master declined to admit a claim as a debt unless it were shewn that the company, or some of the contributories, were liable to it; but he admitted it was a claim. An application was made to me, when Vice Chancellor, to reverse what had been done by the Master, and to adopt the claim as a debt. I refused, and at the same time expressed a doubt whether the Master had not gone too far in admitting it as a claim. I thought that, before admitting either a claim or a debt, it was necessary to shew not only that there was a creditor, but also that there was a debtor; and, what is perhaps more material, to go on and shew that the debtor was a debtor whose debts were to be wound up under the order. The language attributed to me by the report of

the case seems to have led to the inference that I also meant to say that the Master might admit a claim against individuals forming part only of the company, if they alone were the parties liable. If the language of the report bears that construction, it is to be regretted that what was meant has been couched in language so inaccurate. All I intended to decide or say was, that the claim should not be admitted as a proof, and that I doubted whether it ought to be admitted as a claim until it had been shewn that the parties sought to be charged were the parties liable to the demand. The order now to be made will be, that the appeal motion be dismissed, with costs, but without prejudice to any application which may be made to the Master to prove the debt against the company or association directed to be wound up.

LOORDS JUSTICES.

1852.

June 4.

In re HART.

Lunacy—Taxation of Solicitor's Bill.

Solicitors, who claimed costs for taking out the commission, and for other business in the lunacy, obtained an order for taxation, but did not tax. Five years after the order the lunatic died, leaving real estate, but no personal property. The solicitors sued the committees at law, but they set up the Statute of Limitations, and the action failed. The solicitors now presented a petition, praying an order for taxation, with a view to proceedings to make the real estate liable, and the Court made the order, but without prejudice to any question whether the petitioners had any claim on the lunatic's estate.

This was a petition presented in the lunacy by a firm of solicitors, praying an order for the taxation of their bill of costs.

Mr. Prendergast, in support of the petition, stated that he would admit in the outset, that the petition was presented with the view to some proceedings by bill or claim, or otherwise to enforce the demand of the petitioners against the real estate of the lunatic, he having died without leaving any personalty. The petitioners meant

to endeavour, in such way as they might be advised, to establish their claim as a charge on the real estate. The circumstances under which the petition was presented were of a peculiar nature. Before the lunacy, these solicitors were employed by the persons who were afterwards appointed committees to take out and prosecute the commission, and after their appointment the solicitors were still employed by the committees in the matter of the lunacy, and it was in this business before and in the lunacy that the costs now claimed were incurred. In 1842, the petitioners obtained an order to tax their bill of costs, but no taxation actually took place during the life of the lunatic, who did not die until 1847. After that event, the petitioners required payment from the committees, but they declined to accede to the demand on the ground that the lunatic left no personal estate to meet it, whereupon the petitioners brought an action against the committees personally, as the persons who had employed them in the business; but a plea of the Statute of Limitations was put in, and the plaintiffs failed. In this state of circumstances the petitioners submitted to the Court that, as the costs had been incurred for the benefit and protection of the lunatic, and as he left real estate, that estate ought to be rendered in some manner liable to the payment of so just a demand. In *Williams v. Wentworth* (1) a bill was filed by a party who had petitioned for a commission of lunacy, under which the lunacy was established, and on traverse was confirmed, and an order was made for the taxation of costs, but before taxation the lunatic died. Subsequently, a new order for taxation was made, and the costs were taxed at a stated sum, and an order was made declaring that the costs had been properly incurred for the benefit of the lunatic; the bill was filed by this person, on behalf of himself and all other the creditors of the lunatic, in order to obtain payment out of the real and personal estate. A demurrer to the bill was overruled, the Master of the Rolls deciding that where monies are expended for the necessary protection of the person and estate of a lunatic, the law will raise an

(1) 5 Beav. 325.

implied contract, and give a valid demand or debt against the lunatic or his estate; and it was there further held, that the costs were to be raised out of the real estate if the personal estate should be deficient. The reasons given by his Lordship in his judgment in that case applied equally here. In the case of *Tayler v. Tayler* (2) the same principle was recognized, although the Lord Chancellor there did not deal with the costs as being in the nature of a lien, but because, there being a cause, and the fund being in that cause, it could not be dealt with or got at without the aid of the Court, and he declared that he saw no reason for not making the order, "the costs being in equity a charge on the estate."

Mr. Grenside, for the committees, the respondents, argued that, as there was already an order for taxation, there was no necessity for the petition. On that ground, therefore, it ought to be dismissed. The Court would not lend facilities to the harassing the committees, who, in the exercise of their duty having pleaded, and successfully, the Statute of Limitations to the action, would be equally certain to succeed in a similar plea to any bill or other proceeding in this court. Whatever object might be in view, and however that object might hereafter be sought to be effected, it was, in truth, an endeavour to do indirectly what could not succeed directly. If the Court were to make any order on the petition, the petitioners would deal with it as a sort of recognition of their right against the real estate of the deceased lunatic.

LORD JUSTICE KNIGHT BRUCE.—If this be an honest demand, and no part of the argument goes the length of impeaching its honesty, it is as hard a case upon the petitioners as I ever heard of. If the action failed by reason of the Statute of Limitations, so any suit here must share the same fate; and although the Court is certainly in favour, if it has a prejudice, of common honesty, it has no jurisdiction to make any declaration of charge, but it can direct the taxation of costs, and order the remainder of the petition to stand over,

reserving the consideration of all questions of costs of this matter.

LORD JUSTICE LORD CRANWORTH intimated his concurrence.

The order ultimately made was to direct the taxation of the costs, and that the Master should distinguish those incurred before from those incurred after the death of the lunatic, and that the remainder of the petition should stand over. And, at the suggestion of the counsel for the respondents, the order was to be without prejudice to any question whether the petitioners had any claim against the assets of the lunatic. The Master was also directed to be at liberty to state any special circumstances which might arise on the taxation.

PARKER, V.C. }
June 9, 25, 28. }

BLANN v. BELL.

Will—Construction—Gift of Dividends—Life Interest—Enjoyment in Specie—Charge of Debts.

A testator gave the residue of his estate to trustees upon trust to pay the dividends of 1,500l. consols to A. for life, and, after his death, to divide the dividends of the said sum equally between his wife E. B. and his niece F. R. and the survivor of them. The testator gave all the residue of his estate to his wife E. B. for life, with remainder to his niece F. R. for life, with remainders over. F. R. died:—Held, that E. B. was entitled only to a life estate in the 1,500l. consols, and was not entitled to the principal.

A testator gave all the residue of his real and personal estate to trustees upon trust to pay certain specified legacies, and then, as to all the rest, residue, and remainder of his freehold, copyhold and leasehold estates, and all other his estate and effects, upon trust to pay the dividends, interest, rents, profits and annual produce to his wife for her life. The testator at his death was possessed of leaseholds, shares in companies and Dutch bonds:—Held, that the widow was entitled to the enjoyment of the leaseholds in specie, but not of the shares or Dutch bonds.

A testator directed his debts to be paid,

(2) 3 Mac. & G. 426.

and then gave all his real and personal estate to trustees upon trust to pay certain legacies, and then declared certain trusts of all the rest, residue and remainder of his freehold, copyhold and leasehold estates, and all other his estate and effects:—Held, that the personal estate was the primary fund for the payment of the debts and legacies; and that the real estate was only charged with them as a subsidiary fund.

Thomas Blann, by his will dated the 15th of December 1842, directed all his debts and funeral and testamentary expenses to be paid and satisfied; and then appointed certain persons to be his executors; and then gave the specific and pecuniary legacies therein mentioned. The will then proceeded as follows:—"And as to all the residue of my estate and effects whatsoever and wheresoever, whether consisting of freehold, leasehold, or copyhold estates, money in the public stocks or funds, and all other monies or securities for money, I give, devise and bequeath the same to my said wife Edith Blann, and the said J. T. Bell, W. Manses, and J. R. Bell, their heirs, executors, or administrators, and I direct them to stand and be possessed thereof, upon the trusts following, that is to say, upon trust to pay the dividends of 1,500*l.* 3*l.* per cent. reduced Bank annuities to Mrs. Sarah Twitchin of, &c., for her life; and, at her decease, I direct the dividends arising from the said sum of 1,500*l.* 3*l.* per cent. reduced Bank annuities, to be equally divided between my said wife Edith Blann, and my niece Frances Rayner, and the survivor of them."—[The will then contained gifts of three other sums of stock for three other persons for their lives, with a direction that at the decease of each annuitant the dividends should be equally divided between his said wife Edith Blann and his said niece Frances Rayner, and the survivor of them.] And upon trust to pay to Frances Rayner, my niece, the dividends of 8,000*l.* 8*l.* per cent. consolidated Bank annuities for her life, and, upon trust, in case of the death of the said Frances Rayner, leaving issue," &c.—[Here followed a trust for the issue of his niece.] "And, as to all the rest, residue, and remainder

of my freehold, copyhold, and leasehold estates, and all other my estate and effects, subject to such power of appointment as is hereby vested in my said wife, upon trust to pay the dividends, interests, rents, profits, and annual produce thereof to my said wife Edith Blann, or otherwise permit and suffer her to receive, take and enjoy the same for and during the term of her natural life."

The will then proceeded to direct that, after the death of his wife, 1,000*l.* should be made subject to her appointment by will, and that the income of the residue should be paid to his niece Frances Rayner for life, and that the capital should be divided among her children, as therein mentioned, and, in default of children, should go to certain charities.

The testator died in 1846. Part of his personal estate at his death consisted of canal shares, Dutch bonds, shares in assurance companies, and leasehold property. Mrs. Twitchin the annuitant died, and Frances Rayner the testator's niece also died.

The bill was filed by Mrs. Blann for the administration of the estate of the testator.

Three questions were raised in the suit: first, whether, by the gift to Mrs. Blann of the dividends of the 1,500*l.* stock, she was entitled to the stock itself; secondly, whether Mrs. Blann, as tenant for life of the residue, was entitled in specie to the enjoyment of the leaseholds, Dutch bonds and shares; and thirdly, whether the real estate of the testator was to contribute *pari passu* with the personal estate to the payment of the debts and legacies.

Mr. Malins and *Mr. Collins*, for the plaintiff.

Mr. Bacon, *Mr. Little*, *Mr. Walker*, *Mr. Giffard*, *Mr. Willcock*, *Mr. Smith*, *Mr. J. Russell* and *Mr. Younge*, for other parties.

The following cases were cited.—

On the question whether the gift of the dividends amounted to a gift of the stock,
Innes v. Mitchell, 6 Ves. 464.
Adamson v. Armitage, 19 Ves. 416.
Soames v. Martin, 10 Sim. 287; s. c. 8 Law J. Rep. (N.S.) Chanc. 367.

Cooke v. Bowler, 2 Keen, 54; s. c. 5 Law J. Rep. (n.s.) Chanc. 250.

Kilvington v. Gray, 2 Sim. & S. 396.

On the question whether the plaintiff was entitled to the income of the leaseholds, the canal and assurance shares, and the Dutch bonds—

The cases cited in 2 *Roper on Legacies*, 1344.

Mills v. Mills, 7 Sim. 501; s. c. 4 Law J. Rep. (n.s.) Chanc. 266.

Benn v. Dixon, 10 Sim. 636; s. c. 9 Law J. Rep. (n.s.) Chanc. 259.

Sutherland v. Cooke, 1 Coll. 498; s. c. 14 Law J. Rep. (n.s.) Chanc. 71.

Hunt v. Scott, 1 De Gex & S. 219.

Burton v. Mount, 2 Ibid. 383.

Chambers v. Chambers, 15 Sim. 183; s. c. 15 Law J. Rep. (n.s.) Chanc. 818.

On the question of the real estate contributing *pari passu* with the personal estate—

Cole v. Turner, 4 Russ. 376; s. c. 6 Law J. Rep. Chanc. 101.

Roberts v. Walker, 1 Russ. & M. 752.

Ball v. Harris, 4 Myl. & Cr. 264; s. c. 8 Law J. Rep. (n.s.) Chanc. 114; and

Young v. Hassard, 1 J. & Lat. 466.

PARKER, V.C.—The first question here is as to the annuities; one of which has fallen in by the death of Sarah Twitchin, the annuitant. The testator gives all his real and personal property to trustees on the trusts following: to pay the dividends of 1,500*l.* 3*l.* per cent. reduced Bank annuities to Sarah Twitchin for life; and, at her death, he directs the dividends of that sum to be equally divided between his wife Edith Blann and his niece Frances Rayner, or the survivor of them. There are several other gifts in the same words. The question is, whether he gave Edith Blann, who is the survivor, an absolute interest or an interest only for her life. No doubt the general rule is, that an unqualified gift of the income of a fund confers an absolute, and not merely a life, interest in the principal; but it is always a question of construction on a will to discover whether

the testator did or not intend to give more than a life interest. Upon this point several authorities have been cited. It is not a very strong rule which gives an absolute interest in such cases. The Court is obliged to find out the intention of the testator from the words in which he has expressed it. Here the words are, "I direct the dividends arising from the said sum of 1,500*l.* 3*l.* per cent. reduced Bank annuities to be equally divided between my said wife Edith Blann and my niece Frances Rayner, and the survivor of them." The dividends are, under this direction, to be from time to time divided between these two persons, and the survivor of them. That means that the two were to take together, and that the survivor, after the death of either, was to have the whole. It appears to me that the enjoyment of these dividends in succession was to be to the two for life, and then to the survivor for an interest, which must be the same. To this it is to be added, that the general scheme of the will is to give life interests to these same parties. I think that there can be little doubt that a life interest only in this annuity is taken by the survivor. There must be a declaration that the plaintiff is entitled for her life only to the dividends of 1,500*l.* have 3*l.* per cent. reduced Bank annuities which had been set at liberty by the death of Sarah Twitchin.

The next question is, what should be the course of administration of the real and personal estate in this case. First, as to the real estate. It has been contended that the testator has shewn an intention that the real and personal estate should be liable *pari passu* to the pecuniary charges in the will. I do not think that there is any ground for that argument. The testator begins by directing his debts to be paid. He then gives specific and pecuniary legacies, and then gives all his estate (enumerating it) to trustees, upon trust to pay the dividends of certain portions, (which are general and not specific bequests); and then as to the rest, residue, and remainder "of my freehold, copyhold, and leasehold estates, and all other my estate and effects," subject to such power of appointment as therein mentioned, he gives the same upon certain trusts, which

he proceeds to point out. It appears to me that the ordinary rule as to the administration of real and personal estate must apply here. The personal estate is the primary fund for the payment of debts and legacies, and the real estate is charged as a subsidiary fund, which must mean with what remains due after the application of the personal property in a due course of administration. *Roberts v. Walker* was referred to on this point. It was the first authority of the kind, and perhaps it is not altogether to be reconciled with other cases. The will there contained a direction to sell the real estate. Here there is no direction to sell, but the testator seems to assume that, after his estate is administered to the point of paying his debts and legacies, the real estate will be remaining. Then *Young v. Hassard* was cited. That case appears not to be applicable to this subject at all. The property in this case appears to me to be subject to the ordinary rule of administration. The additional authority of *Boughton v. James* (1) seems to me to relieve the question from all doubt. The real estate is not to be applied until the personal estate is found to be deficient.

The next question is, what should be the course of administration of the personal estate. Upon this, two points arise for consideration. The first is, as to the interest of the tenant for life in the leaseholds, which are a wearing-out property; and the second, as to that part of the personal estate, which, though not a wearing-out fund, is not invested upon such security as this Court would approve, and yet may yield to the tenant for life a larger income than the ordinary investment would produce. Whether the tenant for life is to have more than this is settled to be a question of intention to be ascertained from the whole will. The general rule is, that an even hand is to be held between the tenant for life and those in remainder. Everything should be turned into a general fund, and the whole should be preserved for those entitled in remainder. The result of the authorities is, that the applicability of the rule in a particular case is to be ascertained by construing the whole will

according to the directions given by the testator. No direction is to be found in this will that all the property is to be converted. It appears to me that with respect to the leaseholds, this Court must consider that there is no doubt. The testator assumed that there would be freeholds, copyholds, and leaseholds, not required for the purposes of administration, and he directed the payment of "the dividends, interests, rents, profits, and annual produce thereof," to be made to his wife. I do not see how the testator could, in clearer terms, have said that his wife was to have a life interest in the leasehold property, and that it was not to be converted. It is a different question as to the insurance and canal shares and Dutch funds. No direction is given that property of that kind should remain in specie. I think that they must be made subject to the general rule and converted, and that the produce must be invested in the funds of which the Court approves for that purpose. I do not know whether the question of contribution of the leaseholds to the payment of debts and legacies arises, but it may be reserved.

PARKER, V.C. }
June 29; }
July 2. }

WAITE v. COMBES.

Will—Construction—Monies.

A testator, by his will, appointed A. and B. to be his executors, to take and receive all monies that might be in his possession, or due to him at the time of his death, to be by them placed in the funds or otherwise laid out on security, the interest thereof to be paid to his wife for her life, and directed them, after her death, to divide the monies held in trust by them between his two nieces. The testator had at his death only a small balance at his bankers, and the sum of 1,200l. consols:—Held, that the consols were disposed of by the will under the terms of monies.

Thomas Staning made his will, dated the 19th of August 1844, which was in part as follows:—"I, Thomas Staning, of

(1) 1 Coll. 26.

&c., being at this time of sound mind and good understanding, and desirous of making a settlement of my affairs, do accordingly declare the contents of this paper to be those of my last will, putting aside and totally doing away with any previous will or wills made by me, and therefore appoint William Combes, of &c. and George Clode, of &c. my executors, to take and receive all monies that may be in my possession or due to me at the time of my decease, and to prosecute for the recovery of the same if it be found necessary, to be by them placed in the British funds, or otherwise laid out upon such security as they shall deem sufficient, the interest arising from which to be received and paid by them yearly, or oftener as appears best, unto my dear wife Caroline Staning, at this time living with me, for her sole use and benefit, but that only during her life, she having but a life interest in it, and, at her death, or as soon afterwards as it can be done, it is my wish, for very sufficient reasons, and I, therefore, authorize my executors to divide equally, between my two nieces, daughters of my sister Mrs. Ann Combes, of Dorking, or to their children, or the child or children of either, supposing one of them not to have any family surviving, all such monies held in trust by them, and which my nieces or their surviving children at the death of my dear wife Caroline Staning may become by virtue of this my will entitled to in accordance with the wish already expressed by me."

The testator died in May 1846. At the time of the death of the testator his personal estate consisted only of some furniture of small value, a small balance at his bankers, and 1,200*l.* 3 per cent. consols.

This was a claim filed by the nieces of the testator against his executors. The only question in the case was, whether the 1,200*l.* stock passed by the gift of "all the testator's monies in his possession or due to him at his decease."

Mr. E. Webster, for the plaintiffs, cited

Dicks v. Lambert, 4 Ves. 725.

Legge v. Asgill, Turn. & R. 265, n.

Kendall v. Kendall, 4 Russ. 360; s.c. 6 Law J. Rep. Chanc. 111.

Glendening v. Glendening, 9 Beav. 324.

Mr. Drewry and Mr. Cadman Jones, for the next-of-kin, cited—

Ommanney v. Butcher, Turn. & R. 260.

Hastings v. Hane, 6 Sim. 67.

Gosden v. Dotterill, 1 Myl. & K. 56; s.c. 2 Law J. Rep. (N.S.) Chanc. 15.

Rogers v. Thomas, 2 Keen, 8.

Dowson v. Gaskoin, 2 Keen, 14; s.c. 6 Law J. Rep. (N.S.) Chanc. 295.

PARKER, V.C.—This is a claim in which a question of construction arises upon an exceedingly informal will. It appears that the testator, at the time of his death, had a sum of 1,200*l.* consols standing in his name, a very small sum of money at his bankers, and some furniture of the value of 80*l.*, and that this was the whole of his estate. The question is, whether the consols are or are not disposed of. Upon reading the will, I think that the Court ought to come to the conclusion that the will disposes of the whole. It is obvious that such was the intention of the testator, although the words used point rather to specific portions of the estate than to the whole. The testator commences his will thus:—"I, Thomas Staning, being at this time of sound mind and good understanding, and desirous of making a settlement of my affairs, do accordingly declare the contents of this paper to be those of my last will, and, therefore"—he then appoints Combes and Clode his executors. This is the language of a man who is about to make a complete disposition of the whole of his property, and not of a man who is about to die intestate as to a considerable part of it. There are no words of gift to the executors in this will. After having commenced as I have pointed out, the testator seems to assume that the executors, by their appointment alone, would have the controul of his property. He goes on to say—"I appoint these persons my executors to take and receive all monies that may be in my possession or due to me at the time of my decease, and to prosecute for the recovery of the same, if it be found necessary, to be by them placed in the British funds, or otherwise laid out upon such security as they shall deem sufficient, the interest arising from which to be received and paid by them yearly," and

so on, disposing of it. Cases were referred to in the argument on this point, and I add to them the case of *Boys v. Morgan* (1), an authority to shew how unwilling the Court is to consider any portion of the personal estate undisposed of. The whole will in this case seems to point to a complete disposition; but, if it were not so, I think that the words used are sufficient to pass the consols in question. The executors are "to take and receive all monies that may be in his possession or due to him at the time of his decease, and to prosecute for the recovery of the same, if it be found necessary, to be by them placed in the British funds or otherwise laid out upon such security as they should deem sufficient." Now there is no doubt, upon the authorities, that the word "monies," in a gift of "monies" will pass stock in the funds, it being a question of construction upon the whole will, whether the testator meant to use the word in that sense or not. I cannot doubt that the words "take and receive all monies in my possession or due to me at the time of my decease," looking at the general terms of the will and the authorities on the subject, were sufficient to pass this stock. Then it was said, with some point, that the direction to take and receive all monies in his possession or due to him at the time of his decease, cannot mean to refer to stock, because the testator goes on to direct the executors to prosecute for the recovery of the same, if it be necessary, to be by them placed in the British funds or otherwise laid out upon such security as they should deem sufficient. To consider that this direction destroys the generality of the word "monies" as applicable to the stock, would be to take an advantage of a slip or inaccuracy of the testator in wording his will, when, in fact, the meaning is obvious. If he intended to give power to the executors to invest monies not invested, *a fortiori* he must have intended monies which he had himself invested to pass by the will. Upon the executors admitting that the debts and funeral expenses of the testator have been paid, declare that the plaintiffs are entitled in equal moieties to the consols.

(1) 3 Myl. & Cr. 661.

TURNER, V.C.

1850.
July 31.
1851.
Feb. 24;
Aug. 20.

STEVENS v. THE SOUTH
DEVON RAILWAY COM-
PANY.

Railway Company—Agreement or Undertaking in a Cause—Act of Parliament—Jurisdiction.

A railway company, defendants in a cause, entered into an agreement or undertaking with the plaintiff not to do any act contrary to a then pending notice of motion, unless under the authority of parliament, until the hearing of the cause, or the further order of the Court. The company subsequently obtained an act of parliament, which did not by positive enactment, nor, in the opinion of the Court, by necessary conclusion from its provisions, take the case complained of by the plaintiff out of the reach of the undertaking, although it did not prohibit the act, and might have contemplated the act consistently with the provisions of the act of parliament:—Held, on motion by the plaintiff, that the undertaking was binding on the company until the further order of the Court: but that the company, on shewing merits, might have moved to discharge it; and the Court, deeming such merits to have been shewn by the answer, accordingly discharged the undertaking.

This was a motion, by the plaintiff, to restrain the South Devon Railway Company from doing any act contrary to their agreement or undertaking given in the cause, under the circumstances stated in the judgment.

Mr. Stevens appeared for the plaintiff, in support of the motion; which was opposed by

Mr. C. Hall, on behalf of the company.

The motion was heard during the Long Vacation in 1851, before the Vice Chancellor, who delivered the following written judgment.

TURNER, V.C.—There are two classes of shares in this company, the original shares and the half shares. The original

shares are 50*l.* shares, and represent the original capital of the company, which for the purposes of the present motion may be taken to have been the sum of 1,000,000*l.* It was in fact 1,100,000*l.*, but in consequence of a resolution passed immediately after the constitution of the company, 2,000 of the shares were never issued. The half shares, of 25*l.*, represent the sum of 500,000*l.*, increased capital of the company, authorized to be raised under one of their acts. The half shares were created on the 15th of March 1847, and have a guarantee or privilege attached to them; the resolution of the directors by which they were created, being in the following terms:—That 6*l.* per cent. per annum be guaranteed until the 15th of March 1857 upon all calls duly paid, and upon all sums received in contemplation of calls by authority of the board of directors in respect of such half shares; and that the said guarantee shall not exclude the shareholders from participation in any higher rate of dividend for the time being, payable on the whole share." It appears that no dividend or interest has been paid either on the half shares or on the original shares since the year 1848; and in the year 1850 the company, in addition to a mortgage and bond debt to the amount of 478,166*l.*, created under the powers of its acts, had incurred a floating and unsecured debt, to the amount of 97,000*l.* or thereabouts.

In this state of circumstances, a bill was introduced into parliament in the session of 1850, for enabling the company to raise, by the creation of new shares, a further capital, to be applied in liquidation of the mortgage and bond debt, and of the floating and unsecured debt, and as to 50,000*l.* for general purposes; and by this bill it was proposed that the future income of the company should be applied, first, in payment of the interest of the debts and of the shares to be created for the liquidation of them, and then in payment, not only of the preferential dividend guaranteed upon the half shares, but of the arrears and any future deficiency of such preferential dividend, without reference to the period or half year when deficiency occurred.

The plaintiff is a very large holder of original shares in the company, and upon the above application to parliament being

made, he filed his bill in this Court, by which, as first amended, after alleging, amongst other things, that the effect of the resolution by which the half shares were created was, that the clear and divisible profits of each current half year were to be the only fund for the payment of the preferential dividend, and that the profits of one half year were not to be liable or applicable to make good the deficiency of such preferential dividend in any previous half year, that the holders of the half shares were not entitled to the preferential dividend out of any profits derived from increased capital, and that the directors had in hand profits of the past year, which ought to be applied, first, in payment of the floating and unsecured debt, and then in payment of a dividend upon the shares in the company during the period in which such profits were earned, but that the directors intended to apply the same in payment of the arrears of the preferential dividend, and that such payment would be illegal,—he prayed an injunction to restrain the company and its directors from paying any interest or dividends on the half shares in preference to dividends or interest on the original shares, out of any profits derived from any other capital than which at the date of the resolutions creating the half shares had been or could be raised under the provisions of the company's acts, and from paying any preferential interest or dividends on the half shares while any of the floating or unsecured debt was unpaid, except out of the clear and divisible profits of the current half year properly applicable to the payment of a dividend, and so far as such profits might be sufficient for the purpose. The defendants having put in their answer to the original bill, and thereby stated their intention to apply the clear profits in hand in paying to the holders of the half shares the preferential dividend upon such shares for the half year which had elapsed since the shares were created, the plaintiff, on filing the amended bill, gave notice of a motion for the injunction prayed by it. The motion came on upon the 31st of July 1850, and was ordered to stand over till Michaelmas term, the defendants undertaking not to declare or pay any dividend in the mean time; and the motion having again come on in Michaelmas term,

was again ordered to stand over till Hilary term, upon an undertaking by the defendants in the terms of the notice of motion.

The defendants then put in answers to the amended bill, by which they stated that, until the arrangement after mentioned was taken into consideration, they had considered that the profits which they had in hand were applicable to the preferential dividends, including the arrears, and that the capital debt ought to be provided for by the creation of new shares, or otherwise, as parliament might sanction, but they never intended to apply them in payment of interest or dividends until such time as the capital debt was so provided for; and that, in fact, nearly all the profits which they had in hand had been applied towards payment of capital debt, such application having been considered as a temporary loan, to be repaid as soon as, under the authority of parliament, monies for that purpose should have been provided. They then referred to a report of the directors, recommending the arrangement with the holders of half shares which has since been adopted, under the provisions of the act of parliament obtained in the last session, and to a resolution of the shareholders approving the report and authorizing the directors to apply to parliament for powers to give effect to the recommendations; and they stated that it was not intended to apply any profits to the payment of dividends so long as any capital debt remained unpaid, unless parliament should have given the company such powers as would justify such application; and in one of the answers there was a passage to the effect, that it was not intended to apply any profits to the payment of the preferential dividend till the capital debt had been fully paid off.

The motion again came on after the filing of these answers; and on the 24th of February 1851 an order was made upon it, by which—the defendants undertaking that the order should be without prejudice to any question between the parties, and also undertaking to do nothing unless under the authority of parliament, contrary to the notice of motion, until the hearing of the cause, or until further order—it was ordered that the plaintiff should be at liberty to amend his bill. In pursuance of the liberty

given by this order, the plaintiff re-amended the bill, and thereby prayed an injunction against the payment of the preferential dividend only, whilst the floating or unsecured debt should remain due and unpaid or unprovided for.

The defendants, by their answer to the re-amended bill, stated, that the unsecured debt amounted to upwards of 100,000*l.*, and that the assets available for payment of it were under 20,000*l.*; that it could only be paid off by the creation of new capital, by the authority of parliament, or by applying the profits, after keeping down the interest on the mortgage and bond debt, to that purpose, and that they intended to apply such profits accordingly, unless and until some other provision should be made by parliament for such purpose; and they also stated that the balance of profits remaining in hand, after payment of the interest of the mortgage and bond debt, was 789*l.* 19*s.* 7*d.*, which was meant to be applied in payment of the unsecured debt, subject to any provisions parliament might make for the payment; and, further, that the balance of profits on the next account would be applied as parliament might sanction, and in default of such parliamentary sanction in liquidation of the unsecured debt of the company.

At this point the proceedings in the original suit terminated, but the bill, which was introduced into parliament in the session of 1850 having been rejected, the defendants, in the last session of parliament, applied for and obtained an act, by which, after providing for the creation of shares or stock in place of a like amount of the mortgage or bond debt, it was enacted, that, subject to the rights of the holders of the shares or stock created in place of the mortgage and bond debt, it should be lawful for the company to commute the guarantee and privilege attached to the half shares into any other guarantee or privilege, whether perpetual or terminable, which might be agreed upon in manner after mentioned, as an equivalent for the existing guarantee and privilege, and to attach such new or altered guarantee and privilege to the half shares, or to any stock into which the same might be converted; but it was enacted, that no commutation of half shares should be made under the power

of the act until a scheme, setting forth the particulars thereof, and especially the fixed or rateable dividends proposed to be attached to the half shares, or to the stock into which they might be converted in substitution for the 6*l.* per cent. guaranteed, and the privileges, if any, to be secured to the holders thereof, should have been sent to each shareholder, nor without the concurring votes of the holders of, at least, four-fifths of the whole shares, and of the holders of, at least, four-fifths of the half shares, represented at a meeting to be convened by the directors for the purpose of taking the scheme into consideration, with a proviso that such consent, if given, should be binding and conclusive on all the shareholders in the company; and after providing for the cancellation of the 2,000 unissued shares in the original capital, and of certain other shares which had been surrendered and forfeited, it was enacted, that, subject to the provisions of the act, the company might create and issue shares in the stead, and to the nominal amount, of the cancelled shares, and that the monies raised thereby should be applicable to the general purposes of the undertaking authorized by the company's acts, with a proviso that the existing debts of the company, other than the mortgage and bond debt, should be paid thereout. The act contained further provisions as to the shares to be thus created: that the company should not by the creation of them increase the capital of 1,600,000*l.*, which they were authorized to raise; that 20*l.* per cent. should be the greatest amount of any one call, and two months, at least, the interval between successive calls; and that the aggregate amount of calls on any share in any year should not exceed four-fifths of the nominal amount of the share; that the shares should not be created without the consent of, at least, four-fifths of the votes of the shareholders present at a meeting of the company, to be specially convened for the purpose of determining as to such creation, with a proviso that the consent, if given, should be binding on all the shareholders; that the holders of the shares should be entitled in respect thereof to a certain number of votes, but should not in respect thereof have any vote as to the commutation or conversion of the half

shares, and that, subject to the provisions of the act, the company might issue the shares, at such times and of such amounts, and in such classes, and bearing such interest or dividend, preferential or otherwise, and with such privileges and on such terms and conditions, and generally in such manner as the company, with the consent of four-fifths of the votes of the shareholders present at a general meeting to be specially convened for the purpose, should determine.

In pursuance of the provisions of this act, the directors of the company prepared and issued a scheme for the commutation of the half shares, by which scheme it was proposed that the existing guarantee or privilege attached to those shares should be commuted as follows: that each half share should bear a fixed dividend in perpetuity at the rate of 10*s.* 9*d.* per annum, payable half-yearly in priority to all other dividends, except on shares or stock created in substitution for the mortgage or bond debt; that the substituted guarantee and privilege should take effect from the 15th of September 1850; that the first payment in respect thereof should be a dividend, at the rate aforesaid, for the half-year ending the 15th of March 1851, and thereafter that the fixed dividend should be paid half-yearly; that the substituted guarantee and privilege should be received as a full satisfaction for all arrears and future payments of interest originally guaranteed on the half shares, and in satisfaction of all further claims thereon to the 15th of March 1857; but that in case the surplus net revenue should permit a dividend to be made in respect of the 50*l.* shares exceeding 6*l.* per cent. per annum, the commutation should not exclude the holders of the half shares from participating in the surplus, rateably with the holders of the 50*l.* shares; and that, after the 15th of March 1857, the holders of the half shares should, in addition to the fixed dividend of 10*s.* 9*d.* per half share, be entitled to the same rate of dividend per cent. as that which might from time to time be declared in respect of the whole shares.

This scheme appears to have been founded on the report of an actuary, that the 10*s.* 9*d.* per half share, in perpetuity, was equal in value to the 6*l.* per

cent. originally guaranteed for the period of ten years, during the part of that period for which it had not been paid. Notice having been given of an extraordinary meeting for the purpose of taking this scheme into consideration, the plaintiff filed a supplemental bill, by which, after alleging that the act of the last session does not contain any provision authorizing the profits of the undertaking to be divided among the shareholders by way of dividend, so long as any of the capital or unsecured debt remains unpaid or unprovided for, and that the payment of any dividend out of profits whilst the debt is unpaid will be a breach of duty on the part of the directors, and a violation of the undertaking; and further alleging that it is uncertain whether the new shares will be issued, and, if issued, whether they will be taken, and whether the calls upon them will be paid; and that the profits ought not to be divided until a fund shall have been actually obtained for payment of the unsecured debt; and also alleging that the proposed scheme is not authorized by the provisions of the act, and that it is beyond the authority of the directors to propose, and of the meeting to confirm, he has prayed an injunction to restrain the company and the directors from in any manner acting on or giving effect to the proposed scheme for the commutation of the privilege or guarantee attached to the half shares, and from paying or declaring any commuted or other dividend on any of the original or half shares in the company while any of the unsecured or floating debt remains due and unpaid, and, except out of the clear and divisible profits of the current half-year for the time being, properly applicable to the payment of a dividend; and so far as such profits, after payment of such debts, shall be sufficient for that purpose.

The plaintiff has now moved upon the supplemental bill for the injunction prayed by it. The motion was, in the first instance, made before the scheme for commutation had been submitted to the shareholders, according to the provisions of the act; and it then stood over, in order that the scheme might be laid before the shareholders, and to afford the plaintiff the opportunity of considering its effect, it having been suggested that the

adoption of the scheme would enable an immediate dividend to be made on the original as well as on the half shares. The scheme having been submitted to the shareholders and approved by them, but being still objected to by the plaintiff, the motion was again brought on and argued. Upon the argument of the motion, it was agreed that the case should be considered as if a counter-motion, on the part of the defendants, to discharge the undertaking of the 24th of February 1851, had come on with the motion for the injunction.

The case, therefore, has to be considered in three points of view: first, whether the act of last session contains any such authority of parliament as will take the case out of the undertaking; secondly, whether, if the case be within the undertaking, the defendants are entitled to be relieved from it; and, thirdly, whether, if the undertaking be put out of the case, the plaintiff is, upon the merits, entitled to the injunction.

As to the first point, I am of opinion that the act of last session does not contain any such authority as will take the case out of the undertaking. The undertaking must be construed most strongly against the parties by whom it was given, and I think that authority by positive enactment, or by necessary conclusion from the other provisions of the act, was required to take the case out of its reach; and that it is not sufficient for that purpose that parliament has not prohibited the payment of the dividend, or may have contemplated that it might be paid consistently with the provisions of the act. It was argued that parliament must have intended the dividend to be paid, because it has appropriated the capital to be raised by the new shares, which is payable only by instalments, to the payment of the floating or unsecured debt, and has made no provision for re-couping the profits if applied in the payment of it; and again, because the new shares are postponed to the half shares, and if the dividends are not paid upon the half shares no dividends can be paid upon the new shares. But those arguments lead to no certain conclusions. There may be difficulties in carrying out the act which may not have been foreseen, but I cannot impute to parliament the intention to authorize by the act the payment of the divi-

dend out of the profits, as the effect of such a construction would be either to compel the creditors to wait for payment until funds sufficient for the purpose were raised by means of the new shares, or, if they desired more immediate payment, to drive them upon the stock and assets of the company, which it was the manifest object of the act to preserve.

It is necessary, therefore, to consider the case upon the second point, whether the defendants are entitled to be relieved from the undertaking. It was argued, on the part of the plaintiff, that the defendants could not be so entitled unless the Court was of opinion that what they proposed to do was proper to be done. But I do not think this argument can be maintained. It is true that the undertaking having been entered into upon the motion being finally disposed of, and being contained in an order which could only be made by arrangement between the parties, may well be considered as an agreement on the part of the defendants. But it is an agreement only to do nothing contrary to the then pending notice of motion, unless under the authority of parliament, until the hearing of the cause, or until the further order of the Court, terms which do not appear to me to import that nothing contrary to the notice of motion was to be done except under the order of the Court. Had this been the intention of the parties, the order would, I think, have been differently expressed; the more so, as express reference is made to the authority of parliament. I see nothing, therefore, which could have precluded the defendants from asking the opinion of the Court upon the question, whether they ought any longer to be bound by the undertaking, even if the circumstances of the case had remained wholly unaltered. But I think that, at all events, there is enough of alteration in the circumstances of the case to warrant the defendants in calling for the judgment of the Court upon that question, for the receipts in hand are now of much greater amount than they were at the period when the undertaking was given, and the power which has been given by parliament to commute the preferential dividend has afforded the company better prospects than they then had of raising money for the pay-

ment of the unsecured or floating debt. In my opinion, therefore, the defendants have the right to move to discharge the undertaking, and the case must be considered exactly as it would have stood if an injunction in the terms of the undertaking had been granted as of course, and without the matter having been mentioned to the Court, and the defendants had moved to dissolve and the plaintiff to extend the injunction.

I proceed, therefore, to consider the question upon the third point, whether, upon the merits of the case, the plaintiff is entitled to the injunction.

The case on his part appears to rest on three grounds; first, that the holders of half shares are not entitled to profits derived from increased capital; secondly, that the holders of half shares are only entitled to dividends out of current profits, and are not entitled to arrears of dividends out of the profits of subsequent years; and, thirdly, that the earnings of the line cannot lawfully be applied to the payment of dividends while the floating or unsecure debt remains unpaid and unprovided for.

As to the first point, it is unnecessary to say more than that the profits now in question are not derived from any increased capital; and as to the second point, I think, that as between the holders of half shares and of the whole shares, the holders of the half shares were, upon the construction of the resolution by which those shares were created, well entitled to the 6l. per cent. guaranteed out of any funds of the company which could be lawfully applied to the payment of it, and therefore, out of future profits, before any dividend could be payable upon the whole shares. This appears to me to be the plain import of the resolution, and the Court would not, I think, be justified in putting a strained construction upon it, on behalf of the holders of the whole shares, at whose instance and for whose benefit the half shares were created. If this part of the case had depended upon the construction of the resolution, there would not, in my opinion, have been sufficient doubt upon it to have justified the Court in interfering by injunction; but, I think, that, independently of the question of construc-

tion, the act of last session having authorized the commutation of the guarantee and the commutation having been made with the consent required by the act, the point must be considered to be at rest.

The remaining point to be considered is, the payment of the dividend whilst the floating or unsecured debt is unpaid, and, except by the power to create new shares, is unprovided for, and I am of opinion that the Court ought not, upon this ground, to interfere by injunction. I think, that the clause relating to the dividends which is contained in the company's first act, and which was referred to in this branch of the argument, is to be considered as directory. It does not point out the manner in which the profits are to be ascertained, or in what manner the scheme by which they are to be shewn is to be prepared. If such a clause was inserted in a deed of partnership between a limited number of individuals who had agreed to bring in capital by instalments, I think the majority of the partners could overrule the minority upon the question whether profits should be divided while the debts of the partnership were unprovided for, and the principles which apply to partnerships limited in number apply also to these great companies. I think, also, that the question upon this third point is one of internal management, with which the Court cannot interfere; and that the case of *Brown v. the Monmouthshire Railway and Canal Company* (1) goes far to govern the present.

It was attempted, in the first instance, to support the plaintiff's case upon the ground that the proposed scheme for commutation was *ultra vires*, but on my intimating an opinion unfavourable to that view, the point was not further pressed; and I think no weight is due to it. The plaintiff, also, in the argument, relied much upon the statements of the answer as to the intention of the defendants, and upon the state of the company's affairs and the alleged invalidity of a resolution which appears to have been passed for the creation of the new shares; but I think that the defendants have not, by the answer, precluded themselves from disputing the

right to the injunction; and, for the reasons above given, I do not think it necessary to enter upon the other points.

Upon the whole, therefore, I am of opinion that the undertaking ought to be discharged, and the injunction refused. It must not, however, be understood that I give any authority for the payment of the dividend. I discharge the undertaking, upon the ground that the defendants are entitled to the opinion of the Court, whether the injunction should be granted; and I refuse the injunction, upon the ground that the plaintiff has not made out a sufficient case for the interference of the Court. The costs of the motion must be costs in the cause.

LORDS JUSTICES. *Ex parte* THE EAST OF
 1851. ENGLAND BANKING COM-
 Dec. 8, 9, 11. PANY, *in re* THE NORWICH
 YARN COMPANY.

Company Winding-up Acts—Action.

A joint-stock company overdrew its account with its bankers, and was subsequently ordered to be wound up. The amount of debt was disputed, and the public officer of the bank (also a company) carried in a claim before the Master, who refused to admit it as a claim until the debt was proved at law. The Master of the Rolls on appeal admitted the claim, and directed an action to be brought; but, upon appeal to this Court, it was held, that although the order at the Rolls was correct in admitting the claim, it must be altered by giving the public officer of the bank liberty to bring such action against such person or persons as he should be advised.

This was an appeal from an order of the late Master of the Rolls. The short facts were as follows:—In 1833 the Norwich Yarn Company was established, and a deed of partnership was executed on the 2nd of August 1834. In 1836 the East of England Banking Company became its bankers, and the account was overdrawn, and when the Yarn Company ceased trading in October 1847, the amount was alleged to be 85,755*l.* 2*s.* 5*d.* In 1849 an order was

(1) 13 Beav. 32; s.c. 20 Law J. Rep. (N.S.) Chanc. 497.

made for the winding up the affairs of the Yarn Company, under which the public registered officer of the bank carried in a claim, on behalf of the bank, before the Master, for the above-mentioned sum and interest. The Master declined to admit the demand as a claim, and certified that he had so refused, he having at the hearing of the claim stated that it was his opinion that it ought to be established at law in the first instance. On an appeal to the late Master of the Rolls, Lord Langdale, he ordered the claim to be entered and admitted by the Master, and that the bank, by their public registered officer, should bring such action at law as they might be advised against the official manager of the Yarn Company to establish the demand. The Banking company appealed from this order (1).

(1) The following observations fell from the LORD JUSTICE KNIGHT BRUCE during the argument:—
 “Is there any other question substantially before us than this, whether there is a rational legal question to be tried? Is there or can there be anything else? If it is plain to demonstration that the debt is due, it ought to be admitted; but if it is the subject of reasonable question, how can we admit it? This is not analogous to a case of bankruptcy, where the proof must be admitted because all the assets are swept away from the creditor, and a creditor's only resort is under the bankruptcy. Here all the creditor's rights remain as they were, subject only to this condition, that the legislature has imposed upon him the necessity before he sues of going in before the Master for some cause that appeared to the legislature sufficient. Even then the Master may say, as I understand the act of parliament, you may go to law at once, without an allowance or disallowance, otherwise the Master may go on, and allow or disallow. That does not prevent him suing, because after it is disallowed he may sue. The question is this. These acts of parliament are intended for the benefit of the contributories, as I consider, and only secondarily for the benefit of the creditors, whose cases are scarcely interfered with. I repeat, that, as it seems to me, before the debt is admitted on the books of the Master or the Court as one to be paid, it ought to be clear to demonstration that there is not a legal question. * * Suppose a creditor, or alleged creditor, in order merely to obey the act, goes before the Master and carries in half a sheet of paper, and says, ‘I claim such a debt,’ and carries in no evidence to support it, and the Master disallows it, then, unless I misconstrue the act of parliament, the creditor is at liberty to proceed at law, and is not affected by anything that takes place in the Master's office.”—And upon the same subject LORD JUSTICE LORD CRANWORTH said, “What takes place in the Master's office clearly has nothing to do with the action that is pending. When that act of parliament first

Mr. Bethell, Mr. Roundell Palmer, Mr. Cole and Mr. Willes were for the appeal. The following cases were cited.—

Morgan's case, 1 De Gex & S. 750;
 18 Law J. Rep. (N.S.) Chanc. 265.

Ex parte Walters, 3 Ibid. 156; s. c.
 19 Law J. Rep. (N.S.) Chanc. 501.

Taylor v. Hughes, 2 Jo. & L. 24.

King v. Hoare, 13 Mee. & W. 494;
 s. c. 14 Law J. Rep. (N.S.) Exch. 29.

Chapman v. Milvain, 5 Exch. Rep.
 61; s. c. 19 Law J. Rep. (N.S.)
 Exch. 228.

Uppill's case, 20 Law J. Rep. (N.S.)
 Chanc. 480.

Beardshaw v. Lord Londesborough, 18
 Law Times, 76.

*Bank of Australasia v. the Bank of
 Australia*, 12 Jur. 189.

Mr. Roupell, Mr. Walpole, Mr. Crompton, and Mr. Busk, for the respondents, were not called on.

LORD JUSTICE KNIGHT BRUCE.—I am of opinion that the materials before the Court do not enable us to say at present, with any satisfaction to ourselves, or with any reasonable certainty of doing justice, whether this is not, or is, a debt proveable under the order for winding up this company; the consequence is therefore, that we are of opinion that the Master of the Rolls's order, so far as it directs the claim to be entered, and does not direct a proof, is perfectly correct. There remains only for consideration the manner in which the order appears to be expressed with reference to legal proceedings. It directs an action to be brought against the official

passed, a great number of applications were made to be at liberty to prove, but the Courts refused to interfere. They said, all you have to do is to go to the Master, and exhibit such proof as you can, or such proof as you please: when you have done that, you have done all that was in the intention of the legislature, in order that the Master should know what are the claims against the company. It is useful that the Master should know the extent of the claims, that he may be regulated in making a call; but it is not intended otherwise to interfere with the creditor. The great object of the act was internal arrangement. Creditors are not put in the same case as where the assets are taken away from the debtor; the assets remain in the hands of the debtor, and creditors may proceed against him to recover the claim.”

manager. Subject to hearing what the respondents may say, we are of opinion that that should not be so expressed; but whether there should be liberty to bring any action or actions whatsoever against any person or persons, or whether there should be an issue or issues, or what should be done consistently with what I have stated, is a question for consideration. We neither disturb what has been done at the Rolls as to the admission of the claim, nor as to the reservation of costs.

LORD JUSTICE LORD CRANWORTH. — I entirely concur in that view of the case. If I were to adopt the suggestion at the bar, and say that I must decide the case upon the materials before me, I should say that there is nothing made out to establish any claim whatever. I see enough to lead me to the conclusion, that very likely proof may eventually be able to be made. I think it is quite right to allow the party to make a claim; whether there is such a claim, and to what amount, must be decided by some proceeding at law.

Dec. 12th.—An order was this day made —“That the demand of the East of England Banking Company by their public registered officer, against the Norwich Yarn Company, for the sum of 35,755*l.* 2*s.* 5*d.*, with interest from the 19th day of May 1849, be entered and allowed by the Master as a claim only; that the East of England Banking Company, by their registered officer, or otherwise, be at liberty, on or before the last day of Hilary term next, to bring such action or actions at law against such person or persons as they may be advised;” and then followed special directions as to the time for commencing the action, &c.

KINDERSLEY, V.C. }
Jan. 19. } SEWELL v. MOXSY.

Claim—Voluntary Assignment of a Debt.

The assignee of a debt under a voluntary assignment, filed a claim against the representatives of the deceased debtor and the assignor for payment of the debt or adminis-

tration of the debtor's estate:—Held, that the plaintiff had no equity, and the claim was dismissed.

This was a claim, filed by the plaintiff Sarah Elizabeth Sewell, against the heir, executors, and devisees of Nathaniel Stallwood, and against Hannah Rebecca Sanders, claiming to be a creditor upon the estate of Nathaniel Stallwood, for a debt of 71*l.* 10*s.* assigned to her under a voluntary deed by H. R. Sanders, and praying that the real and personal estate of N. Stallwood might be administered in this court. The facts, as stated on the claim, were, that a person named Sanders, now deceased, advanced certain monies to N. Stallwood, and paid other monies on his account to the amount of 71*l.* 10*s.*; that N. Stallwood thereby became a debtor to Sanders to that amount; that Stallwood died in February 1851; that Sanders died in March 1851, having appointed, by his will, Mrs. Sanders his executrix, and bequeathed to her all the residue of his estate; that thereby Stallwood became a debtor of 71*l.* 10*s.* to the defendant Mrs. Sanders; that she being the legal personal representative and residuary legatee entitled to this debt, executed a voluntary assignment by deed-poll, dated in November 1851, by which, in consideration of 5*s.*, she purported to assign the debt due to her from Stallwood or his estate to the plaintiff for her own benefit. She also appointed the plaintiff her attorney with power to sue for the debt.

Mr. Pole appeared in support of the claim, and said it was quite clear that this debt was due to Mrs. Sanders upon her becoming the representative of her husband. Mrs. Sanders assigned the debt to the plaintiff, and, therefore, she could not sue, and there was no one but the plaintiff who could sue.

Mr. Stuart and Mr. Giffard, for the representatives of Mr. Stallwood, contended that the plaintiff had no power under a voluntary assignment to sue in respect of this debt. The power of attorney did not entitle her to sue in her own name. They cited—

Ward v. Audland, 8 Beav. 201; s. c. 14 Law J. Rep. (N.S.) Chanc. 145.

Fortescue v. Barnett, 3 Myl. & K. 36 ;
s. c. 3 Law J. Rep. (N.S.) Chanc.
106.

M'Fadden v. Jenkyns, 1 Hare, 458 ;
s. c. 12 Law J. Rep. (N.S.) Chanc.
146.

Edwards v. Jones, 1 Myl. & C. 226 ;
s. c. 5 Law J. Rep. (N.S.) Chanc.
194.

Mr. Buxton, for Mrs. Sanders, submitted to act as the Court should direct.

KINDERSLEY, V.C.—after stating the facts as already set forth, said,—There is nothing in this case to shew the right of the defendant to dispute this debt as one due from Stallwood to Sanders, the testator of Mrs. Sanders. There is nothing to meet the question that such a debt was due, or to lead me to doubt that if Sanders were now living and filed such a claim as this, he would be entitled to the usual administration decree; nor anything to question this, that if Mrs. Sanders, after the death of Stallwood, had filed such a claim she might not have sustained it. Whether, if the whole 71*l.* 10*s.* would appear to be all due, or only a part, there is no doubt a debt was due to Sanders, and that it was, consequently, due after the death of Sanders to Mrs. Sanders. The question is, whether it is now due to Mrs. Sewell, the plaintiff. In order to entitle a plaintiff to sue, he must be a creditor of the testator whose estate is sought to be administered; but the point is, whether Mrs. Sanders has not ceased to be a creditor under the deed of assignment, which was voluntary, and only for a nominal consideration. It is clear that the plaintiff never could have a decree to enforce that voluntary assignment against her, for a voluntary assignment of a chose in action does not operate to convey any legal right, but it operates as a contract in the eye of a court of equity to give to the assignee the benefit of the chose in action, when brought into possession: if it is for a consideration it may be enforced; but if voluntary, the assignee has no equity to enforce it as against the assignor. Here, the assignor is made defendant; the claim does not ask a decree against Mrs. Sanders. She appears by counsel, and says, “I take no part, I leave it to the

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Court to make its decision.” How then can I decide what I must do, not only against the other defendants, but against Mrs. Sanders, that the plaintiff shall have the benefit against the estate of Stallwood, and against Mrs. Sanders of this voluntary assignment? Does the assignment constitute the plaintiff a creditor of Stallwood's estate? No; certainly not, unless the effect is to put Mrs. Sewell in the place of Mr. Sanders. I cannot make such a decree as against Mrs. Sanders on this claim, which is to enforce not a voluntary agreement against Mrs. Sanders, but against the estate of Mr. Stallwood, on the assumption that the plaintiff stands in the place of Mr. Sanders. Without saying whether if Mrs. Sanders and Mrs. Sewell were joined together as plaintiffs there might be a decree which it is unnecessary to decide, it appears to me there is not such a case upon this claim as to entitle the plaintiff to sue for administration of Stallwood's estate. I do not see any reason to dispute the debt being due to Sanders or Mrs. Sanders, and I do not see any reason, from what is stated as to some rent due to the plaintiff, to say that if the plaintiff could stand in the shoes of Mrs. Sanders for the 71*l.* 10*s.*, there would be any reason why the plaintiff should not have the benefit of administration. On these grounds, I must dismiss the claim, with costs.

LOrds JUSTICES.

1852.

May 28.

In re HEWSON.

Lunacy—Allowances out of Estate, in Confirmation of an Agreement before the Lunacy—Allowance to a Relation.

*Where a lady who had separate property married, and an agreement was made that out of her income certain domestic expenses should be defrayed, and the agreement was acted upon until her lunacy, and the husband continued the same expenses out of her property till his death; and where the lady was under a moral obligation to give her nephew 500*l.*, part of which she gave, and a further part her husband, after her lunacy, paid out of her property; the Court allowed the executors of the husband to de-*

duct all the money paid for keeping up the establishment, after the lunacy, till his death, and also the money paid by him to the nephew, before paying over the separate income of the wife to her committees.

This was a petition by executors, praying the allowance of certain payments out of the lunatic's estate, and the sanction of the Court to payments in respect of an arrangement which had been acted upon during the lunatic's lifetime. The facts were as follows:—The lunatic, Mrs. Anne Hewson, the widow of Mr. Thomas Ansaldo Hewson, a medical practitioner, was entitled to a large income, settled upon her for her separate use; and from the affidavits it appeared that on her marriage with Mr. Hewson, in 1823, an arrangement was made by which the lady's income was to bear the charges of the household expenses, and other charges of the domestic establishment, and that Mr. Hewson should provide for the expense of horses and carriages. This arrangement was acted upon down to the year 1845, when Mrs. Hewson was found lunatic, and from that time until his death, Mr. Hewson continued the same establishment, and received the whole income of his wife's estate. Mr. Hewson appointed executors of his will, who were called upon by the committees of Mrs. Hewson's estate to repay all the income of her property from the time of the lunacy up to his death, but the executors resisted the demand on the ground of the agreement, so far as that they claimed a set-off of so much as had been expended in the keeping up the establishment. This constituted the first part of the case.

The second part, also supported by affidavits, was this:—A nephew or grand-nephew of Mrs. Hewson had been placed by her at school, the expenses of which she defrayed; and when he left school she paid his fee for apprenticeship, and discharged all the costs of his maintenance, and at times intimated to him her intention to advance him in the world, and in particular promised him, before her lunacy, that she would give him 500*l.*, to set up in business for himself, in reliance on which he quitted a wholesale house of business where he was engaged,

and she, on her part, so far redeemed her promise that she gave him 50*l.* After her lunacy, Mr. Hewson gave the nephew a cheque on the bankers, who kept an account of Mrs. Hewson's money, independently of that belonging to Mr. Hewson, for 250*l.*, and the same was duly honoured. The executors of Mr. Hewson now desired to be allowed as a set-off to the demand of the committees of his wife's estate this sum of 250*l.*, which had been paid solely because Mrs. Hewson had promised the nephew the money.

Mr. Malins and *Mr. F. Wood* supported the petition.

Mr. Bacon and *Mr. Shapter* stated that the facts were wholly undisputed; and they left it to the discretion of the Court to say whether any, or, if any, what allowance should be made and deducted from the money coming from the executors of Mr. Hewson, in respect of the agreement to keep the establishment proved to have existed from the time of the lunacy to the husband's death, and also whether the 250*l.* ought to be also allowed, a question which would depend upon whether there was any moral obligation on Mrs. Hewson herself to have advanced the money, and if there were, then, whether Mr. Hewson could fairly be considered to have given the cheque in redemption of that moral obligation, it being admitted that the cheque being drawn on that particular account kept at the bankers, was favourable to such a view.

Mr. Stuart, *Mr. Young*, and *Mr. Barton* appeared for other parties.

LORD JUSTICE KNIGHT BRUCE.—Speaking for myself, as there is no evidence to rebut that in support of the petition, I think that the arrangement between the husband and wife regarding the establishment must be taken to be proved; and the question is, what amount should be allowed.

LORD JUSTICE LORD CRANWORTH.—I am quite of the same opinion; and as it appears that the expenses were 550*l.*, or thereabouts, I think that sum should be allowed as a set-off, counting from the date of the lunacy to Mr. Hewson's death; and, therefore, that the gross amount of such

allowance from that period will be deducted by the executors from the money they have to account for as the separate income of the lunatic.

LORD JUSTICE KNIGHT BRUCE.—We are both of opinion that there was on Mrs. Hewson a moral obligation, under the circumstances disclosed in the evidence, which is not disputed, to fulfil her promise to this gentleman, her nephew. No doubt can be fairly entertained that if she had remained of sound mind she would herself have fulfilled her kind intention on his behalf. Both Lord Cranworth and myself consider it to be a fair discretion to exercise to allow this sum of 250*l.* to the executors of Mr. Hewson in the account. After, therefore, deducting the annual sum of 550*l.* and the sum of 250*l.*, the executors must pay over the balance of the lady's income from the time of the lunacy to the date of Mr. Hewson's death, to the credit of the lunacy.

LORD JUSTICE LORD CRANWORTH.—Expense may be saved if this order is delayed until it can be incorporated with an order which may be made in the suit commenced or contemplated for the administration of the husband's estate. The order will be as we have stated, but it need not be drawn up at present.

PARKER, V.C. }
Feb. 11. } PEPPERCORN v. WAYMAN.

Sale by acting Executors—Statute 21 Hen. 8. c. 4.—Powers—Disclaimer.

A testator devised his freehold estates to A, B, C. and D, and their heirs, on the usual trusts for sale. He then ordered and directed that A, B, C. and D, the executors of that his will, or the survivors or survivor of them, or the executors or administrators of such survivor, should sell his copyhold estates. He then gave all his personal estate to the same persons, and declared the trusts of all the monies to arise from his real and personal estate. A. died in the lifetime of the testator. The testator died in 1830. B. and C. sold the copyhold estates in 1832. In 1851 D. executed the usual deed of disclaimer. There was no evidence that D.

had refused to accept the executorship before the sale in 1832 :—Held, first, that copyholds were within the 21 Hen. 8. c. 4 ; and, secondly, that, under that act, the sale of the copyholds had been properly made by B. and C.

William Betts, by his will, dated the 4th of January 1822, devised all his freehold estates to H. C. Hoare, L. Waller, H. Waller, and M. Wells, and their heirs, upon the usual trusts for sale, and directed them to stand possessed of the purchase-monies upon the trusts thereafter declared. The will then proceeded as follows :—

“And I do hereby order and direct, that the said H. C. Hoare, L. Waller, H. Waller, and M. Wells, the executors of this my will, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, as soon as conveniently may be after my decease, and they shall think fit, in such manner, &c., make sale of all and every my copyhold messuages, cottages, or tenements, farms, lands, and other hereditaments whatsoever, situate and being within and held of the manors of,” &c.—The testator then directed that they should stand possessed of the purchase-monies on the trusts thereafter declared. The testator then directed that the receipts of H. C. Hoare, L. Waller, H. Waller, and M. Wells, or the survivors or survivor of them, or the executors or administrators of such survivor, should be good discharges to the purchasers of his freehold and copyhold estates. The testator then bequeathed all his personal estate to H. C. Hoare, L. Waller, H. Waller, and M. Wells, by name, on the usual trusts for conversion and sale. He then declared the trusts of the monies arising from his real and personal estate. The testator appointed his four trustees to be his executors.

L. Waller, one of the trustees, died in the lifetime of the testator.

The testator died in 1830. The will was proved by H. Waller and M. Wells alone.

In 1832, H. Waller and M. Wells sold the copyhold hereditaments devised by the will to Mr. Peppercorn, the plaintiff.

The plaintiff afterwards entered into a contract with the defendant, Mr. Wayman,

for the sale of the above-mentioned copyhold estates.

In April 1851, H. C. Hoare executed a deed of disclaimer, by which, after reciting that he had declined to act, and never had acted, and was desirous to renounce the trusts and executorship of the will, he disclaimed in the usual form.

The question in this suit was, whether the copyhold estates had properly been sold to the plaintiff by H. Waller and M. Wells.

By the statute 21 Hen. 8. c. 4, it is enacted, that, where lands are willed to be sold by executors, and part of them refuse to be executors and to accept the administration of the will, all sales by the executors that accept such administration shall be as valid as if all the executors had joined.

Mr. Bacon and *Mr. Smythe*, for the plaintiff, contended that the title was good, and cited *Adams v. Taunton* (1).

Mr. Malins and *Mr. Hardy*, for the defendant, contended that, as the power was given to the three surviving executors, it could not be exercised by two only. It was doubtful whether copyholds were within the act of 21 Hen. 8. c. 4. If they were, the defect was not cured by it, as there was no proof that Mr. Hoare had refused to act.

PARKER, V.C.—I think that there is a good title. There is a devise by the testator, William Betts, to four persons, of freehold estate upon trust to sell, and then, in the ordinary course with respect to copyholds, a power is given to the same four persons (who are named as executors), and the survivors and survivor of them, and the executors and administrators of such survivor, to sell the copyholds. Then there is a bequest of personal estate upon trust to sell in exactly the same way; and then a direction that these persons shall apply the whole money, the proceeds of such sales, in a particular manner. One of the four died in the testator's lifetime. The three then became trustees precisely as if three only had been named in the

will. As to one of these three there is nothing to shew whether he acted or not. Nineteen or twenty years after the testator's death he executed a deed of disclaimer, reciting that, from the time of the testator's death, he had declined to act and had never acted, and disclaiming all the trusts. The question whether the two trustees could act alone is not the same as to the freeholds and copyholds. Acceptance would have been necessary to have made him trustee of the freeholds, and the deed of disclaimer operates so as to put him in the position of never having been a trustee of them. The legal estate in these freeholds is in the two other trustees only, and they can execute the trusts of the will as to them. The question as to the copyholds is not the same. At common law, the power to sell them is an authority given to the three trustees and executors, which cannot regularly be executed by fewer than the whole number. The statute 21 Hen. 8. c. 4. commences as follows:—"Forasmuch as a bargain and sale of such lands, tenements, or other hereditaments so willed by any person to be sold by his executors after his decease, after the opinion of divers persons, can in nowise be good or effectual in the law, unless the same bargain and sale be made by the whole number of the executors named," &c. Then there comes the provision referred to. It has been considered that this statute is declaratory. It was suggested in the argument that it does not apply to copyholds. I am not aware that there has ever been a doubt on the point. The question as to the copyholds differs from the question as to the freeholds, because there must be an actual refusal of one executor to act in order to enable the others to sell the copyholds without him. Now what have we here? We have a disclaimer which, if it is effectual at all, must be a refusal as to both the freeholds and copyholds, and, *prima facie*, that must be a refusal to act from the beginning. Is there anything to raise a doubt that this disclaiming executor did refuse from the beginning? If he did not, there would be a great irregularity in the sale by the two other executors without his concurrence. A disclaimer is *prima facie* evidence of a refusal from the

(1) 5 Madd. 436.

beginning, and I have heard nothing to raise a doubt of the irregularity of this transaction. I have, therefore, no doubt that this title is good. I must give the title the benefit of the costs.

LORDS JUSTICES.

1852.

Feb. 24.

BRIGGS v. THE EARL OF OXFORD.

Tenant for Life without Impeachment of Waste—Power to cut Timber—Perpetuity—Remoteness.

Family estates, which were subject to mortgages, were conveyed to trustees, to raise money for the payment of incumbrances, and subject thereto, for A. B. for life, and then for C. D., his eldest son, for life, without impeachment of waste, but subject to a power to the trustees after contained, with an ultimate remainder to A. B. in fee simple. The power to the trustees was during the life of A. B., and after his death, with the consent of C. D., if he should be the survivor, to fell timber, and apply the proceeds towards paying off incumbrances so long as they should exist:—Held, that the power was paramount any authority in the tenant for life without impeachment of waste, and that it was not an infringement on the law of perpetuity.

This case was an appeal from a decision of Vice Chancellor Parker. The questions before the Court arose out of a conveyance of certain estates to trustees, and a declaration of trust of the same. The estates having been conveyed by agreement between the late Earl of Oxford, who was then tenant for life without impeachment of waste, and Lord Harley, his eldest son, who was remainder-man in tail, by an indenture, dated the 20th of March 1832, between Edward, then Earl of Oxford, since deceased, of the first part; Alfred, then Lord Harley, but now Earl of Oxford, of the second part; John Moore, of the third part; and Thomas Briggs, of the fourth part,—it was agreed that certain parts of the premises should be sold or mortgaged, and that a sum not exceeding 50,000*l.* should be raised towards liqui-

dating the debts of the then Earl; and, subject thereto, that an annuity of 600*l.* a year should be raised and payable to Alfred, then Lord Harley; and after his decease, that the same annuity should be payable to Lady Harley; and, subject to the above trusts, the estates were to be held by the trustees during the life of the then Earl upon trust, to pay the rents to him for his life for his own use; and it was declared that in case the said Alfred Lord Harley should survive the said Earl, then that the trustees and trustee should, subject to the above trusts, stand seised or possessed of the said estates, to the use of, or upon trust for, the said Lord Harley and his assigns for his life, without impeachment of waste, but subject to the power thereafter limited to the said trustees or trustee, to fell timber and underwood growing on the said estates: and from and after the death of the said Alfred, then Lord Harley, in case he should survive the then Earl, then upon trust to raise and pay an annuity of 600*l.* to Lady Harley, for her life; and after the decease of the survivor of the said then Earl and Lord Harley, subject as aforesaid, upon trust for the first and other sons of Lord Harley successively in tail male, with an ultimate remainder in default of such issue to the said then Earl of Oxford, his heirs and assigns for ever, and then the following proviso was introduced:—"Provided also, and it is hereby further agreed and declared, that it shall and may be lawful for the said trustees, or the survivor of them, his executors or administrators, at any time or times hereafter, so long as there shall be any mortgage or mortgages, incumbrance or incumbrances, subsisting upon the said hereditaments, or any part or parts thereof (but not, after the said Earl's decease, without the consent of the said Alfred Lord Harley, if living, such consent to be signified in writing), to fell and cut, or cause to be felled and cut, all or any of the timber and other trees and underwood standing, growing, or being upon the said hereditaments, and to sell and dispose thereof, and to pay and apply the money to arise therefrom in or towards the liquidation or discharge of the subsisting mortgages or incumbrances, or of some

or one of them." And it was declared that, in order to provide for the due payment of the interest of the several incumbrances which should for the time being be subsisting upon the said estates, and of paying and applying the rents and profits thereof according to the several interests of the parties interested therein for the time being, the then Earl of Oxford, Alfred, then Lord Harley, and John Moore, appointed the plaintiff, Thomas Briggs, generally to superintend the management of the said estates, and to receive the rents and profits in respect of the estates, and all monies arising from the sale of timber and underwood on the said estates, and to give receipts for the same, and to apply the monies so received according to the trusts of the deed, retaining an allowance of 1s. in the pound for his trouble in the management of the estates.

Since the deed, the Earl had died, and Lord Harley (now Earl of Oxford) claimed the right to cut timber, but the Vice Chancellor decided that upon the true construction of the deed, the power of the present Lord Oxford, as tenant for life without impeachment of waste, had no avail while incumbrances existed, but that his power was controuled by that given to the trustees with his consent. From this decision the Earl of Oxford appealed, and the case being before the Court, their Lordships considered that another question ought to be discussed, namely, whether or not the power in the trustees was not void as tending to a perpetuity?

The Solicitor General (Sir W. P. Wood), Mr. Bethell and Mr. Toller supported the decree below.

Mr. Malins, Mr. Roundell Palmer and Mr. Cole, for the Earl of Oxford.—That the ordinary power given to a tenant for life to cut timber, was not intended to be restricted is plain from the fact that his consent is necessary to the exercise of the power by the trustees; and if this were not so, if the trustees from caprice or any other cause should think fit not to cut timber for the purposes of the trusts of the deed, no timber whatever could be cut at all. On the question of perpetuities, the case of

Ferrand v. Wilson (1), before Sir James Wigram, is a sufficient authority to shew that the power attempted to be given to the trustees is void for remoteness, as plainly infringing the law against perpetuities. In the first place, the property which is settled must be considered as a timber estate, and that the wood and timber are a portion of the profits as much as the rents would be. Then if that be so, and it is plain from the trusts that the settlors so thought it, an attempt is made to deal with the profits in such a way as that the trusts for accumulation are to last so long as there may be incumbrances on the estate, that is, during an indefinite time, which may continue beyond a life or lives in being and twenty-one years afterwards. Practically, this trust is the same as if it had been to receive the rents and profits (the timber or its produce being profits), and accumulate them until there was enough for paying the incumbrances, which would clearly have been bad. In *Ferrand v. Wilson* the devise was made to trustees for twenty-one years, then various tenancies for life were created, and remainders over given, and the trusts declared of the term were to fell timber until the debts were paid, and a power was given to the trustees after the determination of the term until a person entitled in tail or to some greater estate should attain twenty-one, to fell timber, and apply the proceeds in the same way as during the term of twenty-one years, and there the trusts as to the timber were held void for remoteness.

The following cases were also cited:—

Bagshaw v. Spencer, 2 Atk. 570; s. c. 1 Ves. sen. 142.

Lord Southampton v. the Marquis of Hertford, 2 Ves. & B. 54.

Ware v. Polhill, 11 Ves. 257.

Davies v. Wescomb, 2 Sim. 425.

Waldo v. Waldo, 7 Ibid. 261; s. c. 12 Ibid. 107; 10 Law J. Rep. (n.s.) Chanc. 312.

Ibbetson v. Ibbetson, 10 Sim. 495; s. c. 5 Myl. & Cr. 26; 10 Law J. Rep. Chanc. 49.

(1) 4 Hare, 344; s. c. 15 Law J. Rep. (n.s.) Chanc. 41.

Phillips v. Barlow, 14 Sim. 268; s. c. 14 Law J. Rep. (N.S.) Chanc. 35.

Broune v. Stoughton, 14 Sim. 369; s. c. 15 Law J. Rep. (N.S.) Chanc. 391.

Kekewich v. Marker, 3 Mac. & G. 311; s. c. *ante*, p. 182.

Lewis on Perpetuities, 541.

LORD JUSTICE KNIGHT BRUCE.—On the question of construction we have not the least doubt. We are both clearly of opinion that the exemption of the life estate of the present Lord Oxford, from being impeachable of waste, is subject to a power exercisable only by the trustees, though not without his consent. The question being, in substance, whether, according to the true intention of the settlement, the timber growing on the estate is during his Lordship's life to be applicable to his own purposes, or to relieve the inheritance from certain charges, we think that the latter is plainly the true construction. It is not necessary to rely upon the obvious argument, that the contention of Lord Oxford goes to strike the parenthesis (if it is a parenthesis) out of the settlement, or to give it no operation. Independently of that observation, not necessarily conclusive, the intent is plain that the trustees were to have the power of cutting timber for the purpose of relieving the inheritance, not to be exercised without his consent. It has been suggested that Lord Oxford might wish to have timber cut, and that the trustees might maliciously or capriciously refuse to concur. When that case shall arise it will be time enough to consider it. The case probably would be one as to which I (speaking for myself alone) should feel no difficulty. The question as to this part of the argument now stands simply thus: is that life estate which is stated in express terms to be subject to a certain power, to be not subject to the power? We think this point not arguable. But one of us has a doubt upon the question of remoteness, and, therefore, that point must be further discussed.

LORD JUSTICE LORD CRANWORTH.—My doubt is how this case is to be distinguished from that before Sir James Wigram.

Mr. Bethell.—In that case the money arising from the sale of timber is to be

applied, not in relieving the estate from which the timber was cut, as is the case here, but in paying the debts and legacies of the testator, a most material, and indeed vital, distinction; and, moreover, on the point of remoteness, that is met by the very essential fact, that the power may be destroyed by a disentailing deed, and so must be considered as within the rule relating to perpetuities. In the case of *Ferrand v. Wilson*, Sir James Wigram actually founded his decision on those of *Ware v. Polhill* and *Ibbetson v. Ibbetson*; for he said that those two cases, or rather the former, and the principle of the latter, required the decision he made. So far, and so far only, as *Ferrand v. Wilson* lies within the limits of *Ware v. Polhill* and *Ibbetson v. Ibbetson*, it is an authority for that now before the Court; and even if those two cases should be considered as supporting this, which is, at least, doubtful, they do not warrant the doctrine being carried one step further. But, in fact, upon examination, it will be seen that in *Ware v. Polhill* the estates were leasehold, and the power was held void, the estate vesting absolutely in the tenant for life, while *Ibbetson v. Ibbetson* was the case of a suspense of vesting of chattels, which the Vice Chancellor said "might have continued for ages," as there might not be a tenant in tail attaining twenty-one, who might become possessed of a particular house. The two cases, namely, *Ferrand v. Wilson* and the present, are sufficiently distinguished.

LORD JUSTICE LORD CRANWORTH.—The doubt that I had has been removed. It was a doubt created in the course of the argument, by the reasoning of Sir James Wigram in *Ferrand v. Wilson*. Some of the expressions in the judgment in that case certainly have an aspect favourable to the view taken by the defendant; but I think there is a manifest distinction between the cases. If the law be not that a power is always good so far as perpetuity is concerned, if it is capable of being barred by a common recovery, or by that which is now equivalent to a common recovery, perhaps it is a matter of regret that that is not the state of the law; if there are any exceptions to that rule, I think they have created more embarrass-

ment than is compensated for by any benefit which they have produced. It is not necessary to give any opinion as to whether *Ware v. Polhill* is right, or whether *Ferrand v. Wilson* can or not properly come within the same category. For supposing *Ware v. Polhill* to have been rightly decided, and *Ferrand v. Wilson* to have correctly followed, still I think that those authorities are not applicable to this case. This is a case in which not only is the power capable of being barred by the act of the first tenant in tail, when he is in a condition which, in point of law, enables him to act at all, by being of the age of twenty-one, but in which the power is one to be exercised solely by virtue of the contract between the parties to the settlement: a contract to this effect, that that which was a debt upon the estate should be liquidated in a particular mode. It appears to me that, to whatever extent of time the operation of that contract extends, it is not a contract within the doctrine of perpetuity. The person who enjoys the estate has only to pay off the incumbrance, and there is an end of it. The present case, therefore, is materially distinguishable from those cited.

LORD JUSTICE KNIGHT BRUCE. — The equity of redemption of a wooded estate is settled, and those concerned in the matter agree that no person having a limited interest shall apply any of the wood to his own use until the *corpus* of the estate shall have been relieved from certain incumbrance. It seems certainly a very reasonable agreement. It has been said, however, that it is void, as trespassing upon the law of perpetuity. But the circumstance of the power being liable to destruction by the tenant in tail is of itself sufficient to preclude all objection, at least to a power of this description, on that ground. I think the plaintiff right.

L.C. } *In re* THE ST. GEORGE STEAM-
May 31, } PACKET COMPANY, *ex parte*
June 1. } HAMER'S DEVISEES.

Company—Winding-up Acts—Contributory Devisee—3 & 4 Will. 4. c. 104.

A. was the holder of shares in a joint-

stock company, the members of which had by covenant, not binding their heirs, engaged that the partnership should continue for ninety-nine years; that there should be no right of survivorship, and that the shares should be deemed personal estate. A. died in 1838, having, by his will, devised his real estate to B, and appointed C. his executrix. At the time of his death the company were solvent, and all the then existing liabilities were afterwards discharged. C, after A.'s death, was treated as the proprietor of the shares; and for five years received dividends upon them as executrix. The company became insolvent; and, it appearing that the testator's personal estate was exhausted, B.'s name was put on the list of contributories, in his character of devisee of the real estate:—Held, reversing the decision of the Court below, that B. was rightly placed on the list of contributories.

The statute 3 & 4 Will. 4. c. 104. charges debts of every description on the real estate of the testator; and a future debt, arising out of a previous obligation of the testator, is within the act.

This was an appeal by the official manager, from an order of Knight Bruce, V.C., directing the removal of the names of Mr. and Mrs. Rawdon and Mr. J. Hamer from the list of contributories, on which they had been placed in their character of devisees of certain real estate under the will of J. Hamer deceased. The report of the hearing, before the Vice Chancellor, will be found in 20 *Law J. Rep.* (N.S.) Chanc. 207; and it will only be necessary to state, in addition to the facts there set out, that by the deed of settlement of the company, the parties thereto of the first part for themselves and himself, severally and respectively, but not all or any of them jointly, and the several other persons of the other part, whose names and seals were thereunto subscribed and set, for themselves and himself, severally and respectively, but not all or any of them jointly, mutually and reciprocally covenanted, declared and agreed with and to each other (amongst other things) that the company should continue for ninety-nine years, and that there should be no benefit of survivorship, as between the shareholders.

Mr. Bacon, Mr. Rolt, and Mr. J. V. Prior, in support of the appeal.—The liabilities of the company, though incurred after the death of the testator, are, by the covenant in the deed, a debt of the testator—*Morse v. Tucker* (1), *Birmingham v. Burke* (2), and though the covenant in this case does not bind the heirs, yet by the 3 & 4 Will. 4. c. 104. debts of every description are charged upon the real estate of the testator.

Mr. Bethell, Mr. Malins, and Mr. H. Humphreys, contra.—The devisees have been in the possession of the real estate for twelve years; and during all that time the company have accepted and treated the executrix as owner of the shares. At the time of the death of the testator there were no debts which could affect the real estate. To call a liability under a covenant a debt, would be to confound a contract with its consequences. A debt, within the meaning of the statute, must be such as could be sued for—*Wilson v. Knubley* (3), *Farley v. Briant* (4). In *Morse v. Tucker*, Wigram, V.C. drew the distinction between the statutory liability and the liability under a charge in a will. This liability would not have been proveable as a debt in bankruptcy—*The South Staffordshire Railway Company v. Burnside* (5). If this case is within the 3 & 4 Will. 4, then the estate is equitable assets, and must be administered in the usual way.

Mr. Bacon, in reply, cited *Ex parte Doyle*, in *re the St. George Steam-Packet Company* (6), to shew that the receipt of dividends by the executrix did not constitute her a proprietor of the shares.

June 1.—The LORD CHANCELLOR.—This is a case in which, after several years have elapsed, an attempt is made to charge the real estate of a shareholder, in the hands of devisees, with the liabilities of the company incurred long after the death of the shareholder. The shareholder

entered into a deed of covenant for carrying on this company, with others, for ninety-nine years. At the time of his death it was admitted that there were no debts owing, but that debts afterwards accrued. Therefore, at the time the devise (which was not charged with debts) took effect, no debt had in fact accrued. The question is, whether the real estate is now liable, twelve years after the death of the testator. If it is so, it is a very inconvenient disposition of property by the legislature to render real estate liable, after so considerable a distance of time, in respect of transactions over which the devisee had no controul; for, by the deed, the shares belong to the personal representative of the testator. It has been ably argued that, under the deed, the proprietorship of the shares vests in the executrix, who has continued to receive the dividends in that character; but the contrary has been decided (*Ex parte Doyle*, *suprà*), and I have no intention of interfering with that decision, though I think it a question of considerable nicety. By the deed the parties covenant (and being under seal it is a specialty) that they will carry on trade without benefit of survivorship for ninety-nine years. This covenant, being a specialty, does not bind the heirs, because they are not named; but it does bind the personal estate beyond all question. The devisees who took the real estate, not charged with debts by the will, and who had no controul over the personal estate, might probably have compelled the executrix to have come to some account, which would have put an end to the liability of the real estate. I give no opinion as to how that was to be effected. The devisees, however, took no step, and remained in perfect security as to their real estate; and a hard case it is, if that liability should be established.

Now the deed not creating a specialty debt binding the heir, it is clear that, unless the act of parliament provides for this case, there is no relief to be had against the proprietors of the real estate. The statute 3 Will. & M. c. 14. does not bear upon this case, because the word "debts," in that act, was used in a limited sense; and in *Wilson v. Knubley* it was held that, where an action of debt would not lie, the act did not operate to bind the devisee; and in

(1) 5 Hare, 79; a.c. 15 Law J. Rep. (N.S.) Chanc. 162.

(2) 2 J. & Lat. 699.

(3) 7 East, 128.

(4) 3 Ad. & E. 839; a.c. 5 Law J. Rep. (N.S.) K.B. 132.

(5) 5 Exch. Rep. 129; a.c. 20 Law J. Rep. (N.S.) Exch. 120.

(6) 2 Hall & Tw. 221.

Farley v. Briant that doctrine was carried a little further; but both decisions depended upon that particular act of parliament which contained those words of restriction. The statute 1 Will. 4. c. 47. does not extend to this case, but is confined in its operation to cases where the heirs are bound.

Then the question is, whether this case falls within the 3 & 4 Will. 4. c. 104. That act is rather ambiguously framed; but it recites, that it is expedient that the payment of debts should be secured more effectually; and then it enacts that, "when any person shall die seised of or entitled to any estate or interest which he shall not by his last will have charged with or devised, subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound." Now, stopping there, a difficulty occurs; because, though it first enacts, that where a man shall not by his last will have charged his estates with, or devised them subject to, the payment of debts, the same shall be equitable assets for the payment both of simple contract and specialty debts; yet it afterwards refers to the remedy as it would be against the heir or heirs, or devisee or devisees, as if they had been bound. But I think the true construction of the act is to charge debts of every description upon the real estate of the testator; and the difficulty raised in the argument that this was a debt by specialty, in which the heirs were not bound, is answered by the proviso of the act,— "Provided always, that in the administration of assets by courts of equity, under and by virtue of this act, all creditors by specialty in which the heirs are

bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands." The act, therefore, provides for the payment of debts by specialty, where the heir is not bound; and this is a case of a specialty debt where the heirs are not bound; and, therefore, I think, upon the true construction, it is included in the act.

There is another way of construing the act, which is to me very satisfactory. The act does not extend to any case where there has been a devise subject to the payment of debts. Now, what was the intention of the act, or what want did it mean to supply? It meant to supply the want of charge of debts, generally, and not in the restricted sense of the term as used in the act of 3 Will. & M. c. 14, or the later acts. When, therefore, it is settled that where there is a general charge of debts by will, that includes not only present debts, but future debts also; and if this act meant, as I think it did, to make a charge here which the testator had neglected to do by his will, then this case falls within the authorities as a future debt arising out of a previous obligation, and is within the provisions of the act. Then *prima facie* the real estate is liable; and the only point arises upon the subsequent transactions.

Now the deed has provided that the party shall become a proprietor, though, until he has done some act, he shall not have any benefit, such as receiving dividends. Here the party has been permitted to receive dividends; but it has been decided that an executor, by receiving dividends, does not become a proprietor in his own right, but continues entitled as personal representative. In the present case, the executrix never received any payment from the company, except in her character of personal representative; therefore, there is no personal liability. How then can I restrain the company from enforcing the liability of the real estate against the devisees? They have not done any act to prevent their coming against any property which was liable, as between themselves, to the engagements of the company. The obligations of the deed, with the assistance of the act, bind the testator's real and

personal estate. This liability would have ceased, if the executrix had sold the shares, and a new member had been introduced. No such transfer, however, was made; and, consequently, the shares remained the property of the testator, and his real and personal property, by force of the deed, aided by the act of parliament, remained liable to these obligations. If, as has been argued, the acts that have taken place would have had the effect of substituting the executrix as proprietor, that would have carried the point to the proper extent; for then the executrix would have become proprietor in her own right, and the estate would have been discharged. But those acts, not having had that operation, the shares still remain the property of the testator, and his real and personal estate is liable. I see nothing in the acquiescence, as it is called, of the company in not having made any motion against the real estate that can affect their title. The cases in bankruptcy have no bearing upon the present case.

Then it is said, you cannot attach the real estate, because you cannot attach the devisee personally. That is not the contention; for the devisee is not sought to be charged personally, but in his character of devisee. But then it is said that these proceedings, being in the place of a suit for administration, you cannot come against the party, except in the course of administration; and, consequently, you must shew that the personal estate is exhausted. That is a question which I have not now to decide. These parties are put upon the list as contributories in respect of the real estate of the testator; as between themselves and the co-partners they will have a right to say, that the personal estate shall be first applied, but they will have no right to say, if the personal estate is exhausted, the real estate in their hands is not liable. Consequently they must remain on the list in respect of the real estate. Those are points which may have to be decided hereafter.

I regret to differ from the learned Judge below, and I cannot differ from him without hesitation. I am of opinion, however, that the liability does remain, and that these parties must be kept on the list as contributories.

PARKER, V.C.
Mar. 25, 26, 29.

In re THE LONDON AND
BIRMINGHAM EXTENSION,
AND THE NORTH-AMPTON,
DAVENTRY, LEAMINGTON,
AND WARWICK RAILWAY COMPANY,
ex parte CARPENTER'S EXECUTORS.

Company—Winding-up Act—Breach of Trust—Misapplication of the Funds of a Company by the Committee of Management.

A railway company was formed, and a large number of shares in it was allotted, and a considerable sum paid in respect of deposits on the shares. A managing committee of the company was appointed, and five of its members were appointed a finance committee, with power to draw cheques. By the direction of the managing committee, large sums, part of the company's funds, were employed in purchasing shares in the market. The Master to whom the winding up of the company was referred, charged the members of the finance committee with these sums, on the ground that the managing committee was implicated in the breach of trust. The Master's order was overruled.

The above-mentioned company was formed in 1845, and provisionally registered. A large number of shares in the concern was allotted, and a considerable sum was paid on account of deposits on the shares.

A managing committee of the company was formed, and five persons, Sir J. E. De Beauvoir, R. Carpenter, S. N. Fisher, P. H. Edlin, and F. F. Weiss, members of the managing committee, were appointed a committee of finance, any three of whom were to form a quorum, with power to draw on the company's bank by cheques, to be signed by not less than three, and to be countersigned by the secretary.

The managing body directed that very considerable sums, part of the funds of the company, should be expended in purchasing shares in the market, and cheques were drawn by members of the finance committee on the company's bank for this purpose.

Mr. Carpenter died, having, by his will, appointed executors who proved his will.

The Master, to whom the winding up

of the company was referred, charged Mr. Carpenter's executors, and the four surviving members of the finance committee with all the sums expended for the above-mentioned purpose, in respect of which cheques were not produced, and charged all the sums expended for such purpose, in respect of which cheques were produced, on the members of the finance committee who had signed them.

This was a motion to discharge the Master's order.

Mr. Bacon and *Mr. Hallett*, for Mr. Carpenter's executors.

Mr. Daniel and *Mr. Southgate*, for Mr. Weiss.

Mr. Selwyn and *Mr. Smythe*, for the official manager.

The following cases were cited—

In re St. Marylebone Joint-Stock Banking Company, 1 Hall & Tw. 100 ; s. c. 18 Law J. Rep. (N.S.) Chanc. 81.

Parbury v. Chadwick, 12 Beav. 614 ; s. c. 19 Law J. Rep. (N.S.) Chanc. 562.

Deeks v. Stanhope, 1 Sim. N.S. 448 ; s. c. 20 Law J. Rep. (N.S.) Chanc. 485.

Cox's case, 3 De Gex & S. 180 ; s. c. 19 Law J. Rep. (N.S.) Chanc. 167.

Chadwick's case, 15 Jur. 597.

Ex parte Inderwick, 3 De Gex & S. 231.

Hollinsworth's case, 3 Ibid. 102.

as to the Winding-up Act ; and

Booth v. Booth, 1 Beav. 125 ; s. c. 8 Law J. Rep. (N.S.) Chanc. 39.

Fenwick v. Greenwell, 10 Beav. 412.

The Attorney General v. Wilson, Cr. & Ph. 1 ; s. c. 10 Law J. Rep. (N.S.) Chanc. 53.

The Charitable Corporation v. Sutton, 2 Atk. 400.

Stiles v. Guy, 1 Hall & Tw. 523 ; 1 Mac. & G. 422 ; s. c. 19 Law J. Rep. (N.S.) Chanc. 185.

The Attorney General v. the Corporation of Leicester, 7 Beav. 176,

as to the breach of trust.

PARKER, V.C.—I have come to the conclusion that the Master's order cannot

be sustained consistently with the principles and practice of the Court. The circumstances are that five individuals, with several others, were members of the managing body, and that these five were appointed to be a finance committee, with power for any three of them to sign cheques, which were to be countersigned by the secretary. It is admitted on both sides that some, if not all, of the five, acting by the direction of the managing body, employed the funds of the company, to a large amount, in buying up shares in the company. The Master, by his order, has, in fact, charged these persons with the monies which they were instrumental in applying for the purchase of these shares. I should be extremely sorry to say anything intimating any difference of opinion from the conclusion to which the Master has come as to the proceeding in question, which he has rightly characterized as a breach of trust in the application of the funds of the company. It is possible that there may be an explanation given of it, but I have not heard any. I do not in the least differ from the view which the Master has taken. It appears to me to be a misapplication of the funds of the company, tending, as had been put by Mr. Selwyn, in the course of his argument, to destroy the very object for which the money had been put into the hands of the directors. Whatever jurisdiction the Master may or may not have under the act, he certainly has all the jurisdiction necessary for taking the ordinary accounts, and enforcing the ordinary liabilities. In carrying out the act of parliament another class of liabilities, not of the ordinary kind, may arise. It is not necessary to consider this point in the present case. It appears to me that the vice of the Master's order is this, that it assumes that the five individuals, where there was no cheque forthcoming, or three of them, where there were cheques, were the parties who, as between these persons and the company were solely and ultimately chargeable with the monies misapplied. It assumes that complete justice would be done in the case by making these persons, who were the hands of the governing body, solely liable by making an order for the restitution of the funds to be applicable as funds in

which the whole of the company had a benefit. When it is considered that these acts were done under the direction of the governing body, and that the object of this proceeding is to wind up the company, and to settle all matters as between all the members of it, it is certain that the object would fail if the Court were to proceed upon the principle of making these persons solely liable, who, no doubt, were implicated in the misapplication of the money, but not more so those other persons who were not charged. If this money be recovered, the very persons who had directed a misapplication of it would have the benefit of the fund being brought back. It seems to me that all persons who were implicated in the transaction are jointly and severally liable, and that there is an obvious distinction between the present case and *The Attorney General v. Wilson*, and that class of cases, where the application was to have the funds restored on behalf of a company, no members of which were implicated in the misapplication of them.

Being of opinion that there was a misapplication of the funds, it appears to me, with regard to the mode of proceeding, that it is not consistent with the ends of justice that it should be of so simple a kind as the Master has considered. The transaction was much more complicated than to enable him to treat these parties as being merely liable to bring back these funds. I have very little doubt that some other course will be found to enable the Master to investigate what had been done. The Master's order must be discharged, and the costs be reserved, with liberty to apply.

TURNER, V.C. { THE GREAT NORTHERN
1851. { RAILWAY COMPANY v. THE
LONG VACATION. { EASTERN COUNTIES RAIL-
WAY COMPANY.

Railway Company—Agreement—Parliamentary Authority—Jurisdiction—Statute—Railways Clauses Consolidation Act (s. 92.), Construction of.

The Court of Chancery will withhold its interference when called upon by either

party to act in aid of an agreement, attempting to carry into effect without the intervention of parliament what cannot be lawfully done except by parliament, in the exercise of its discretion with reference to the interests of the public.

Whether railways are public highways—quære.

This was a motion, on behalf of the Great Northern Railway Company (the plaintiffs), for an injunction to restrain the defendants, the Eastern Counties Railway Company, from obstructing the engines, &c. of the former in passing over the junction of the East Anglian Railway with the Eastern Counties Railway near Wisbeach, and from obstructing the plaintiffs in freely passing between the two last-mentioned railways at Wisbeach.

The bill stated that the plaintiffs, on the 29th of May 1849, made an agreement with the defendants, by which, after reciting the Boston, Stamford and Birmingham Railway Act, 1846 (Stamford and Wisbeach line), an agreement entered into between the Great Northern Railway Company and the Boston, Stamford and Birmingham Railway Company, in February 1847, under the authority of the Great Northern Railway Company's Purchase Act, 1847, and that it had been agreed between the defendants, and the Boston, Stamford and Birmingham Railway Company, and the plaintiffs, that, in order to obviate the necessity of constructing a line from Peterborough to Wisbeach, and in consideration of the abandonment of the same, the defendants granted unto the plaintiffs, their successors and assigns, that thenceforth, and so long as certain lines therein mentioned should not be constructed (and which never had been constructed, and the powers for constructing which had expired), and in case the same should never be constructed, it should be lawful for the plaintiffs, their successors and assigns, to have and exercise full and free right to run their trains with their own engines, to and fro, over those parts of the lines of railway belonging to the defendants which lay between the Great Northern Railway at or near Peterborough and the Eastern Counties Railway station at Wisbeach, proceeding through March; and also to use all

the stations, watering-places, sidings, and other conveniences upon or appertaining to the same lines, and free ingress, egress and regress for all agents, servants and workmen, and other authorized officers of the plaintiffs in, to and from such parts of the said railway, stations and appurtenances of the defendants, as might be necessary and convenient for the conduct and management of the trains and traffic of the plaintiffs working on and over the same; and that the times and manner in which the engines and trains of the respective companies should run over the portion of the line thereinbefore authorized to be used by the engines and trains of the Great Northern Railway Company, and the rules and regulations to which the same respectively should be subject, should be settled, in case of difference between them, in the manner thereafter provided; that the plaintiffs should pay to the defendants for the use of the before-mentioned portions of their said railway, and in lieu of all other tolls and charges or sums of money, after the rate of 60*l.* for every 100*l.* which the plaintiffs should actually receive in respect of the traffic passing over such parts of the defendants' railway as might be traversed by the engines and carriages of the plaintiffs, and that the charges for such passage to be made by the plaintiffs should in no case be less than the charges actually for the time being made by the defendants in respect of the traffic upon the same railway for equal distances; and that the defendants should, by their servants and officers, give to the plaintiffs all such and the same facilities and assistance at their several stations, and off the same, along the parts of their line which might be traversed by the trains of the plaintiffs as were usually given, and as should for the time being be actually given to their own traffic of the same class or character.

The bill also stated that by an agreement made, on the 16th of May 1851, between the plaintiffs and the East Anglian Railways Company, it was, amongst other things, agreed that the plaintiffs should, for twenty-one years from the 2nd of June 1851, work over the said East Anglian Railway, and receive the tolls and charges and all the income due in respect of the traffic which would be carried by them

on the terms therein mentioned, and that under the said agreement the plaintiffs were entitled to the use of all the railways, works, and conveniences of the East Anglian Railways Company.

In opposition to the motion, the secretary of the defendants stated that, by the last-mentioned arrangement between the East Anglian Railways Company (into which the Lynn and Ely Railway Company and certain other companies have been consolidated), the latter company had, without any parliamentary authority for that purpose, altogether abandoned the working of their lines; and the plaintiffs, without any parliamentary authority for that purpose, had undertaken to work the same; that in the year 1847 an agreement was entered into between the Lynn and Ely, Ely and Huntingdon, and Lynn and Dereham Railway Companies (now the East Anglian Railways Company) and the defendants, whereby the defendants agreed to take a lease of all the lines of railway belonging to the Lynn and Ely, Ely and Huntingdon, and Lynn and Dereham Railway Companies, but that parliament refused to sanction a bill for carrying such agreement into effect; and that the alleged agreement between the plaintiffs and the defendants mentioned in the bill was an unauthorized and illegal attempt to obtain for the plaintiffs, without the sanction of parliament, the like benefit as would have been obtained by the defendants by means of the agreement of 1847, if the same had been sanctioned by parliament.

In reply to this affidavit, it was stated, on behalf of the plaintiffs, that there was no arrangement between the East Anglian Railways Company and the plaintiffs other than that contained in the agreement of May 1851; that the East Anglian Railways Company did not thereby abandon the working of their lines; that there was no provision therein purporting to require them so to do, nor to prevent their working the same; and that the plaintiffs, though they had undertaken to work on and over the same, had not, under these thereby acquired or purported to acquire any exclusive right to work over the same.

The motion was heard before the Vice Chancellor during the long vacation 1851.

Mr. Rolé appeared for the plaintiffs, in support of the motion; and

Mr. Bethell, for the defendants, opposed it.

TURNER, V.C. delivered the following written judgment.—This case was argued, before me, on behalf of the plaintiffs upon two grounds: first, that under the provisions of the general railway acts the plaintiffs were entitled, independently of any agreement between them and the defendants, to pass over the Eastern Counties Railway between Peterborough and Wisbeach, and thence on to, and over the East Anglian Railways; and, secondly, that, whether they were so entitled or not independently of their agreement with the defendants, they were so entitled under that agreement. The plaintiffs did not attempt to derive to themselves any rights under their agreement with the East Anglian Railways Company, or to rely upon that agreement further than as evidencing the consent of that company to the use of their lines by the plaintiffs.

The argument, on the part of the plaintiffs, upon the first point was made to rest entirely upon the 92nd section of the Railways Clauses Consolidation Act, which it was said converted all railways into public highways, and was not controuled by the 87th section of the same act, giving powers to companies to enter into agreements as to passing over each other's lines; but whatever may be the right construction of the Consolidation Act in those respects, agreements have in this case, in fact, been entered into with each of the companies over whose lines the plaintiffs claim the right to pass. I think that where such agreements have been entered into, the rights of the parties can no longer be governed by the provisions of the act, but must depend upon the terms of the agreement which has been made. I am of opinion, therefore, that the plaintiffs cannot maintain their case independently of their agreements with the defendants.

With respect to the second point, which indeed was mainly relied on by the plaintiffs, I think that, upon the true construction of the agreement between the plaintiffs and the defendants, the plain-

tiffs are entitled to pass over the Eastern Counties Railway on to the East Anglian Railway and to use the Eastern Counties Railway for that purpose. The recitals of this instrument shew that it was intended to grant some powers and rights beyond the power of using the Eastern Counties Railway from Peterborough to March and Wisbeach, and the grant itself is not merely of the right to pass to and fro over those parts of the lines of railway belonging to the Eastern Counties Railway Company, between the Great Northern Railway at Peterborough and the Eastern Counties Railway Station at Wisbeach (terms which may of themselves well be construed to give the right to pass over any part of the lines), but also of the right to use all stations, watering-places, sidings, and other conveniences, upon or appertaining to the same lines, and of the right of access to such parts of the railway stations and appurtenances of the Eastern Counties Railway Company as may be necessary and convenient for the conduct and management of the trains and traffic of the Great Northern Railway Company working, not merely on, but on and over the same; and this is followed by a covenant on the part of the Eastern Counties Railway Company, to give to the traffic of the Great Northern Railway Company the same facilities and assistance at their several stations, and off the same, along parts of their lines which may be traversed by the trains of the Great Northern Railway Company, as is usually given, and as shall for the time being be actually given, to their own traffic of the same class or character. The construction contended for by the plaintiffs seems to me, therefore, to be supported both by the recital of the instrument and the terms of the covenant, which, I apprehend, must be construed most strongly against the defendants, and I see nothing in the context to alter that construction. It was said, indeed, that the Eastern Counties Railway Company had not the right at the time to the use of the junction, and could not, therefore, intend to grant any such right; but independently of the evidence in the case, which I think proves that the junction was in use, I think that the Eastern Counties Railway Company having granted the use

of those lines and of all conveniences upon the lines, cannot object to their grantees using the conveniences granted for any purposes for which they may be able to apply them, although they may not themselves be entitled to use them for such purposes. It was also said that this junction was beyond the limits of deviation of the East Anglian Railway, but I do not think it is competent for the defendants to raise that objection against their own grant.

If, therefore, this case had rested wholly upon the construction of the agreement between the plaintiffs and the defendants, I should have thought it the duty of the Court to interfere to some extent by injunction; but I think there lies at the root of this case a question of public policy which precludes the interference of the Court. It is impossible to read the agreement between the plaintiffs and the East Anglian Railways Company without being satisfied that it amounts to an entire delegation to the plaintiffs of all the powers conferred by parliament upon the East Anglian Railways Company. All the stock of that company is to be taken by the plaintiffs, without any obligation to restore it. The plaintiffs are to manage and regulate the railways of the East Anglian Railways Company for the purposes of the agreement, and although in form it is declared that the instrument shall not operate as a lease or agreement, it amounts in substance either to one or the other. It is framed in total disregard of the obligations and duties which attach to these companies, and is an attempt to carry into effect, without the intervention of parliament, what cannot lawfully be done except by parliament, in the exercise of its discretion with reference to the interest of the public. It is true that the plaintiffs do not found their case upon this agreement, and that whether the injunction be granted or not the agreement remains in force; but it is not less true that the interference of the Court will promote the object of the agreement, and extend and facilitate its operation; and I think it is the duty of this Court to withhold its interference when called upon to act in aid of agreements of such a nature. My opinion, which I have framed upon the case, being thus dependent upon the legality of the agreement between the plain-

tiffs and the East Anglian Railways Company, I will, if the plaintiffs desire it, send a case for the opinion of a court of law upon that question; but if the plaintiffs do not desire to take the case, my order will be to refuse the motion, and direct the costs of it to be costs in the cause.

KINDERSLEY, V.C. }
June 28. } CLOWES v. WATERS.

*Simple Contract and Specialty Debts—
Interest—Bond Creditors.*

An assignment of property was executed to trustees for the benefit of creditors, who were to be paid equally, and it was stipulated that any securities held by creditors, might be realized and applied towards payment of their debts, and as to any deficiency such creditors were to stand pari passu with the others, but not to receive more than the principal and interest. A schedule was added containing the debts, calculated with interest up to the date of the deed, but there was no express contract that simple contract debts should carry interest:—Held, upon exceptions to the Master's report, that this deed did not convert the simple contract debts into specialty debts, and no right to interest after the date of the deed was created which did not otherwise exist.

Held, also, that bond creditors were only entitled to prove for the amount of the penalties in their bonds.

This case came on upon exceptions to the Master's report, the question being, what sums of money the creditors of Edmund Waters were entitled to, under a deed of composition.

It appeared that, in the year 1823, Edmund Waters being largely indebted to a number of persons, executed two deeds of transfer and assignment of his property, including the opera-house held under a renewable lease, with all the scenes, furniture, &c. thereto belonging, to H. Winchester, upon the trusts declared by an indenture of even date, to which the creditors were made parties. By the deed of trust it was declared that the said H. Winchester, his heirs, executors, administra-

tors, and assigns should stand possessed of the money to arise by the sale of the leasehold and other saleable property and effects of the said E. Waters, upon trust, in the first place, to reimburse himself for the necessary expenses incurred in executing the trusts, and then to apply the money to be received by him under the deeds of assignment in payment of the debts owing by the said E. Waters to such of his creditors as should execute the said deed of trust, or to their respective executors, administrators or assigns, rateably and in proportion to the amount of debts owing to them, without any priority or preference of any one or more of them, before any other or others of them, until each of the said creditors, his or her executors, administrators or assigns, should have received the full amount of the debts owing to him, her or them respectively, and to pay the surplus, if any, to the said E. Waters, his executors, administrators or assigns. And the said indenture also contained a proviso that if any creditor having any mortgage security should execute the deed, it should be without prejudice to such security, and that any such creditor should be at liberty, with the consent of the trustee or trustees for the time being, to convert his security into money and receive a dividend rateably with the other creditors or so much of the said debt as should not be satisfied by the proceeds to arise from the sale of such security; and the trustee or trustees for the time being were to make such arrangements as they should think reasonable with any person holding a security upon any of the property comprised in the deeds of assignment for the purpose of releasing such property from the said security, but no consideration or price for or upon any such arrangements should be given by the trustee, beyond the amount or value of the principal money and interest due to the persons respectively holding such securities, and the incidental expenses attending such arrangement and release. It was also provided by the said deed that the said E. Waters should have free liberty and licence to go about and attend to any business without arrest, attachment or imprisonment by the creditor who should execute the deed. A schedule was appended to this deed, which contained the

signatures of the creditors to the deed and the amount due to them set opposite to their names.

A reference having been made in this suit for the Master to take an account of the sums due to the different creditors who had executed the deed, and to compute interest on such of the debts as carried interest after the rate of interest respectively carried by such debts under the provisions of the deed, the Master reported what creditors had proved their debts and what amount was due to those who had simple contract debts, allowing interest thereon at 5l. per cent. from the date of the deed of trust.

Exceptions were taken to this report, on the ground that interest ought not to have been allowed by the Master upon the simple contract debts, and that the bond creditors ought not to have been allowed to prove for more than the penalties in their bonds.

Mr. Willcock and *Mr. Wickens*, in support of the exceptions, contended that the simple contract debts were not made specialty debts by the trust deed, and that interest was not payable upon them. There was no indication of a contract to that effect upon the face of the deed, and without such contract the nature of the debt could not be altered. The deed of trust could not be taken in any manner to vary the nature of the debts, or to give interest to creditors who would not otherwise be entitled to it. It was also contended that the bond creditors were entitled to prove for no more than the penalties in their bonds. They would not be able to recover more at law, and no further claim was given them by the trust deed.

The following cases were cited—

Hughes v. Wynne, 1 Myl. & K. 20;
s. c. 2 Law J. Rep. (N.S.) Chanc.
28.

Tait v. Lord Northwick, 4 Ves. 816.

Lowndes v. Collens, 17 Ves. 27.

Tew v. the Earl of Winterton, 3 Bro.
C.C. 489.

Mr. Malins and *Mr. Briggs*, contra, submitted that the simple contract debts were made specialty debts under this deed, and were entitled to interest. There was

a clear intention expressed to that effect, because in the schedule the debts were set down opposite the names of the creditors, and to these debts interest had been added in every case. Interest, therefore, was given up to the date of the deed, and it could not be supposed that it was to cease after the deed was executed. The creditors had been kept out of their money for a long period, during which the property had been accumulated, and it was consistent with every principle of equity that the creditors should receive interest for the time they had been obliged to wait for their debts. This case was analogous to damages at law, and to legacies, upon which interest was always allowed. They cited—

Hyde v. Price, 1 C. P. Cooper, 193.

Craven v. Tickell, 1 Ves. jun. 60.

Brown v. Newall, 2 Myl. & Cr. 558;
s.c. 6 Law J. Rep. (N.S.) Chanc. 348.

KINDERSLEY, V.C., after stating the facts of the case, and the provisions of the deed of trust, said—The first question is, whether a creditor is entitled, under the terms of this deed of trust, to interest in respect of a debt not carrying interest. Now, there is no reference made in any part of the deed to the question whether any of the debts alluded to are specialty or simple contract debts. It refers to debts due, without the slightest mention of the nature of the debts. If all the debts were simple contract debts, not carrying interest, there is nothing there to indicate any intention that such debts are to cease to be simple contract and to become specialty debts, and there is nothing to indicate that any one of the creditors was to receive interest by virtue of the deed to which he would not be otherwise entitled. If the trust deed had contained on the part of Waters an agreement or covenant for payment of the debts, then the creditors would be secured under that deed. But so far from there being any such agreement or covenant, all that the deed purports to shew is, that Waters, not being able to pay his debts, makes provision for their payment by putting his property in the hands of trustees, who were to pay the debts, but in the same manner as he himself would have been bound to pay them. There is a direction as to

creditors holding securities upon certain property, concerning which the stipulation is, that any creditor in that condition may, when his security has been realized and applied towards payment of his debts, as to the deficiency stand *pari passu* with the other creditors, and the trustees are at liberty to pay any creditor holding such security for the benefit of the creditors at large; and it is stipulated that they shall not receive more than the principal and interest. That does not affect the question whether this deed makes all the debts bear interest; and supposing the case—very unlikely, but possible—of a creditor holding a security not carrying interest, then the direction that the payment shall not exceed what is due to him for principal and interest, does not shew that anything is to be paid to him for interest. It certainly cannot be the intention of this deed to create a right to interest which would not otherwise exist; and I do not see why any instrument of this nature, making provision for payment of debts, is to be taken to vary in the slightest degree the nature of the debts, for the payment of which provision is made.

It is said that the creditors give a consideration by agreeing not to sue, except so far as the trustees may give them a right to do so. If it is meant that by reason of this, the debts were for the future to bear interest, surely it would have been necessary to insert a special stipulation in the deed to that effect; nor can I see why, in the absence of any such stipulation, the deed is to have that effect. The schedule contains a statement of certain gross amounts, but it does not shew that these were the sums actually due. The deed provides that the proceeds are to be applied in payment of the debts due by Waters to such creditors as shall execute, not specifying the debts mentioned in the schedule. In the schedule the sums are set opposite the names, but there is nothing to shew that these are sums due or claimed, and if a creditor, with 500*l.* opposite his name, could prove a debt of 1,000*l.*, it appears to me he would be entitled to 1,000*l.*; and if 1,000*l.* was set down when 500*l.* only was due, there would be no obligation to pay him 1,000*l.* It is alleged that the amounts there set down include interest;

but I cannot conceive that a blunder in the calculation of previous interest upon debts not carrying interest should alter the construction of the deed. The question really is, what was the contract between the parties? If I should find an implied contract that the debts were to carry interest, I should, of course, give effect to it; but if omission can be considered a ground of implication, I find an implication to the contrary. Then the clause has been referred to, by which it is stipulated that the debts are to be paid without priority or preference, and it is contended that if you paid one creditor interest and another none, you would give some a preference over others; but that is not so, for some were already entitled to interest and others were not. What was meant by this clause was, that one creditor, because he was a specialty or a judgment creditor, should not be paid in priority, but all should stand *pari passu*. Under these circumstances, I cannot come to the conclusion that there is any contract to pay interest.

Then, as to the question whether a creditor by bond can have more than the penalty of the bond; I think not. The case of *Hughes v. Wynne* appears to me to be a distinct decision as to this very point. There the Court decided that a creditor could not, under a trust deed, receive more than the amount of his bond, because he could not recover more at law. The exceptions must, therefore, be allowed.

PARKER, V.C. }
June 2. } TURNER v. TURNER.

Will—Power—27th Section of the Wills Act.

A testator bequeathed certain property to A. for life, with remainder to such persons as A. should by any deed or deeds, instrument or instruments in writing, to be by her signed, sealed and delivered in the presence of, and attested by two or more witnesses, appoint. A. made a will, dated after the operation of the Wills Act:—Held, that the will was an execution of the power.

A, having a power of appointment over a sum of consols, some leasehold ground-rents, and some shares in an insurance com-

pany, made a will, by which she bequeathed all her real estate, money and securities for money to B, and all the rest, residue and remainder of her personal estate to C:—Held, that all the property subject to the power passed by the will, and that B. was entitled to the consols, and C. to the shares and ground-rents.

J. H. Green, by his will, gave certain property therein mentioned to trustees upon trust for his wife for life, and, after her decease, for such persons as his wife should, by any deed or deeds, instrument or instruments in writing, to be by her signed, sealed, and delivered in the presence of and attested by two or more witnesses, appoint, &c.

The testator died in 1830.

A part of the property made subject to the power consisted of a sum in consols, certain leasehold ground-rents, and some shares in an insurance company.

Mrs. Green, the widow, made her will, dated after the operation of the new Wills Act, and thereby gave all her real estate and such part of her personal estate as should consist of money or securities for money to the persons therein named, and gave all the rest, residue and remainder of her personal estate to certain other persons therein named.

The questions in this suit were: first, whether Mrs. Green's will was an execution of the power; and secondly, what part of the property, if any, subject to the power passed under the terms "real estate and such part of her personal estate as should consist of money or securities for money," and what part under the term "rest, residue and remainder of her estate."

Mr. Follett and Mr. Kinglake, for the plaintiff.

Mr. Headlam, Mr. W. M. James, Mr. Bacon, Mr. Bazalgette, Mr. Russell, Mr. Pitman, Mr. Wigram and Mr. Wiglesworth, for the different parties.

The following cases were cited:—

Kibbet v. Lee, Hob. 312,

The cases referred to in 1 *Sugd. on Powers*, 263, 7th edit.

Francombe v. Hayward, 9 Jur. 344.

Curtis v. Kenrick, 3 Mee. & W. 461; s. c. 7 Law J. Rep. (N.S.) Exch. 169.

PARKER, V.C. said that, first, upon the authorities, independently of the Wills Act, the will was a good execution of the power. The next question was, whether the bequests by the will came within the 27th section of the Wills Act. — [His Honour read the section.]—He thought that, in both parts of the will, there was a bequest of property "described in a general manner," and therefore, under one part or another, the legatees under the will were entitled to the whole property, subject to the power. Now, the consols passed under the words "securities for money"; but as to the ground-rents and insurance shares he wished to hear the reply.

Mr. Follett replied.

PARKER, V.C. said, that he thought the shares in the insurance company did not pass under the bequest of money or securities for money; and that the leasehold ground-rents did not pass under the term "real estate." All, therefore, that the legatees of the real estate, money and securities for money would take would be the consols, and the rest would go to the residuary legatees.

M.R. { LONG v. WATKINSON.
Feb. 19, 20. { LONG v. LONG.

Legacy—Lapse—Payment to Executors—Next-of-Kin.

W. L., by his will, directed his executors to pay the residue of his property to M. F., but in case of her death then to pay the same to the executors or executrices which M. F. might appoint. M. F. died before W. L., and by her will gave the residue of her property to I. W., and appointed M. L. her executrix. Upon a bill filed by M. L. against I. W.,—Held, that M. L. did not take the residue of W. L.'s estate beneficially, but that she took it as part of the personal estate of M. F., and that she was to hold it upon the trusts and for the purposes of M. F.'s will.

William Long, by his will, dated the 2nd of November 1848, gave and be-

queathed to George Sandeman and his sister, Mary Fowler, and his sister-in-law, the plaintiff, Mary Long, all the property to which he should be entitled at his decease; he then continued: "And my instructions to my executor and two executrices are, that they do pay out of the above my just debts and funeral expenses, the expenses of proving this my will, likewise my servants' wages, also a legacy of 20*l.* to my executor and a legacy of 20*l.* to my executrix, Mrs. Long; and that they then pay over all the residue and remainder of my estate and effects to my sister, Mrs. Mary Fowler, my other executrix; but in case of my said sister's death, my instructions are, then to pay over all the residue and remainder of my estate and effects to the executors or executrices which my said sister, Mrs. Mary Fowler, by her will may appoint."

On the 1st of January 1849 Mary Fowler died, in the lifetime of William Long, leaving a will, dated the 28th of December 1846, by which she gave and bequeathed the residue of her property to the defendant, Isabella Watkinson, and appointed the plaintiff, Mary Long, her sole executrix.

On the 25th of January 1849 William Long died; and George Sandeman having renounced, his will was proved by Mary Long the plaintiff alone.

On the 28th of February 1849 Mary Long proved the will of Mary Fowler.

This bill was filed by Mary Long, the executrix under the will of William Long and of Mary Fowler, against Isabella Watkinson, the residuary legatee under the will of Mary Fowler, to determine who was entitled to the residuary gift in the will of William Long, as his sister, Mary Fowler, died before him.

On the hearing of the cause, a reference was directed to the Master, to ascertain who were the next-of-kin of the testatrix, Mary Fowler, living at her death and at the death of the testator, William Long.

By his report, the Master found that, at the death of Mary Fowler, her brother, William Long, was her sole next-of-kin, and that at his death several parties mentioned in his report were her sole next-of-kin. These parties were brought before the Court by a supplemental bill, and both

the causes now came on upon further directions.

The questions were, first, whether Mary Long, as executrix of Mary Fowler, took the residuary estate beneficially; if not, secondly, whether she took it as a trustee for Isabella Watkinson, the residuary legatee of Mary Fowler, or for the next-of-kin of the testatrix.

Mr. Kenyon Parker and *Mr. Shebbeare*, for Mary Long, insisted that she took the residuary estate beneficially.

1 *Roper on Legacies*, 118.

Evans v. Charles, 1 Anst. 128.

Bridge v. Abbot, 3 Bro. C.C. 224.

Price v. Strange, 6 Madd. 159.

Sanders v. Franks, 2 Ibid. 147.

Palin v. Hills, 1 Myl. & K. 470; s. c.

2 Law J. Rep. (N.S.) Chanc. 142.

Nurse v. Oldmeadow, 5 Law J. Rep. (N.S.) Chanc. 300.

Wallis v. Taylor, 8 Sim. 241; s. c. 6 Law J. Rep. (N.S.) Chanc. 68.

Long v. Blackall, 3 Ves. 486.

Hinchliffe v. Westwood, 2 De Gex & Sm. 216; s. c. 17 Law J. Rep. (N.S.) Chanc. 167.

THE MASTER OF THE ROLLS.—My opinion is, that the executrix does not take beneficially.

Mr. Lloyd and *Mr. Hardy*, for Isabella Watkinson, the residuary legatee.

Graffey v. Humpage, 1 Beav. 46; s. c. 8 Law J. Rep. (N.S.) Chanc. 98.

Bulmer v. Jay, 3 Myl. & K. 197; s. c. 4 Sim. 48.

Morris v. Howes, 4 Hare, 599; s. c. 16 Law J. Rep. (N.S.) Chanc. 121.

Sibley v. Cook, 3 Atk. 572.

Collier v. Squire, 3 Russ. 467; s. c. 5 Law J. Rep. Chanc. 186.

Stocks v. Dodsley, 1 Keen, 325.

Holloway v. Clarkson, 2 Hare, 521.

Allen v. Thorp, 7 Beav. 72; s. c. 13 Law J. Rep. (N.S.) Chanc. 5.

Mr. Lee and *Mr. Eddis*, for the next-of-kin of the testator and testatrix.

Ripley v. Waterworth, 7 Ves. 425.

Jennings v. Gallimore, 3 Ves. 146.

Long v. Blackall, Ibid. 486.

11 Geo. 4. & 1 Will. 4. c. 40.

Holloway v. Holloway, 5 Ves. 399.

The Attorney General v. Malkin, 2 Phill. 64; s. c. 16 Law J. Rep. (N.S.) Chanc. 99.

Cotton v. Cotton, 2 Beav. 67; s. c. 8 Law J. Rep. (N.S.) Chanc. 349.

Wallis v. Taylor, 8 Sim. 241; s. c. 6 Law J. Rep. (N.S.) Chanc. 68.

Mr. R. Palmer and *Mr. James*, for others of the next-of-kin.

Earum v. Appleford, 5 Myl. & Cr. 56; s. c. 10 Sim. 274; 10 Law J. Rep. (N.S.) Chanc. 81.

Wilkinson v. Garrett, 2 Coll. 643.

Daniel v. Dudley, 1 Phill. 1; s. c. 11 Sim. 163.

Mr. Lloyd, in reply.

THE MASTER OF THE ROLLS.—The case of *Evans v. Charles* has been overruled after being doubted for a considerable time, and I am of opinion that the executrix of the testator does not take beneficially, but merely as a trustee, and as such she must administer according to the will of the testator; and in the absence of any declaration of trust in the will of the testator, she must hold it on the trusts expressed in the second will. Neither the residuary legatee nor the next-of-kin take as *personæ designatæ*. I think, therefore, that the residuary legatee takes the property as forming part of that belonging to the testatrix. The residuary legatee is not *persona designata*, but one of the *cestuis que trust* of the testator's will. There is not a provision in the will by which any person can take it as the property of the testator; but I know of nothing to prevent a party saying it is to go and be administered as a part of the property of another. This claim is embarrassed by its being made as if given to a *persona designata*. I cannot distinguish it from *Palin v. Hills*; which, however, I cannot reconcile with *Daniel v. Dudley*, *Allen v. Thorp* and *The Attorney General v. Malkin*. The proper construction of the testator's will, therefore, seems to be that he has directed his property to go to the trustee of his sister's will, to be administered as part of her estate. The fund, therefore, will fall upon her in her charac-

ter of executrix, and if the debts and legacies are paid, it will be the property of the residuary legatee. The costs of all parties must be paid out of the fund, and those of the plaintiff between solicitor and client.

PARKER, V.C. } *In re THE MERCHANT
March 9.* TRADERS' SHIP, LOAN,
 AND ASSURANCE ASSO-
 CIATION, *ex parte* LORD
 TALBOT.

Company — Winding-up Act — Calls — Policies of Assurance.

A. subscribed the deed of settlement of a joint-stock company, instituted for the purpose of granting assurances on ships, for 1,000 shares of 25l. each. By the deed of settlement it was declared that a deposit of 2l. 2s. should be paid on each share, and that a further call of 2l. 2s. might be made by the directors, but that no further call should be made without a previous resolution of the shareholders assembled at a general meeting. The company granted several policies. The company was afterwards made bankrupt, under the 7 & 8 Vict. c. 111, and debts were proved against it to the amount of 70,000l., and upwards. It was afterwards ordered to be wound up under the Joint-stock Companies Winding-up Act. The Master placed A. on the list of contributories, and made an order that he should pay 25,000l. Motion, that the order as to the call should be discharged was refused.

The above-mentioned company was projected and provisionally registered in 1845, the object being to effect assurances on ships and procure loans.

The deed of settlement of the company was signed by Lord Talbot, in respect of 1,000 shares of 25l. each. Mr. Winthrop also signed the deed of settlement, in respect of the same number of shares. The 127th clause of the deed of settlement is as follows:—

"That the original capital shall be paid up, and contributed in such portions and at such times as the board of directors shall from time to time fix and determine in that behalf, so that every portion of the

original capital which shall be required to be paid and contributed shall be set and calculated upon the whole amount of the said original capital, rateably and distributively, whether the whole of such original capital shall have been taken and subscribed for or not; and every such portion shall be taken and divided into aliquot parts or proportions, and apportioned to the shares into which the capital shall be divided; and that every person, who at the time of the making or passing of the order or resolution by which such portion shall be fixed and determined upon, and required to be paid or contributed, shall be an owner or proprietor of, or subscriber for, or shareholder in respect of any share of such capital, and shall, whether registered in the register of shareholders or not, be liable to pay and contribute, for the purposes of the company, and at the time and place which shall be fixed or determined by the said board of directors in that behalf, the aliquot part which shall be apportioned to his share of such capital, and such aliquot parts shall be treated and considered as an instalment of capital due upon or in respect of a share held by him, or a call or instalment within the meaning of the said statute, and may be sued for, and recovered as such, according to the provisions of the said statute, and as herein also provided." The 128th section is as follows: "That a deposit of 2l. 2s. per share shall be payable by every person desirous of being a shareholder, within such period after any shares shall have been allotted to him by the company, subsequent to the same having been so allotted as the directors shall appoint; and that a second call, not exceeding 2l. 2s. per share, may be made by the board of directors, within six months after a resolution shall have been come to by the board of directors, declaring that such first call of 2l. 2s. per share has been made by them; but that no further call or instalment whatsoever shall be payable by any shareholder without a previous resolution of the shareholders of the company assembled at a general meeting, competent under these presents, to make such further call or instalment."

The company proceeded to carry on business, and granted several policies.

On the 8th of May 1848 a fiat of bankruptcy issued against the company, under the 7 & 8 Vict. c. 111, and debts were proved against the company to an amount of upwards of 70,000*l*.

An order was afterwards made for winding up this company, under the Joint-Stock Companies Winding-up Act.

The Master charged with the winding up of the company placed Lord Talbot on the list of contributories, and made a call on him for 25,000*l*.

This was a motion that the order as to the call might be discharged.

Each of the policies granted by the company contained the following proviso:—
"Provided always, and it is hereby expressly declared and agreed, between and by the said company and the assured, that the said policy and anything therein contained shall in no case extend or be deemed or construed to extend to charge or render liable the respective proprietors of the said company, or any of them, or any of their heirs, executors or administrators, to any claim or demand whatsoever in respect of the said policy or of the insurance thereby made, beyond the amount of their, his or her respective individual shares or share in the capital stock of the said company; but that the capital stock and funds of the said company shall alone be charged and liable to answer all claims and demands, by virtue of the said assurance or incident thereto."

In Trinity term 1849 Mr. Halkett, a creditor on a policy, recovered judgment against the company, and obtained a rule calling on Lord Talbot to shew cause why execution should not issue against him. This rule was discharged. This is the case of *Halkett v. the Merchant Traders' Ship, Loan and Insurance Association* (1). The Court of Exchequer decided in the same way in *Hassell v. the Merchant Traders' Ship, Loan and Insurance Association* (2).

Mr. Daniel and Mr. Baggallay, for the motion.

Mr. Roxburgh, for the official manager.

Mr. Daniel replied.

(1) 19 Law J. Rep. (n.s.) Q.B. 59.

(2) *Ibid.* Exch. 183.

The following cases were cited—

The Queen v. the Victoria Park Company, 1 Q.B. Rep. 288.

Smith v. the Hull Glass Company, 19 Law J. Rep. (n.s.) C.P. 123.

Halkett v. the Merchant Traders' Ship, Loan and Insurance Association, and

Hassell v. the Merchant Traders' Ship, Loan and Insurance Association.

PARKER, V.C.—I do not consider that the cases which have been decided at law upon the rules to shew cause why execution should not issue against Lord Talbot and Mr. Winthrop govern this motion. These cases only establish that policy holders cannot at law sue any individual shareholder of the company; and they leave untouched the question whether the claims of the policy holders, by virtue of their policies, are in the nature of a charge upon the property or assets of the company, which can only be enforced in this Court by a bill, or under the Winding-up Act, or in the Bankruptcy Court under the bankruptcy. I do not entertain a doubt that the policy holders, by force of their policies as general creditors, or by force of the Bankruptcy Act, or under the Winding-up Acts, must have a claim upon the general funds or assets of the company, whatever they may be. This leads to the question, what does the property or assets of the company consist of? It consists, among other things of the capital subscribed, that is, of the sum which the different shareholders agreed to subscribe towards the funds of the company, amounting in Lord Talbot's case to 25,000*l*. and in Mr. Winthrop's case to the same amount. This *prima facie* they are liable to pay. If I had found in the deed any express stipulation that these sums should be paid at a fixed period or by yearly instalments, or in any particular way, I should have felt great difficulty in saying that they were to pay it in any other way. But I find no such stipulation in the deed. There is a provision to subscribe a certain amount. The 127th and 128th clauses of the deed provide for the payment of this sum by means of machinery which does not now exist, namely, meetings of the company; but there is no stipulation that the share-

holders should have the benefit of deferred payments. It appears to me that it is right to consider Lord Talbot, as the Master had considered him, liable, by force of the provisions of the deed, to contribute the sum of 25,000*l*. Taking this view of the question, I do not think I should in any way contravene the 58th section of the act of 1848, which provides "that nothing therein contained should extend or enlarge, diminish, alter, or affect the rights or remedies of creditors," which could in one way or another be made available for their benefit to the extent of the amount of the subscriptions which the shareholders had thought proper to agree to make.

It has been said that this form of proceeding deprived the different shareholders or contributories of the right they would otherwise have had of disputing each debt. There was a large number of debts found by the Master to an amount exceeding that which was called for. In my opinion, the amount subscribed for by Lord Talbot and Mr. Winthrop is liable to be called for to discharge these debts. There is nothing to prevent any contributory from putting any person, who is upon the list of creditors, to the proof of his debt. I do not think it necessary to entitle a creditor to receive payment that he should previously have established his debt at law. Before the Master, and upon the bankruptcy proceedings, it would appear that he had proved his debt, and that he was *prima facie* a creditor. Any contributory might take the necessary steps for questioning the debt and putting it upon a proper footing, if it should turn out not to be an available claim or debt. It, therefore, appears to me that the Master has come to a right conclusion in saying that, having regard to the amount of debts *prima facie* proved before him, the contributions which the appellants had agreed to make towards the company should be made, so as to render available the funds or property of the company to meet the demands upon it. As to the question of *quantum*, the call was for the amount to be subscribed. It was admitted that, if there had been any payment made, the parties were entitled to have the benefit of a set-off as to that. This does not

affect the right to make the call. The parties may claim a set-off, if any, of the official manager; and, if he declines to allow it, they may go before the Master or come to the Court to have it allowed, not on the footing of undoing the call that had been made, but of establishing the amount of the call. The official manager must have his costs of this motion out of the estate. I do not think the question has been unnecessarily brought before the Court.

KINDERSLEY, V.C. }
April 27. } ATKINSON v. GYLBY.

Insurance Company—Transfer of Policies—Bond.

A sum of money was borrowed from an insurance company, and a bond was given to secure the repayment of the money. The borrower at the same time insured his life as a further security, and the bond extended to the payment of the premiums for keeping up the policy. The insurance company having ceased to carry on business was dissolved, and the affairs being wound up, the company transferred, amongst other things, this bond and policy to another insurance company. No premiums were paid to the second company, and the policy was allowed to drop. The surety in the bond died, and the second insurance company claimed to be creditors against his estate for the amount of premiums unpaid, on the ground that the policies ought to be kept on foot until the money due upon the bond had been paid:—Held, as regarded the premiums, that this was not such a contract as the assignees of the first insurance company could enforce, although they had a good claim against the estate of the surety, quoad the amount secured by the bond.

This suit was instituted by the creditors of a testator, named John Parker Gylby, for the administration of his estate, and a claim had been carried in before the Master by the trustees and directors of a company called the Britannia Life Assurance Company, alleging themselves to be creditors upon the estate under the following circumstances:—From the state of facts taken in before the Master, it appeared that by a policy of assurance, dated the 15th

of July 1841, under the hands of three of the directors of the London and Westminster Mutual Life Assurance Society, the sum of 1,000*l.* was assured upon the death of William Edwards to his executors, administrators or assigns, upon payment by him to the directors of the society for the time being, at the office of the said society, of the yearly premium of 39*l.* 5*s.* That by another policy of assurance, dated the 20th of January 1842, also under the hands of three of the directors of the London and Westminster Mutual Life Assurance Society, a further sum of 1,000*l.* was assured upon the death of the said William Edwards to his executors, administrators or assigns, upon payment by him in like manner of the annual premium of 40*l.* 11*s.* 8*d.* That by a bond or obligation in writing, under the hands and seals of the said William Edwards and of Frederick Edwards and John Parker Gylby, the testator in this cause, dated the 7th of February 1842, the said W. Edwards as principal, and the said F. Edwards and J. P. Gylby as sureties for W. Edwards, became jointly and severally bound to David Salomons and H. M. Kemshead, two of the directors of the London and Westminster Mutual Life Assurance Society, in the penal sum of 900*l.*, with a condition, whereby, after reciting that W. Edwards having occasion for the sum of 450*l.* had requested the said David Salomons and H. M. Kemshead to lend him the same, which they had agreed to do, upon having repayment of the said sum in manner therein mentioned, and interest thereon secured by this bond, it was declared, that the bond should be void upon payment by the said W. Edwards, his heirs, executors or administrators, unto the said D. Salomons and H. M. Kemshead, their executors, administrators or assigns, of the sum of 450*l.* in the proportions, and at the times therein mentioned, with interest thereon at the rate of 5*l.* per cent. per annum, and the following clause was added:—"And also do and shall so long as any money shall remain due on the security of the above-written bond or obligation, well and truly pay, or cause to be paid, the several annual premiums payable in respect of the said two several policies of assurance, and all other

payments whatsoever that shall be requisite or necessary for keeping the same on foot: and if the said W. Edwards shall not, during such time as aforesaid, do any act whatsoever, whereby the two several policies may be, or might be, liable to be forfeited, then and in such case the above-written bond or obligation shall be void, or otherwise shall remain in full force and effect." That by another bond, dated the 19th of December 1842, between the same parties and in the same terms as the last, the sum of 500*l.*, also borrowed by W. Edwards from the London and Westminster Assurance Society, was secured, together with the premiums payable upon the policies of assurance. That the monies so paid by the said D. Salomons and H. M. Kemshead were the proper monies of the London and Westminster Assurance Society; and the said two bonds were made to them as trustees for the same society. That J. P. Gylby died on the 27th of June 1843. That in October 1844 the London and Westminster Assurance Society ceased to carry on business as a life assurance society; and thereupon the affairs of the society were wound up, and the society was dissolved, and ceased to exist; and since the month of October 1844 there had been no directors of the society, and no society of that name; nor had the said society, since that time, had any office for the transaction of business; and the capital, stock, funds, and property of the society were shortly afterwards distributed amongst the shareholders and members thereof, according to their shares and interests therein. That by an indenture of assignment, dated the 13th of December 1844, the said D. Salomons and H. M. Kemshead, as the trustees of the London and Westminster Assurance Society, assigned to several persons, therein named as trustees and directors of the Britannia Life Assurance Company, (among other things,) the said two several hereinbefore-stated bonds, and the principal and other sums secured thereby, and all interest due or to become due in respect of the said sums, or any of them, and the said several policies of assurance, subject nevertheless as to such policies of assurance, to such rights of equity of redemption as were then subsist-

ing thereof. That the London and Westminster Society was dissolved, and the affairs wound up, and the aforesaid assignment to the Britannia Company executed without the knowledge or privity either of J. P. Gylby, during his life, or the present defendant, his representative. That the premiums which became due on the said policies, up to January 1845, were duly paid by W. Edwards, but none of the premiums upon either policy had since been paid. That by reason of the non-payment of such premiums, within twenty days after they became due, the two policies had become absolutely void, and the same had never been revived. The claim made by the directors of the Britannia Life Assurance Company against the estate of J. P. Gylby, was for payment of the premiums upon the two policies, on the ground that such policies ought to be kept on foot until the money due upon the bonds should have been paid. They also claimed a liability against the estate of J. P. Gylby, in respect of the two principal sums of money secured by the two bonds. The defendant Cassandra Gylby objected to the claim, as far as regarded the premiums, and charged that there was not now due or owing to the trustees and directors of the Britannia Assurance Company from the estate of J. P. Gylby any sum or sums whatsoever, for or in respect of the annual premiums reserved by the before-stated policies of assurance.

The Master reported in favour of the claim carried in by the trustees and directors of the Britannia Life Assurance Company; and the case now came on upon exceptions to that report, the exceptions extending only to the amount claimed for premiums.

Mr. Bethell and *Mr. Haldane* appeared in support of the exceptions, and said, the question was, whether the directors of the Britannia Life Assurance Company were or were not creditors of the testator, J. P. Gylby, for the amount of premiums upon the two policies which had been allowed to drop upon the transfer by the London and Westminster Assurance Society to the Britannia Company. The rule was, that if any of the terms of a contract were altered, a new contract was substituted, and the surety

was no longer bound by it. The surety in this case contracted with the London and Westminster Society and not with the Britannia Company. The transfer was made between the two companies without his knowledge or concurrence. It was evident that Mr. Gylby never intended to be bound to the Britannia Company, and his obligation virtually came to an end. A contract of this nature rested mainly upon the solvency and responsibility of the company, and the surety had no opportunity of obtaining information upon these important points as regarded the Britannia Company.

Mr. Malins and *Mr. Cairns*, in support of the Master's report, referred to the terms of the bonds. The surety was thereby bound to see that the premiums were regularly paid upon the policies. It was admitted that the Britannia Company had a good claim against the testator's estate in respect of the sums secured by the two bonds. No exceptions were taken to that part of the case. The grounds were the same respecting both liabilities. The premiums were to be paid to the trustees of the London and Westminster Society, their executors, administrators or assigns. Now, they had assigned their interest to the Britannia Company, who must necessarily stand in the same position as the first company. It was not a new contract that was now set up, but the same contract. This claim was simply one by the assignee of a *chose in action*, which was of every day occurrence. If the arguments on the other side were worth anything, they must apply to the capital and interest secured by the bond as well as to the premiums.

KINDERSLEY, V.C.—I think in this case that the Master was wrong, and that the exceptions must be allowed so far as regards the premiums. I will go upon the assumption in the first place, that instead of its being a suit to administer the estate of the surety it was to administer the estate of Edwards. The facts are these, —I will state the case as respects one policy and bond, because the same principle applies to the other: — Edwards then, it appears, borrows a sum of 500*l.* from the London and Westminster As-

insurance Office; and to secure the repayment of the money with interest, he gives his bond, which is a bond in the usual way, payable to the obligees as trustees of the insurance company, and is assignable in equity, subject to all the equities that would be applicable to an ordinary mortgagee; but, besides borrowing that sum of money, there is another transaction:—the office says to him, “we will not lend the money except you do something more; you must insure your life for 1,000*l.*, and you must pay a yearly premium for the insurance, and you must be compellable to pay the premiums so long as the debt remains due, after which you may leave off such payments.” It is clear that in this transaction the office gains a benefit by having the premiums paid, which is an additional profit to the interest upon the money borrowed, and they also have the money secured by the policy as an additional security for the amount lent; but, on the other hand, there is the benefit to the party insuring, that by paying the premiums there will be payable upon the death of such party the amount insured, that is, 1,000*l.* Then the bond is made to secure the 500*l.* and interest, which is one portion of the transaction, and it is also made to secure the payment of the premiums, which became a charge on the funds of the insurance company, as well as on the individual directors of the company. If the transaction had consisted only in the borrowing a certain sum of money and repayment with interest, it is clear that the benefit of that transaction would be assignable in equity to any individual, and in equity the plaintiff would have the benefit of it.

But let us look to the other portion of the transaction. Leave out of consideration that portion which concerns the borrowing of the money and take an individual who has entered into a policy and bound himself to keep up the premiums. That transaction is entered into upon the faith that the office will continue to be the effective and substantial office it was at the time the policy was effected, and that it will continue to carry on the business of life insuring, and have the means of providing payment when the policy becomes due out of the funds of the company. But when that office, either from insolvency, or not

having business enough to make it profitable, or from any other cause, is unable to continue and must give up the carrying on of the concern, and more than that, is actually dissolved by an order of the Court, and the affairs ordered to be wound up, can any one representing that office say, “Although we have ceased to be a working office and are not carrying on business, so that we may not have funds to make the payment, still we will compel you to go on paying the premiums”? Could the official manager appointed in such a case by the Master under a winding-up order maintain an action against those persons who had insured their lives, to make them pay the amount of their premiums? I apprehend not. I think in a court of law it would be an answer to such an action to say, the contract is at an end either by the act of the legislature, or the contracting party who is unable to perform his portion of the contract. I am sure it would be an answer in a court of equity.

In this case the transaction consists of two portions, of the portion which secures the money borrowed, and that relating to the premiums; and if this were a question arising upon the winding up of Edwards's estate and not his surety, though there might be good security for the sum borrowed, there is no longer any liability to the directors of the London and Westminster Assurance Office for the premiums. Now, it is clear that with regard to the transactions which took place between the two offices, the party has a right to say he repudiated the Britannia Company. It is true the money secured by the bond is made payable to the directors, their executors, administrators or assigns, and no doubt a common bond is assignable to any party. It is contended, however, that that alone is sufficient to justify the Master in allowing not only the directors of the first, but also those of the second office to stand as creditors for the money in the bond, and also for the premiums; but it does not follow that the whole of this contract, which is a mutual contract, might be the subject of assignment. If it could be so, and without the consent of the contracting parties, it must equally be the subject of assignment to any individual who might just have come out of the

Bankrupt Court, with perhaps a certificate of the third class. It could never be said that the contract, because it was made with the directors or their assigns, might be assigned so as to allow the company standing in the position of assignees of the original company, to compel performance of such a contract. So even if it were a question affecting the estate of Edwards himself, I think the exceptions should be allowed; but the case is much stronger with regard to the surety, because there is a material variation of the contract as to the surety, which puts an end to his liability. When you look at the contract, it was one in which, if the London and Westminster Society continued acting in their business, and were a solvent and substantial company, what would be the position of the surety? If he were called upon to pay any portion of this sum secured by the bond, he might say, "If I pay any monies which Edwards ought to have paid, I shall have a right to have the benefit of such sums secured by the policy, and to claim as against the representatives of Edwards the repayment of that money before they receive any portion of it;" but that is all put an end to, and the surety would have to pay the premiums as well as the debt, without being able to resort to the amount secured on the policy. I admit it does not put an end to Gylby's liability *quoad* the amount of the bond, but it does so as to the premiums. The exceptions must, therefore, be allowed.

LORDS JUSTICES. { *Ex parte* YELLAND, in re
 1852. { THE PORT OF LONDON
 May 22. { SHIPOWNERS' LOAN AND
 ASSURANCE COMPANY.

Company—Winding-up Acts—Contributory.

A joint-stock company was completely registered, and a person applied for and accepted shares and paid a deposit on the shares allotted to him. The company's deed required that on its execution the names of the parties executing should be entered on the list of shareholders, and be returned to the Stamp Office, &c., and thenceforth they should have the privileges and be subject to

the liabilities of shareholders. In this instance the deed was not executed, but the directors entered and returned, &c. the name:—Held, nevertheless, that the name of this person had been properly placed by the Master, under a winding-up order, on the list of contributories to the debts and liabilities of the company.

This was an appeal from a decision of Vice Chancellor Parker, who had refused to remove the name of Mr. Robert Easton Yelland from the list of contributories of the above-named company, he having been placed thereon by Mr. Tinney as a contributory of the second class in respect of two shares. The facts appearing upon the Master's decision were as follows:—

The Port of London Shipowners' Loan and Assurance Company was provisionally registered on the 24th of February 1847. The capital to consist of 50,000*l.*, in 500 shares of 100*l.* each, and the deed of settlement of the company was dated the 8th of April 1847, the 83rd section of which was as follows:—"That immediately upon the execution of the deed of settlement of the company, or such deed of accession thereto in the manner aforesaid, the person executing the same being a person duly entitled by original subscription, or by transfer, election, nomination, or otherwise, in the manner hereinbefore mentioned, shall be forthwith entered on the register of shareholders, and duly returned to the Joint-Stock Registry Office, under the provisions of the Registration Act, and shall thenceforth, but not before, assume the liabilities and privileges of a shareholder, and if such person be entitled in any of the representative capacities as aforesaid, or as the nominee of any party so entitled, the dividends accruing on the share or shares to which such party, or the nominee of such party, shall have been so entitled after the event on which such title shall have accrued, and before the execution of the deed of settlement, or the deed of accession thereto, shall, unless forfeited, under the 30th clause of these presents, be accumulated for and paid to the person so executing at the time of such execution, whose receipt then given, and no other, shall be a valid and sufficient discharge for the same; but in all cases of transfer the former holder of

the share in respect of which such execution is made shall, until such execution and registration as aforesaid, be entitled to the dividends up to or before that time paid on any such share, and to all other the privileges, and be subjected to all the liabilities of a shareholder in respect of the same share." The company was completely registered on the 22nd of April 1847. Mr. Yelland was proved, in a conversation with the managing director, to have consented to take two shares in the company, and the following letter was sent to him ;—

" No. 1,417.

" London, 20, St. Helen's Place, Bishopsgate.
July 20, 1848.

" Sir,—In compliance with your application for shares in the Port of London Shipowners' Loan and Assurance Company, I beg to inform you that two shares have been allotted to you.—I am, Sir, your obedient servant,

" Augustus Collingridge,

" Managing Director.

" N.B.—A certificate will be given in exchange for this letter on executing the deed."

On the 22nd of July 1848, the following letter was forwarded to Mr. Yelland :—

" R. E. Yelland, Esq., Bideford.

" July 22, 1848.

" Dear Sir,—The 31st of this month being the day appointed by the 7 & 8 Vict. c. 110. for the half-yearly return to be made to the Registrar of Joint-Stock Companies, I beg to inform you that you will be furnished immediately after that date with a printed list of upwards of 200 proprietors, who, during the past half-year, have executed the registered deed of settlement of this company. It may be as well to add further, that the aim of the directors having avowedly been directed throughout to the distribution of the shares in the hands of as many parties as possible, the actual number of shareholders at this moment exceeds 900, whose attested signatures will be obtained as early as the different localities in which parties reside will admit of.—I am, dear sir, yours faithfully,

" Aug. Collingridge,

" Registered Officer."

On the 24th of July 1848 Mr. Yelland paid 10*l.*, the deposit on the two shares

allotted, and received the following letter from the secretary of the company, acknowledging its receipt,—

" R. E. Yelland, Esq., Bideford.

" July 25, 1848.

" Sir,—We are in receipt of your favour of the 24th instant, with bank order for 10*l.*, in payment of instalment on your allotment of two shares in this company, which is all in order, and duly placed to your credit. Noting the other contents,—I am, sir, your obedient servant,

" James Grecy, Assistant Secretary."

On the 3rd of August 1848, the following letter was also sent to Mr. Yelland.—

" R. E. Yelland, Esq.

" August 3, 1848.

" Dear Sir,—Herewith you have a list of shareholders, which would have been printed in the *Shipping Gazette*, but the price demanded was beyond all reason. The certificate will be ready for delivery either this or the ensuing week, and yours will be duly forwarded to you.—I am, dear sir, yours faithfully,

" Augustus Collingridge,

" Registered Officer."

It was not proved that the certificate was ever, in fact, sent to Mr. Yelland as promised in the letter. Vice Chancellor Parker refused the motion, considering that Mr. Yelland had impliedly authorized the directors to register his name without his having executed the deed.

Mr. Willcock and Mr. Terrell, for the appellant.—Mr. Yelland has never executed the deed of settlement, and that deed, in the 83rd section, makes it a condition precedent to the shareholder being entitled to the benefits or liable to the losses of the company, that he shall execute it. It can, therefore, never be held that this gentleman is a contributory, although he does not deny that he has accepted the shares, and paid the deposit on them. Although there are those two facts, still they did not authorize the directors to place Mr. Yelland's name on the register of shareholders, and this is the more clear from the tenour of the 26th section of the Joint-Stock Companies Registration Act, which directs that until a man, who is a subscriber, has executed a deed of settlement of a company he shall not be entitled to receive

any dividends or profits, or be entitled to the remedies and powers given to shareholders. If, then, he be not entitled to benefits, he cannot with propriety be held liable for any costs or losses under these acts, for clearly he could not be sued on any judgment against the company, for in the 66th section of the act last referred to, it is declared that "shareholders" alone are to be so liable. The acts that Mr. Yelland has done do not amount, as the Master has held they do, to any contract in equity to take the shares, or to execute the deed, for, until he did execute the deed, he had a full right to retire from what he had done, and to demand back his deposit—*Ex parte Hall* (1).

Mr. Bethell and Mr. Roxburgh, who appeared for the official manager, were not called on.

LORD JUSTICE LORD CRANWORTH.—I entertain no doubt upon the question, whether Mr. Yelland's name has properly been placed upon the list of contributories. The act of parliament says, that "the word 'contributory' shall include every member of a company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, whether as heir, devisee, executor, or administrator of a deceased member, or as a former member of the same, or as heir, devisee, executor, or administrator of a former member of the same, deceased, or otherwise howsoever." Although the Court is always reluctant in these cases of contributories to hold a man liable here to a debt to which he is not liable at law, yet this is always with the qualification that such person has not, by having contracted to become a member of the company, incurred all the liabilities of an actual member. Now, in the case before the Court, Mr. Yelland has applied for shares, and having received an allotment accordingly, has paid a deposit on such allotment, and had afterwards assented to a communication acknowledging the receipt of such deposit by the company. Under these circumstances, Mr. Yelland must be held to have contracted, and to be clearly bound to become a member of the com-

pany. He is, therefore, liable in that character to contribute to the debts and liabilities of the company, and, consequently, his name has been properly placed on the list. The motion must be refused, with costs.

LORD JUSTICE KNIGHT BRUCE intimated his concurrence in the judgment, and the motion was accordingly refused, with costs.

PARKER, V.C. }
Feb. 28 ; } HEWARD v. WHEATLEY.
May 24. }

Joint-Stock Banking Company under 7 Geo. 4. c. 46.—Deceased Partner.

In April 1847, a joint-stock banking company, carrying on business under the provisions of the 7 Geo. 4. c. 46. of which A. was a member, became indebted to B. in the sum of 5,000l. A. continued to be a partner until his death, and died in December 1847. In April 1848, B. recovered judgment against the public officer of the company. In December 1848, the usual decree for accounts was made in a suit for the administration of the estate of A. B. presented a petition for liberty to go in before the Master and prove, as a creditor against A.'s estate, for 5,000l. and interest. The petition did not state that the bank had ceased to carry on business, or that any proceedings had been taken to enforce the judgment against the existing partners. The petition was dismissed.

The facts of this case sufficiently appear in the judgment.

Mr. Malins and Mr. Toller, for the different parties.

The following cases were cited—

Barker v. Buttrese, 7 Beav. 134 ; s. c. 13 Law J. Rep. (N.S.) Chanc. 58.
Steward v. Greaves, 10 Mee. & W. 711 ; s. c. 12 Law J. Rep. (N.S.) Exch. 109.
Wilkinson v. Henderson, 1 Myl. & K. 582 ; s. c. 2 Law J. Rep. (N.S.) Chanc. 190.

PARKER, V.C.—This is an application on the petition of George Wilson, praying

(1) 1 Hall & Tw. 580 ; s. c. 1 Mac. & G. 307 ; 19 Law J. Rep. (N.S.) Chanc. 69.

that he may be at liberty to go in before the Master, to whom this cause stands referred under a decree in the cause, and to prove as a creditor of the testator, Joseph Elder, for the sum of 5,958*l.* 16*s.* 8*d.*, the balance now remaining due for principal money on his debt, together with interest thereon at 5*l.* per cent. per annum, from the 3rd of April 1849. It appears that the testator in his lifetime, and up to the time of his death, was a member of the Newcastle, Shields and Sunderland Union Joint-Stock Banking Company, which was a banking copartnership carrying on business under the provisions of the 7 Geo. 4. c. 46. On the 3rd of April 1847, upon a deposit of money by the petitioner with the bank, which constituted a debt due from the bank to him, the bank gave an accountable receipt carrying interest at 5*l.* per cent. per annum to the petitioner. The testator at this time was a partner in the bank, and he continued so up to the time of his death. He died on the 8th of December 1847, and on the 19th of April 1848 the petitioner recovered judgment in an action at law against the public officer of the company for the sum mentioned in the prayer of this petition. On the 22nd of December 1848, a decree was pronounced in the present cause, which is an ordinary administration suit, directing an account to be taken of the testator's personal estate and debts in the usual way.

Independently of the before-mentioned statute, the case would admit of no doubt. On the death of the testator his liability on the contract would have ceased, but his assets would have continued liable in equity. In this case, however, the liabilities are regulated by the statute. The Courts of law and equity have found a difficulty in acting on that statute, and its enactments are found on judicial authority to be inconsistent with each other, and not entirely intelligible. The first section appears to create a several liability on the part of the several members to pay all bills and notes issued by the company, and all sums borrowed and owed by the company, and it has frequently been noticed that this clause extends the ordinary liability, and includes various classes of members of the company. There is nothing to take away the liability which in equity would attach

to the assets of a deceased partner, who is a party to the contract, as the testator is in this case. The 11th section relates to decrees of Courts of equity recovered against the public officer. I notice that, because it is difficult to reconcile the provisions as to decrees in equity with those as to judgments at common law. A decree of this Court may be a simple order to pay money, as simple as a judgment of a Court of law. By the 11th section a decree for payment of money is to be enforced against every or any member of such copartnership in the same manner as if they were parties before the Court.

The very special provisions of the 13th section are not to be found in this 11th section, as applicable to a decree which is to result in the payment of money. The 13th section provides the means of enforcing judgments at law. The 11th section appears to give to a judgment the same effect as a decree in the court of equity against the public officer of the company. The 13th section contains most important provisions applicable to the mode of enforcing execution upon a judgment against the public officer at common law. By that section, execution is first to be issued against any member or members for the time being of the co-partnership, and the Court of Exchequer, in the case of *Dodgson v. Scott* (1), decided that "the time being" means the time of the execution. Execution must first be issued against the persons who are members of the partnership at the time of the execution, and, in case that should be ineffectual for the purpose of obtaining satisfaction, then execution may be issued against certain persons who have ceased to be members before that time. This section provides only the mode of issuing execution against those persons who are liable at law. If the assets are liable in equity only, this clause contains no means by which that liability may be enforced. It appears to me that it does not follow that there is to be no liability in equity. The state of the law and the previous sections of the act appear to shew that there is to be a liability in equity; and, if that be so, that liability

(1) 2 Exch. Rep. 457; s. c. 17 Law J. Rep. (N.S.) Exch. 321.

must be enforced according to the ordinary principles of this Court, because there is nothing about it in the clause pointing out how a judgment at common law is to be enforced against the parties legally liable. In asserting an equitable liability against the assets of a deceased partner, however, I think that regard must be had to those provisions of the act which would have been applicable if it had been a legal liability, according to the view taken by Lord Langdale in the case of *Barker v. Buttress*.

One of the most material provisions of the 13th section of the act is, that a creditor of the partnership is in the first instance to issue execution against the members for the time being, and only in case that execution proves insufficient is execution to be issued against other parties. The reason of that is very obvious. The members for the time being are those who have controul over the assets of the partnership, and those who have ceased to be partners have no such controul. The object is to provide a mode of first rendering liable the funds of the partnership, which are primarily liable to pay the debt, by issuing against those who have the controul over these funds in the first instance, and execution is not to go against those who have no controul over the funds until the others have been found not to be available. This is an application to enforce the equitable liabilities of a deceased partner, in the same way as if he had ceased to be a member by a transfer of his interest; and, therefore, it appears to me that the petitioner must first shew that the liability cannot be satisfied by proceedings against those who were members of the partnership at the time. In the present case, no such statement is made; there is no statement that the bank has ceased to carry on business, or that there has been any attempt to enforce judgment against those who are primarily liable, and, therefore, he has not made out his case to reach those who are liable in the second degree. There must be no order, but the statute is so difficult that I think it is not a case for costs.

Petition dismissed, without costs.

PARKER, V.C. }
July 21, 25. }

ALCOCK v. ALCOCK.

*Baron and Feme—Evidence—14 & 15
Vict. c. 99.*

A married woman instituted a suit against her husband in respect of property come to his hands, which she claimed as belonging to her, and tendered her evidence in the suit:—Held, that her evidence was not admissible.

The facts of this case sufficiently appear in the judgment.

Mr. Bacon, Mr. Anderson and Mr. Collins, for Mr. Alcock.

Mr. Russell, Mr. Cole, and Mr. Smythe, for Mrs. Alcock.

The following cases were cited—

Barbat v. Allen, 21 Law J. Rep. (N.S.)
Exch. 155.

Stapleton v. Croft, 21 Law J. Rep.
(N.S.) Q.B. 247.

PARKER, V.C.—In this case of *Alcock v. Alcock*, in the course of the plaintiff's evidence, the plaintiff tendered her own depositions as evidence in support of her own case. Mr. Bacon objected to the reception of those depositions. The point was argued, and I thought it right to consider whether, in the present state of the law, the plaintiff's evidence was or was not to be received. The plaintiff is a married woman, suing by her next friend. The principal defendant is her husband. She is suing for an account of property of her own, come to the hands of the husband, in respect of which he is accountable under the settlement stated in the bill. She tenders herself as a witness. It is necessary to consider the objections which have been taken to her evidence.

Before the recent act there would have been two objections to her evidence; one, that she was a party to the issue which is being tried, the other that she was giving evidence against her husband; and either of these would have been a good objection to the evidence being received. The 6 & 7 Vict. c. 85. provided that a witness should no longer be excluded by reason of inca-

capacity arising from interest; but it contained a provision that the act should not render competent any party to any suit, action, or proceeding, individually named in the record, nor the husband or wife of any such party. Hence, after Lord Denman's Act, the two objections remained as before.

Then came the 14 & 15 Vict. c. 99. The 1st section of that act repeals so much of the 6 & 7 Vict. c. 85. as provided that that statute should not render competent any party to any suit, action, or proceeding, individually named in the record, but there is nothing in it to alter the incapacity of a husband or wife. The second clause provided, in substance, that, upon the trial of any issue, the parties should, except as thereafter excepted, be competent and compellable to give evidence on behalf of either or any of the parties to such suit or proceeding. A question has arisen whether, upon this latter act making the parties competent witnesses, a husband or wife is a competent witness; and it has been decided by very high authority at common law that their incapacity remains, notwithstanding that act (1). It does not appear to me that any case has been decided like this, where the witness herself is a party to the suit, and is examined in that character. The case referred to was one where the witness was not a party, but was examined on behalf of a party. Mrs. Alcock, then, so far as she is a party, is a competent witness; but, so far as she is to be examined against her husband, it appears to me that the incapacity remains. The late act only removes the objection to this evidence, which arises from the fact of the witness being a party, and leaves every other cause of objection unaltered. Many similar cases may be imagined; as, for instance, the case of a solicitor. A client has a right to say that the solicitor shall not be examined as a witness against him to give in evidence confidential communications between them. The solicitor might be suing his client, and might tender himself as a witness against him. I think that this act does not say that the objection to the solicitor's evidence, on the ground that

he was the solicitor of the party, is one that can no longer be taken by the defendant, his client. Again, the act says that the parties shall be compellable to give evidence. Suppose a party were required to be a witness to be examined on matters which would expose him to penalties; I think that the act leaves that objection to his being compelled to give evidence untouched. I think that the same principle applies to the case of a wife.

The 4th section provides that nothing in the act contained "shall apply to any action, suit, proceeding, or bill in any court of common law or in any ecclesiastical court, or in either house of parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage." It may be said that that section contemplates a particular class of matrimonial suits, and that the husband and wife, being excluded in such cases, an argument may be drawn from that circumstance that there was no more extensive exclusion intended by the legislature than is provided by that clause. I think that that view cannot be sustained. The section of the act seems to me to refer to the subject-matter of disputes of a certain kind, disputes in which it is thought, for other reasons, not fit that the parties themselves should be examined. That section is open to the same observation that was made on the 3rd section, which says that husband and wife shall not be competent or compellable to give evidence against one another in criminal proceedings; and it has been considered in one case that, in consequence of that section, the former section was to receive a more extended construction, and that it was only in criminal proceedings that they were not to give evidence against each other. The Court of Queen's Bench, however, have taken a different view (2), and have considered that the 3rd section was introduced from excessive caution, and that it does not controul the meaning of the former section. It appears to me, therefore, that there is nothing in these statutes to take away the incapacity of Mrs. Alcock arising from the fact of her being a married woman.

(1) *Barbat v. Allen*.

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(2) *Stapleton v. Croft*.

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PARKER, V.C. }
March 4. } HEDGES v. HEDGES.

Mortgage—Transfer—Real and Personal Representatives of Mortgagor.

A. mortgaged real estate to B. for 3,000l., and died, having devised two-thirds of it to C, and one-third to D. and E, in equal moieties. By a deed of transfer, after reciting that B. had required payment of the debt from C, D. and E, which they were unable to pay, and that they had applied to F. to lend them the amount, which he had consented to do, on having the repayment secured as thereafter expressed, B, at the request of C, D. and E, conveyed the premises to F, subject to a proviso for redemption on payment by C, his heirs, executors and administrators, of 2,000l., and by D. and E, their heirs, executors and administrators, of 1,000l.; and C. covenanted to pay 2,000l., and D. and E. covenanted to pay 1,000l.: — Held, that as between the real and personal representatives of D, he had not taken on himself the payment of his share of the mortgage debt.

By indentures, dated the 4th and 5th of April 1800, Thomas Jefferies mortgaged certain real estate to Mrs. Clarke for 3,000l. This mortgage was afterwards assigned to Ward and Merriman.

Under the will of Thomas Jefferies and subsequent conveyances, George Jefferies became entitled to two third parts of the equity of redemption of this estate, and Sarah Jefferies and Jemima Jefferies to the other one third, in equal moieties.

Indentures of lease and release, dated the 24th and 25th of January 1826, were made between Ward and Merriman of the first part; George Jefferies, Sarah Jefferies and Jemima Jefferies of the second part, and T. Neale and P. Neale of the third part. The indenture of release contained the following recital:—"Whereas, in the month of January 1826, the said J. Ward and T. Merriman called in and required payment of the said mortgage debt from the said G. Jefferies, S. Jefferies, and J. Jefferies, according to their respective proportions thereof, and the said G. Jefferies, S. Jefferies, and J. Jefferies, being unable to comply with such request, applied to the said T. Neale and P. Neale to lend

and advance to them the said sum of 3,000l. to enable them to do so, which they have consented to do in manner hereinafter mentioned, upon having the repayment thereof, with interest, secured to them in such manner as is also hereinafter expressed." It was then witnessed that Ward and Merriman, at the request of G. Jefferies, S. Jefferies and J. Jefferies, assigned the mortgage debt and conveyed the mortgaged premises to T. Neale and P. Neale, subject to the proviso that, if the said G. Jefferies, his heirs, executors or administrators, should pay to T. Neale and P. Neale the sum of 2,000l., with interest, &c., and if S. Jefferies and J. Jefferies, their heirs, executors and administrators, or either of them, should pay the sum of 1,000l. in equal moieties, with interest, &c. on the 25th of July 1826, then that T. Neale and P. Neale would reconvey two-thirds of the premises to G. Jefferies, and the other one-third to S. Jefferies and J. Jefferies, in equal moieties. G. Jefferies then covenanted to pay 2,000l. and interest, and S. Jefferies and J. Jefferies covenanted to pay 1,000l. and interest.

A bond was executed to the same effect as the covenant by G. Jefferies, S. Jefferies and J. Jefferies.

Jemima Jefferies died intestate, leaving Thomas Hedges Jefferies, her heir-at-law. The other shares in the estate also became vested in him.

The question argued in this cause was whether, as between Thomas Hedges Jefferies, the owner of the estate, and the administrator of Jemima Jefferies, the personal estate of Jemima Jefferies was liable to the sum of 500l., her proportion of the mortgage debt, or, in other words, whether Jemima Jefferies had, as between her real and personal representatives, taken on herself the payment of her share of the debt.

Mr. Malins and Mr. Speed, for the plaintiffs, contended that Jemima Jefferies had taken on herself the payment of the mortgage debt as between her real and personal representatives, and cited—

Barham v. Earl of Thanet, 3 Myl. & K. 607; s. c. 3 Law J. Rep. (n.s.) Chanc. 228.

Earl of Oxford v. Lady Rodney, 14 Ves. 417.

Lushington v. Sewell, 1 Sim. 435.

Mr. Russell and Mr. Webb, *contra*, cited—

Shafto v. Shafto, 1 Cox, 207, and

Earl of Tankerville v. Fawcett, *Ibid.* 237.

Mr. Follett, Mr. Grove and r. Rasch, for other parties.

PARKER, V.C.—There is no doubt as to the rule applicable to such cases as the present. We have here a person who is owner of both funds; and the question is, upon her acts or contracts, which fund is the one primarily liable. The rule of law is, that the intention of a person in that position is to govern the liability. The question of the application of that rule depends on the particular circumstances of each case. The cases cited as authorities are no more material in this case than so far as they illustrate the rule. It is the settled law, that a mere transfer of a mortgage by one mortgagee to another, although accompanied by a covenant of the owner of the estate, making his personal estate for the mortgage debt liable to the transferee, will not of itself make his personal estate the primary fund for payment of the mortgage debt. The law is laid down with great precision by Lord Alvanley in *Woods v. Huntingford*(1). He there says—"If a person succeeding to an estate, subject to a mortgage, has done no act to adopt the debt and make it his personal debt, his personal estate is not liable; but if by his acts he has put himself so far in the place of his ancestor as to make the debt his own, that is understood to be the same as if he was the original mortgagor: but the Court has been extremely anxious not to make that inference, unless where it is perfectly clear and obvious; therefore though, the mortgagee pressing for his money, the heir is obliged to have a transfer of the mortgage, and, as every one knows, no assignee will take it without some personal covenant, upon that transaction he executes a bond to the new mort-

gagee, if he does it only for that purpose, not meaning to make himself more liable, it has been determined not to make it the personal debt of the party, whose original debt it was not."

What are the circumstances of this case? We find that, in 1826, three persons were owners of the equity of redemption in different shares as tenants in common. The recital in the deed of transfer is, "that the mortgagees had called in and required payment of the mortgage debt from George Jefferies, Sarah Jefferies, and Jemima Jefferies, according to their respective proportions thereof, and that the said G. Jefferies, S. Jefferies, and J. Jefferies, being unable to comply with such request, had applied to the said T. Neale and P. Neale to lend and advance to them the said sum of 3,000*l.* to enable them to do so, which they had consented to do in manner thereafter mentioned, upon having the repayment thereof, with interest, secured to them in such manner as was also thereafter expressed." The only object in that is to effect a transfer of the mortgagee pressing for payment. There is no object whatever apparent on the deed, except merely to transfer the mortgage deed from one person, who is pressing for payment of it, to another who is contented to advance it. So far the case is precisely within the rule stated by Lord Alvanley, and also laid down by Lord Thurlow in *Shafto v. Shafto*. What does the deed do more than that? There is a proviso for redemption which is in a special form, stipulating what clearly the law would have done if it had not been there stipulated. The shares are according to the interests of the parties in the estate. So far from intending to make themselves personally liable by that, it shews that the liability to pay the debt is to pursue the interest which each had in the estate. There is a covenant which it is admitted on all hands does not change the character of the debt. It appears to me, therefore, that there is nothing in this case except a simple transfer of the mortgage debt from one person to another. In *Barham v. the Earl of Thanet*, Sir John Leach did not dispute the rule, but came to the conclusion, on the construction of the deed in that case, that there was an intention to change the nature

(1) 3 Ves. 128.

of the debt. I find no such intention apparent in the deed before me. Something has been said about the form of the proviso for redemption; but I think that we should be losing sight of the substance in a mere question of form if anything were made to turn upon that. If the mortgage was transferred, it seems to me that there must be a new proviso for redemption, as the hand to receive and the hand to pay the money would have both been altered, and accordingly that is expressed in the deed.

PARKER, V.C. }
July 28. } LANGHORN v. LANGHORN.

*Trustee Act, 1850—Vesting Order—
New Trustees.*

In cases where new trustees are appointed under the Trustee Act, 1850, the real estates subject to the trust ought to be conveyed to them by deed, and the vesting order ought only to be resorted to when it is inconvenient to obtain a conveyance.

This was a petition for an order vesting real estate in new trustees under the Trustee Act, 1850.

Mr. Lewis, for the petition.

Mr. Toller, Mr. Spring Rice, Mr. Snape and Mr. Cumming, for other parties.

PARKER, V.C.—I wish it to be understood in this and every other case that, as a general rule, a conveyance ought to be made, and that the vesting order should only be resorted to in the case of its being inconvenient to obtain a conveyance, and I do not regard expense as coming under the term inconvenience. There is this reason: the statements in and the prayer of a petition seeking for a vesting order ought to be framed as carefully as the recitals and the operative part of a deed of conveyance; but petitions are not unfrequently drawn by persons who have not competent skill or time to frame them as they ought to be prepared for this purpose. I think then that, for the security of titles there ought to be conveyances. I have had before me several cases in which I have been applied to to discharge vesting

orders,—matters having been discovered subsequently to their being made which have rendered them ineffectual.

LOrDS JUSTICES.

1852.

August 3, 5.

} OWEN v. BRYANT.

Will—Construction—An illegitimate Child held entitled to a Share as one of a designated number of "Children."

A testator recited in his will that he had nine children, whom he named and described, and he bequeathed the income of his estate to his wife for life; and, after her death, the capital to be divided among his children by his wife then living, and the issue of them who should be then dead. Various other trusts were declared by the will, and among them that the trustees should pay the interest during the life of such of his "said children" as should be a daughter in a particular manner. One of the daughters was illegitimate:—Held, (Lord Cranworth laying great stress on the latter clause, but the Lord Chief Justice considering the will sufficient without it,) that the intention of the testator was on the will manifest that the illegitimate daughter should take a share with the legitimate children.

There is no inflexible general rule that illegitimate children cannot participate in a gift to children.

Robert Wrightson, by his will, dated the 24th of September 1836, reciting that his two daughters, by his first wife, were amply provided for by him on their respective marriages: and reciting that he, the testator, had nine children then living, by his present wife, namely, Eliza, the wife of R. B. O.; Charlotte, the wife of W. R.; Harriett, the wife of J. E. J.; Mary Ann Wrightson; Maria, the wife of S. P.; Robert Wrightson, his eldest son; George B. Wrightson, his second son; Caroline Wrightson; and Charles Frederick Wrightson, his youngest son: and reciting that, on the respective marriages of his four married daughters, by his present wife, he had advanced to them sums of money, amounting together to 560*l.* each; and that it was his intention to make

similar provisions for his two unmarried daughters, bequeathed the sum of 1,120*l.* to trustees, upon trust, to divide the same into two equal shares, one of such shares to be allotted to each of his said two unmarried daughters, and to be held upon the like trusts for the benefit of each daughter, as were declared thereafter concerning the share which should be allotted to them in the proceeds of the sale of his real estate, and in leasehold lands thereafter devised and bequeathed, and the stocks, funds, and securities thereof, in case she were living, on the decease or second marriage of the testator's said wife. The testator, then, after giving legacies to his sons, bequeathed the residue of all his personal estate whatsoever and wheresoever (except leasehold lands and tenements) to his wife absolutely; and then devised and bequeathed all his real estate, and all his leasehold messuages or tenements, lands, and hereditaments, to the trustees before named, their heirs, executors, administrators and assigns, respectively, upon trust, on the decease of his said wife, or in her lifetime, with her consent in writing, absolutely to sell the whole, or any such real and leasehold estates, and to invest the proceeds of such sale or sales in the parliamentary stocks or public funds of Great Britain, or at interest in government or real securities in England or Wales; and upon further trust to permit and suffer his said wife Charlotte Wrightson to receive the rents and profits, interest and dividends, and annual produce of his said real estate and leasehold lands, and trust monies and securities, during such time as she should continue his widow; but, if she should marry again, then upon trust, after such marriage, and during the remainder of her life, with and out of such rents, issues, and profits, to pay her an annuity of 50*l.* to her separate use, free from anticipation. The testator then declared as follows: "And from and after the decease or marriage of my said wife, but subject and without prejudice to the trusts and purpose aforesaid, the said trustees or trustee for the time being, do and shall divide the principal of the said trust-monies, stocks, funds, and securities between all and every my children by my said present wife, who shall be living at the time

of her decease or second marriage, and the issue of such as shall have departed this life, leaving issue then living, such issue taking *per stirpes*, and not *per capita*, as tenants in common, and their respective executors, administrators and assigns, subject, nevertheless, as to the shares of daughters, to the directions hereinafter contained. [And I do hereby direct that my said trustees or trustee shall, during the life of each of my said children by my present wife who shall happen to be a daughter, pay the dividends, interest, and annual proceeds of her share of the said stocks, funds, and securities, trust-money, and premises, unto such person or persons, for such purposes, and in such manner only as such daughter, whether covert or sole, shall, from time to time, by any writing signed by her, appoint, but not so as to deprive herself, while under coverture, of the benefit thereof by anticipation; and in default of such appointment, and subject thereto, into the hands of such daughter, for her sole and separate use, exclusively of any husband with whom she may marry, and so that her receipts shall be sufficient discharges for the same,] and from and after the decease of each and every of such daughters, then upon the trusts hereinafter mentioned, for the benefit of the children of such daughter; and in default of issue of such daughters, then in trust for such person or persons, and for such purposes as such daughters shall by will appoint; and in default of appointment upon the following trusts, viz., upon trust for the brothers and sisters of the whole blood of such daughter then living, equally, and the issue of any brother or sister of the whole blood who may have died, leaving issue then living (such issue taking *per stirpes*, and not *per capita*) as tenants in common, and their respective executors, administrators and assigns; and in default of any brother or sister of the whole blood, or the issue of any such brother or sister, then upon trust for such person or persons as, at the time of the decease of such daughter, shall be her next-of-kin, under and according to the statute made for the distribution of intestates' effects."

The testator had by his wife only the nine children enumerated by him,

the daughter Eliza, the wife of R. B. O., being, however, illegitimate, having been borne by the testator's wife to him before their marriage. The time for the division of the produce of the sale having arrived, the facts were embodied in a special case; and it was set down before the Vice Chancellor Turner, but was transferred by leave to their Lordships' paper, and now came on to be heard. It appeared that, by some inadvertence, the passage in the will within brackets was omitted in the case, and was only discovered on the production of the probate in court.

Mr. W. R. A. Boyle appeared for the illegitimate daughter.—Admitting the general rule that by "children" only "legitimate children" can be considered as intended, there being persons who can satisfy the term "children," still, where a testator has furnished on the face of his will a means of interpreting his meaning, the Court will so interpret his expressions as to admit an illegitimate child to participate in the benefits of the bequest made to children generally. In the first place, here the testator enumerates his nine children by name, this lady being among them. Again, he speaks of his children by his present wife: that lady was his child by his present wife. Again he refers to his children as his "said" children, and again he refers to his daughters as his "said daughters." He cited the following cases:—

Metham v. the Duke of Devon, 1 P. Wms. 529.

Beachcroft v. Beachcroft, 1 Madd. 430.

Bayley v. Snelham, 1 Sim. & S. 78; s. c. 1 Law J. Rep. Chanc. 35.

Gill v. Shelley, 2 Russ. & M. 336; s. c. 9 Law J. Rep. Chanc. 68.

Meredith v. Farr, 2 You. & Col. C.C. 525.

Evans v. Davies, 7 Hare, 498; s. c. 18 Law J. Rep. (N.S.) Chanc. 180.

Mr. Waley, for the trustees, submitted the question to the Court to shew that the authorities were not all one way, and drew attention to the cases of—

Bagley v. Mollard, 1 Russ. & M. 581; s. c. 8 Law J. Rep. Chanc. 145.

Wilkinson v. Adam, 1 Ves. & B. 422.

Fraser v. Pigott, You. 354.

from which two propositions could be deduced: first, that illegitimate children could only take as *personæ designatæ*, and not as a class; and, secondly, that illegitimate children could not take as a class along with legitimate children.

LORD JUSTICE LORD CRANWORTH.—This case has been well argued by the learned counsel; but with all respect to them, I think that a very material passage in the will, to which my attention has been called by my learned Brother, has not been touched upon in the argument, nor even set forth in the special case. But for that, I was on the point of differing from my learned Brother as to the construction to be put upon this will. The grounds of the conclusion I had come to I shall state. I reject the notion of there being any rule to the effect that illegitimate children cannot, under any circumstances, participate with legitimate children in the benefit of a gift or bequest to children generally. I think that there is no invariable rule of that sort, but that in each case the question is one which depends upon the circumstances appearing upon the will; and that if, from the whole context of the will, it appears that illegitimate children are to be included with legitimate children in the benefit intended, illegitimate children may take. *Prima facie*, the word "children" means "legitimate children," and it is to be read as if the word "legitimate" were annexed. Therefore, where a will purports to give a benefit amongst children, it is the same thing as if it had said "amongst legitimate children," unless something is disclosed upon the face of the will which shews that that is not meant.

Now, it was said that in this will that something is disclosed, inasmuch as the testator begins by saying, "Whereas I have nine children, viz., Eliza, wife of R. B. Owen; Charlotte, wife of," &c.; and among the nine children thus enumerated, one is illegitimate, and consequently, that the testator, when he speaks of his children, means to designate his daughter Eliza Owen also, who is not legitimate. The question, however, is, whether this recital must of necessity be coupled with the gift afterwards of

the real and leasehold estates ; for the rule is, legitimate children must be taken to be intended by the word " children," unless the context leads necessarily to the inference that something else was meant. Now, the recital here was for a purpose, viz., as an introduction to, and an explanation of, the gift made immediately afterwards in favour of the testator's two unmarried daughters. After enumerating his children, and distinguishing those daughters that were married, the testator goes on to recite his intention to make a provision for each of his two unmarried daughters equal to that which he had previously made upon each married daughter upon her marriage. This provision he then makes, and he then proceeds to give and devise his real estate and leasehold estate in the manner stated in the special case. Now, I must own, that had the will stopped there, I should have thought that legitimate children, and legitimate children only, were intended ; for I cannot see that there would, in that case, have been an absolute necessity to construe the word " children " otherwise than according to its natural import.

In some of the cases cited, it was thought impossible to construe the word according to its natural import, as in the case of *Gill v. Shelley*, where the gift was to the children of a deceased person, who had died leaving only two children, of whom one was legitimate and the other illegitimate. There it was held, that the illegitimate child was intended to be included, otherwise it was impossible to give a meaning to the word " children," which was in the plural. So, also, where the gift is to the " children " of a deceased person, who at his death left none but illegitimate children, and there the illegitimate children are supposed to be intended, for otherwise there would be nothing for the will to operate upon. The principle upon which Sir John Leach acted in *Bagley v. Mollard* is, I think, the right one. There the testator bequeathed a leasehold house in trust for Elizabeth Mollard, whom he described as the then only surviving child of his son William Mollard, and concluded his will by a residuary bequest to all and every the children of his sons James Mollard and William Mollard, and of his

daughter Mary Bagley. Elizabeth Mollard, the grand-child, being illegitimate, the question was, whether she was entitled to share in the residuary gift. Sir John Leach held she was not, on the principle that whenever it was possible for the general description of children to include legitimate children, it could not also be extended to illegitimate children.

Upon that principle, I should have come to the same conclusion here, but for a passage in the will to which my attention has been called, as I have said, by my learned Brother, namely, the passage in which the testator says, " And I do hereby direct that my said trustees or trustee shall, during the life of each of my said children by my present wife, who shall happen to be a daughter," dispose of the interest of her share, &c., in the way mentioned in the will. Coupling that passage with the passage which precedes it, and in which the testator enumerates by name his children by his present wife, I am of opinion that by the words " children by my present wife " he must be taken to have meant all those whom he had previously enumerated as his children.

LORD JUSTICE KNIGHT BRUCE.—The passage upon which so much stress has been laid by my learned Brother is not stated in the abstract of the will as set forth in the special case, but was discovered only on my referring to the probate of the will. It will be necessary, therefore, that the probate should be entered. It is important that it should be so, because Lord Cranworth has laid so much stress upon the passage in question. He is, I need not say, probably right ; but, for myself, I confess, I should have thought the intention of the testator sufficiently apparent without the aid of those words. I think that, consistently with the whole of the authorities cited, except, perhaps, the case of *Bagley v. Mollard*, this case may be decided according to the plain intention of the testator. The result is, that the illegitimate daughter and her children are entitled to a share in the proceeds of the real estate.

KINDERSLEY, V.C. }
 June 10. } BODENHAM v. HOSKINS.

Receiver—Bankers' Liability—Separate Accounts.

The plaintiff, being owner of an estate, employed an agent and receiver, who paid into the defendants' bank the rents of the estate, to an account headed with the name of the estate, to distinguish it from his private account. The receiver's private account being overdrawn, he transferred the balance of the estate account to make up the deficiency due upon his private account. Upon a bill filed by the plaintiff, against the bankers, to refund this balance so transferred, it was held—that, according to the principles of a court of equity, a person who deals with another knowing him to have in his hands, or under his controul, monies belonging to a third person, must not enter into a transaction with him, the effect of which is that a fraud is committed on the third person; and it appearing upon the evidence that the bankers were aware that the money was the produce of the rents of the plaintiff's estate, a decree was made against the bankers, for repayment of the amount.

The bill stated that the plaintiff was the owner of an estate called "The Rotherwas Estate," in Hereford, producing a rental amounting to between 5,000*l.* and 6,000*l.*; that previously to the year 1846 the plaintiff had employed Mr. Charles Blount, a solicitor, residing in Hereford, as his receiver and agent, to collect the rents of the Rotherwas estate; that in the year 1846 the said Mr. Blount sold his business to Thomas William Parkes, also a solicitor, and the plaintiff, thereupon, appointed him to be the receiver of his said estate, in lieu of Mr. Blount; that the said C. Blount and T. W. Parkes, and afterwards the said T. W. Parkes alone, kept a banking account with the defendants, Messrs. Hoskins, Morgan & Hamp, bankers, of Hereford; that in the month of June 1846, the said T. W. Parkes had an interview with Mr. Hamp, at the bank, and requested liberty to overdraw his account, to the extent of 1,500*l.*, to meet certain liabilities, which was agreed to; but at such interview the said Mr. Hamp inquired of the said T.

W. Parkes whether he was not the agent of the plaintiff for collecting the rents of the Rotherwas estate, and upon being informed that he was, and being told what was the amount of the rents, the said Mr. Hamp requested Parkes to open an account with the bank for the receipt of such rents, saying that if the accommodation required by Parkes was granted, he might, in return, do something for them; that Parkes agreed to open the proposed account, and stated that he believed the average balance in respect of these rents would be about 1,000*l.*; that in pursuance of the liberty granted to Parkes, he drew largely on his private account with the bank, and there was a balance against him of 1,037*l.*, or thereabouts; that in October 1846, the said T. W. Parkes received the sum of 746*l.*, in respect of the half-year's rents arising from the Rotherwas estate, which sum he paid into the defendants' bank, and desired that a separate account might be opened for such rents, to be entitled "The Rotherwas Account;" that the defendants then had notice that the Rotherwas account was opened by Parkes, as the receiver and agent of the plaintiff, and that the money placed to that account was the money of the plaintiff, arising from the rents of the Rotherwas estate, and it was then arranged that the words "Rotherwas account" should be written at the foot of every cheque drawn on such account, as well as at the head of such account in the bank books, for the purpose of distinguishing the said account from any other account kept by Parkes at the said bank; that the said T. W. Parkes, in the month of December 1846, opened with the defendants, the bankers, a third separate account, called "The General Account," for the monies of his clients, other than the money of the plaintiff; that Parkes continued to pay into the bank the rents of the Rotherwas estate, and to draw cheques when required upon the Rotherwas account; that in the month of July 1847 the plaintiff was informed that a cheque drawn by Parkes at the request of the plaintiff for money owing by him to a person named Pritchard, but which was not drawn on the Rotherwas account, but was drawn generally, had been dishonoured at the defendants' bank.

That the plaintiff thereupon went to the defendants' bank, and was for the first time informed that all the balance, amounting to 829*l.* 11*s.* 9*d.*, which ought to have been then standing to the credit of the Rotherwas account, had been previously passed or transferred from the Rotherwas account to the credit of the private account of the said T. W. Parkes at the said bankers, in part to cover a deficiency then existing in the private account of the said Parkes. That at the time of such transfer the said T. W. Parkes was and still continued to be insolvent, and that the defendants, well knowing that the said Parkes was the receiver and agent of the plaintiff, and that the balance remaining due from them on the said Rotherwas account, was the proper money of the plaintiff, arising from the rents of the said Rotherwas estate, and well knowing or having reason to believe that Parkes was insolvent, or in great pecuniary embarrassment, and that he had no means whereby he could, out of his own monies, discharge the balance due from him to them on his private account, contrived and colluded with Parkes to pass or transfer the said sum of 829*l.* 11*s.* 9*d.*, remaining due from them, to the credit of the said Rotherwas account, so as in part to liquidate or reduce the balance due from him on such "private account." That the plaintiff, by his solicitors, applied to the defendants, and requested them to account for and pay to the plaintiff the said sum of 829*l.* 11*s.* 9*d.*, which, but for the collusion and contrivance of the defendants and Parkes, would be now remaining due from them, on the credit of the Rotherwas account; but the defendants refused to comply with the plaintiff's request, on the ground that, at the time when Parkes, as the receiver of the plaintiff, opened with the defendants the Rotherwas account, it was arranged and agreed, between the defendants and Parkes, that the said several accounts kept by him at their bank were to be considered as one account, and that, consequently, the defendants were at liberty to debit either account for sums overdrawn on the other account or accounts.

The bill contained charges, to the effect that the defendants well knew that Parkes was the agent of the plaintiff, and that the money paid in by him to the Rotherwas

account, was money belonging to the plaintiff. That the defendants, well knowing that Parkes was in insolvent circumstances, repeatedly urged him to transfer the balance due upon the Rotherwas account to his own private account, in order to reduce the debt due from him to the defendants, and that, in consequence of such applications, Parkes did, on the 7th of July 1847, sign a memorandum, in a minute-book of the defendants, to the following effect:—"The three accounts to be brought into one, and cheques for the transfer of the balance shall be sent forthwith to the bank account; to be overdrawn 1,000*l.* as a maximum debtor balance, and, by the 7th of November, the credit to be reduced 500*l.*, and, on the 31st of December, the account to be cleared; a discount, to the extent of 200*l.* or 300*l.*, to be given if desired. Signed, T. W. Parkes." That, in the same month of July, Parkes drew a cheque for the sum of 829*l.* 11*s.* 9*d.* on the Rotherwas account, and which, by agreement with the defendants, he did on the same day pay into the bank, to the credit of his own private account. That the plaintiff, on several occasions being in want of money, and it not being convenient for him, on such occasions, to apply to T. W. Parkes, and in his absence, and without his knowledge or privity, drew and signed, in his own name, cheques for certain sums of money on the "Rotherwas account;" and that, on other occasions, during the temporary absence of Parkes from Hereford, the plaintiff obtained money from the defendants' bank upon cheques drawn at the suggestion of the defendants themselves, by the clerk to Parkes, and indorsed by the plaintiff in his own name, which money was thereupon debited to the Rotherwas account.

The bill prayed that the transfer or paying of the said sum of 829*l.* 11*s.* 9*d.* from the Rotherwas account to the private account of Parkes, might, under the circumstances, be declared fraudulent and void, and that the defendants might be directed to pay to the plaintiff the said sum, or such sum as, but for the acts of the defendants, would now be the balance remaining due from the said bankers, at the credit of the said "Rotherwas account."

The answer of the defendants was to the following effect: that the said T. W.

Parkes directed his banking account to be kept with three distinguishing heads, one of which accounts was the Rotherwas account; but that the said Parkes expressly stated that, although kept and distinguished under three heads, yet as to debits and credits arising on them between him and the said bankers they were, in fact, to be regarded by the said bank as one account only; and it was expressly stipulated that the defendants were to be at liberty to consolidate the said three accounts, and that they were not in any manner to be prejudiced by the said accounts being kept separate, or distinguished separately, such distinguishing modes of keeping the accounts being required at the particular request of Parkes, and for his sole accommodation. That during the whole of the time when the stipulations and agreements as to the banking accounts of Parkes were being made, the plaintiff's name was never mentioned or alluded to, nor had they any notice or knowledge that the plaintiff had any controul over either of the accounts, nor were they aware that the money placed in the bank by Parkes to the Rotherwas account was received by him as agent of the plaintiff. That the transfer of the balance due to Parkes on the Rotherwas account to his own private account, was made at the desire of Parkes himself and not at the suggestion of the defendants. The defendants submitted that under the circumstances they were justified in making such transfer, and that it was a good, legal, and equitable transfer, particularly as the said Parkes reserved to himself the right to draw cheques thereon; and he alone paid into the banking house of the defendants all the money which was entered to his credit, and never stated to the defendants that any other person had any right or interest therein, and the name of any other person was never mentioned as connected with the accounts. The defendants alleged that they did not know at the time of the aforesaid transfer of the balance on the Rotherwas account, that Parkes was insolvent; but, on the contrary, they believed he had several thousand pounds coming to him from the partners of his late firm, and they could not state whether he was now insolvent; that the defendants knew

Parkes was the solicitor for the plaintiff, and that knowing the plaintiff to be a person of high respectability and standing in the county of Hereford, they had on several occasions paid cheques indorsed by him upon the defendants' bank in the absence of Parkes, and had at the plaintiff's request debited the amount of such cheques to the Rotherwas account, believing that Parkes would approve of their conduct, as he subsequently did; but these sums of money were paid on the credit of the plaintiff, as a gentleman of wealth and property, and if Parkes had not assented to be debited therewith, they must have looked to the plaintiff alone for payment; and the defendants further stated that they could not set forth whether the plaintiff had drawn any other cheques in his own name upon the Rotherwas account.

Mr. Bethell and Mr. Collins, for the plaintiff, regretted that the defendants, the bankers, should have allowed themselves to have been drawn into such a suit as this, when they had no legal defence whatever to the plaintiff's claim. The right of the plaintiff depended upon these two propositions, that the money deposited with the bankers by Mr. Parkes and carried to the credit of the Rotherwas account, was so deposited by Parkes as the agent and receiver of the plaintiff, and that the bankers knew the money to have been placed in the bank by Mr. Parkes to that account as a receivership account, separate from his private account. If these two propositions were made out upon the evidence, to the satisfaction of the Court, the bankers had no defence. In permitting the money to be transferred from the receivership account, the bankers were colluding with the receiver to enable him to defraud his employer, and the employer was at liberty to follow the money into the hands of the bankers, and could maintain against them the same claim which he had against the receiver or agent. The evidence of the plaintiff clearly established both these propositions, and there was nothing in the evidence of the defendants to contradict it. The three accounts kept at the bankers of Parkes were separate accounts, and the bankers perfectly well knew that the money paid in to the Rother-

was account was the money of the plaintiff. The separate heading to the different accounts was used expressly to shew that the money was appropriated to particular purposes and distinct from the private account of the individual. The principle acted upon by this Court was, that if money was deposited with a banker in separate accounts, and the banker knew the money received upon one account was the property of any other person than his customer, he had no right to allow the blending of the two accounts. This principle arose upon the universal maxim of common honesty, that if you know the person with whom you are dealing is applying for your benefit money belonging to another, you are in point of fact auxiliary to that person committing a wrong upon another.

Mr. Stuart and Mr. Wright, for the defendants, contended that there was no fiduciary relation existing between the bankers and the plaintiff, and there was no fiduciary relation between the bankers and their customer. The bankers received the money of Parkes, which he desired should be kept in three separate accounts; but he had full power to controul his own accounts, and if he thought fit to draw the money from one account and place it to another, the bankers had no power to prevent him from doing so. The three accounts were, in fact, treated as one account; and it was not proved that the bankers knew that the money paid in by Parkes to the Rotherwas account was belonging to the plaintiff; but if they did, there was no reason why they should prevent Parkes from drawing it out, and applying it in any manner he chose.

The following cases were cited:—

M'Leod v. Drummond, 14 Ves. 353.

Scott v. Tyler, 2 Bro. C.C. 431.

Hill v. Simpson, 7 Ves. 152.

Foley v. Hill, 1 Phill. 399; s. c. 13 Law J. Rep. (N.S.) Chanc. 182.

KINDERSLEY, V.C.—The doubt that has from time to time crossed my mind in this case was chiefly this, whether the facts were stated in the pleadings with that degree of particularity as that I could say there had been a full opportunity for the

defendants to meet those allegations of fact by the evidence which they might be able to adduce. Now that I have become more acquainted with what is contained in the pleadings, I feel myself in a condition, without waiting to look through the pleadings more in detail, to express my opinion in this case. I will first consider the case as between the plaintiff and Parkes; that is, what was the state of things as between the plaintiff and Parkes in the course of these transactions; and then consider what was the relation of the defendants, the bankers, towards Parkes in the matter; and how far the plaintiff, upon that state of things, is entitled to the decree which he asks against those defendants.

Now, as between the plaintiff and Parkes the matter seems to have stood thus:—the plaintiff was the owner of this Rotherwas estate, (a considerable property in the neighbourhood of Hereford,) and it seems that he had employed, as his solicitor and his agent and receiver, a gentleman of the name of Blount. Mr. Blount, being about to give up his employment, sold his business or transferred it to Mr. Parkes, who had been previously a solicitor in London; and it was arranged between Parkes and Blount that, for six months, Parkes should use the name of Blount, and accordingly an account was opened by Parkes, with the concurrence of Blount, with these bankers, in the joint names of Blount and Parkes. It was intended that that should not continue more than six months. When that account ceased, in short, when Parkes was to use his own name exclusively in the matter, or shortly after that period, he was employed by the plaintiff as his solicitor, succeeding Blount in that employment, and shortly after that period again (all within the period of a very few months, or even weeks) Parkes was employed by the plaintiff as his receiver and agent in respect of the Rotherwas estate, apparently in the same manner as Blount had been employed before. Parkes having on the occasion of the ceasing of the account,—the putting an end to the joint account in the names of Blount and Parkes with the bankers,—opened a private account of his own on the 23rd of June 1846. When he came to be appointed the receiver of the rents

and profits of the Rotherwas estate by the plaintiff, he very properly, as it appears to me, opened another account with the bankers for the purpose of placing to the credit of that account with the bankers the sums which he might receive in respect of the rents and profits of the Rotherwas estate, and drawing from the account the sums which he might have to pay, on account of the Rotherwas estate, or which he might have to pay to his employer, the plaintiff. I say that that account was very properly kept separate from his own account, and, at all events, as between the plaintiff and Parkes, that account, although unquestionably it was the account of Parkes, and the bankers were to look to Parkes as the only person entitled to draw upon that account, still, I say, as between the plaintiff and Parkes, that account was opened by Parkes for the purpose of keeping in that form an account of the receipts and payments by Parkes, as receiver in respect of the Rotherwas estate, and Parkes very properly intitled the account as "The Rotherwas Account," which distinctly marked it, at all events as between him and the plaintiff, as being the account of the Rotherwas estate: how far it marked it as between Parkes and the bankers I shall have occasion to refer to presently. I am now, as I have said, considering the case as between the plaintiff and Parkes. With regard to the third account which Parkes opened, the plaintiff had nothing to do with that—I mean that account which is called the "General Account." Now, whatever balance might from time to time be standing to the credit of the Rotherwas account, it is quite clear that, as between the plaintiff and Parkes, Parkes would violate his duty if he applied any part of that balance to any purposes of his own; if, for example, he had drawn out that money and applied it to any purpose of his own, the bankers knowing nothing of the matter; still, as between Parkes and the plaintiff, it would be a gross breach of duty,—a breach of that duty which Parkes owed to the plaintiff,—to apply the monies which should arise from the Rotherwas estate to any other purpose than the purpose of the plaintiff. When, therefore, Parkes drew the cheque, on the 9th of July 1847, for the 829*l.* and a fraction, which was then the

balance standing to the credit of the Rotherwas account, in order that the amount of that cheque might go towards the liquidation of the separate account of his own, on which he was debtor, without at present saying how far the bankers were affected by that, as between Parkes and the plaintiff, it was a breach of trust committed by Parkes as against the plaintiff; it was a fraud, in fact, committed upon the plaintiff; it was a misappropriation by Parkes of that which was in fact the money belonging to the plaintiff, to purposes of Parkes, and not to the purposes of the plaintiff: that, I conceive, is beyond all question. The condition of things, and the relation as between Parkes and the plaintiff (and I do not understand that there is any controversy raised on that part of the case), is stated on both sides, and it is admitted on both sides, that, whether or not the bankers have made themselves liable, as far as Parkes is concerned there is a great breach of duty, and it was very justly made a matter of observation on the part of the defendants' counsel that Parkes's own representations were such as to shew that he had been guilty of very great misconduct; and from that an argument was drawn, with more or less of weight, that he was not to be believed in the representations of fact which he made; but, at all events, I take it thus far beyond all controversy, that that act of Parkes was a great breach of duty towards the plaintiff, his employer. Now, as the agent or receiver of Mr. Bodenham, the plaintiff, he clearly was, in all senses, a trustee for him; there was a fiduciary character created between the plaintiff and Parkes. I do not know that it is very material whether this be technically called a breach of trust on the part of Parkes; but, at all events, it was a breach of a duty which Parkes owed to the plaintiff, standing towards him in a fiduciary character, in respect to the monies, as receiver of the Rotherwas estate.

Now, then, I approach the question as to the participation of the bankers in this misconduct of Parkes—how far the bankers (the defendants) were in any way participators in this misconduct of Parkes: participators in the act they were, but it does not follow, because they

were participators in the act, that therefore they were participators in the fraud of Mr. Parkes. Let us see, therefore, what was the position of the bankers in the matter. I entirely agree with many of the observations that have been made by the counsel for the defendants, that, as between banker and customer, in a naked case of banker and customer, the banker looks only to the customer, in respect of the account opened in that customer's name, and whatever cheques that customer chooses to draw, the banker is to honour. He is not to inquire for what purpose the customer opened the account; he is not to inquire what the monies are that are paid in to that account, and he is not to inquire for what purpose monies are drawn out of that account: that is the plain general rule, as between banker and customer. But now let us see whether that naked state of circumstances existed in the present case. Now the first transaction or circumstance that appears as important to note—first, in point of date—appears to be the interview which, on the 10th of June 1846, took place between Parkes and Mr. Hamp (one of the partners) and Spozzi, a clerk or cashier of the bankers. It appears that at this time there was a considerable balance, I think somewhere about 1,200*l.*, to the credit of the joint account, which I have mentioned, had been opened in the names of Blount and Parkes; but the six months during which Parkes was to keep that account open, that is, to use the name of Blount, were nearly expired, and Parkes represented to the bankers, that is, represented to Mr. Hamp and Mr. Spozzi, the cashier, that he would have occasion to draw largely for purposes of his own, and wished to know whether they would honour his cheques, that is to say, allow him to overdraw the account which he had with them. One can easily conceive there would be some hesitation in acceding to that proposal, and Mr. Hamp, very fairly, I think, said, "Well, if we are to do this for you, you ought to be doing something for us; we should expect some sort of return of obligation;" and, whether suggested originally by the bankers or offered by Parkes, this at last took place, that Parkes told the bankers that he would introduce to them the Rotherwas account. Now, referring

to the statement in the evidence of Parkes upon this part of the case, I find that he represents it thus: after stating what I have already adverted to, which is not precisely material to the present case, the particulars of that account opened in the names of Blount and Parkes, he states this, that when that joint account was closed, the balance standing to the credit of that account was transferred to the credit of his own account which he opened, and which, I should observe, was not opened until some days after this interview. It was on the 26th of June 1846 that the private account was opened, and the interview I have adverted to was on the 10th, just before the opening of the private account. He speaks of the separate account, and then goes on thus:—"The book now produced, and shewn to me at this the time of my examination, marked with the letters A. B., is the pass-book, wherein such private or office account was kept by the said defendants, the bankers." Then he goes on thus:—"Before the said joint account was closed, and on or about the 10th of June 1846, while there was a balance to the credit of the said joint account of 1,337*l.*, or thereabouts, I had an interview at the defendants' banking-house, with the defendant, Francis Hamp, and Mr. Spozzi, the cashier of the bank, touching certain pecuniary engagements to persons in London, which I was about to be called upon to meet. The six months during which I was entitled to use the name of the said Charles Blount had then nearly elapsed, and it was consequently in contemplation to close the said joint account and open a separate account. The object of that interview was to obtain leave from the defendants, the bankers, to overdraw my account from them, from time to time, as might be necessary, to the extent of about 1,500*l.*, for the purpose chiefly of making certain payments in London, and also, temporarily, the expenses of my business in Hereford. On my making the application in question, the said Francis Hamp, in the presence of Mr. Spozzi, said, that he and the said Nathaniel Morgan," the two partners, "would assent to it, and that they would communicate with the said K. Hoskins, who would, no doubt, also concur in it;"

those are the three partners. "In the course of the interview, the said Francis Hamp said to me, 'I understand, from Mr. Spozzi, that you intend to introduce the Rotherwas account; you ought to do something for us if we help you.'" I confess, it does appear to me, that the use of the word "introduce" there, which occurs more than once, is important. It is evidently not the splitting of a pre-existing account for the mere convenience of the individual keeping the account. It was a holding out to the bankers, or a conception on the part of the bankers that there was held out to them, the introduction to them, that is, the opening with them, of some account which would be for their benefit.

Now, whether the benefit they were to derive from that was a benefit merely of having an additional customer, at least an additional account on which there would generally be some balance (which is always to the advantage of the banker), or whether they contemplated something beyond that, namely, that, allowing Parkes to overdraw his own account, they might appropriate the balance which might be to the credit of the Rotherwas account, to protect themselves against the loss of such balance: whatever was the view which they had, this, at all events, appears to me to be clear in this transaction, that the question of the opening of this Rotherwas account was mooted on this 10th of June, as the introduction to them of some account, which was to be doing something for the bankers, as the bankers were doing something for Parkes: that is, for the benefit of the bankers. Well, the witness goes on in this way: "I said that I did intend to introduce that account when I became the plaintiff's receiver; and the said Francis Hamp then asked me two or three questions as to the rental of the Rotherwas estate and the balance that would probably be kept on the account. I told him the rental was about 6,000*l.* a year, and the balance I would keep as large as I could: that it would probably average about 1,000*l.* He then said that he was satisfied. The arrangements then entered into between the said Francis Hamp on behalf of the defendants, the bankers, and myself, was undoubtedly that I should be allowed to

overdraw my said separate account when the same was opened, if I would introduce to the bank, the account of the rents of the said Rotherwas estate so soon as, under my arrangements with the said Charles Blount, I became the receiver thereof. I did certainly promise the said Francis Hamp, or lead him to understand, that on my becoming such receiver I would open the last-mentioned account at the banking house of the defendants."

Now, when the evidence was read I had not heard the pleadings; and I confess I was in some doubt, especially when I came to the evidence of the defendants and found there was no evidence given on the subject of the interview in any way contradicting this, whether the matter had been so alleged in the pleadings, as to give the defendants an opportunity of meeting it, in which case I certainly should not have come to a decision without further inquiry, either by means of an issue or referring it to the Master on the facts. But I find in substance — perhaps a little more strongly put — the same statement is contained in the bill, as to what took place on the 10th of June; and when I come to the evidence given by Spozzi, who is here alleged to have been present during this interview, I do not find that Mr. Spozzi makes any attempt, or that any question is put, with a view to his making an attempt, to say that Mr. Parkes is not to be believed on his oath; he is a man who by his own shewing has been guilty of misconduct; but I see no reason, I confess, for disbelieving Parkes. I accede to the suggestion that Parkes is to be looked at with great jealousy; and if I found that Parkes positively swore one way and Spozzi positively swore the contrary, I confess I should be much more disposed to put confidence in what Mr. Spozzi stated than what Parkes stated, for the very reason that has been stated, that Parkes has been guilty of misconduct in the matter. But when I find, of the two persons present during that transaction, when both sides have the opportunity of examining each other, or of each examining both, or cross-examining if they please; when I find that one is called upon to state what took place according to his view, and the other is not called upon to state it, and when the interrogatories

abstain from giving him the opportunity of stating it, I do consider myself bound to believe the witness on his oath, and I see no reason for disbelieving him.

Now it does not stand only on the evidence of Parkes; for, although Parkes and Spozzi were the only persons present at that interview, except Hamp (who could not of course be examined as a witness), we find this corroboration, not of all the details of what is stated to have passed at this interview, but this corroboration of the substance of it, which goes to shew that the bankers knew that this was a receivership account, in respect of the rents and profits; we find on the 26th of October 1846, when the Rotherwas account was actually opened, another person intervenes, who is examined as a witness, for the previous act of opening the account was not by Parkes himself going to the bankers, but by sending Mr. Ward, his clerk. Now let us see what Mr. Ward states to have passed between him and the bankers on that occasion. Mr. Ward states—and I have not heard a word of suggestion that Mr. Ward is not to be believed—in answer to the twentieth interrogatory, after stating that he was in the employ of Parkes as his clerk and book-keeper, he says, “I was directed by Mr. Parkes, in the month of October 1846, to open an account with the house of Messrs. Hoskins & Co., of Hereford, bankers, which was then composed of Kedgewin Hoskins, Nathaniel Morgan, Francis Hamp (since deceased), and Joseph Morgan (who are named as defendants in the title to these interrogatories), for him, Mr. Parkes, in the name of the Rotherwas Estate Account. I accordingly attended at the bank of Messrs. Hoskins & Co., in Hereford, on the 26th of October 1846, and opened the said account, and paid to the credit of it, the sum of 700*l*. I saw Mr. Spozzi, the then manager of the bank, on that occasion, and addressed myself to him; but, to the best of my recollection, the defendant, Joseph Morgan, was in the bank and near enough to hear what passed between Mr. Spozzi and me. I stated to Mr. Spozzi on the last-mentioned occasion, by Mr. Parkes's directions, that the said account was to be opened under the title of the Rotherwas Estate Account, and that the cheques

which he, Parkes, would draw upon it would be so indorsed, as the money which would be paid in to the said account belonged to Mr. Bodenham (meaning Charles Thomas Bodenham, the plaintiff in this suit), and that he, Mr. Parkes, wished it to be kept separate from the other account which he had with the bank. The sum of 700*l*. which I paid in to the credit of the said account consisted of rents arising from the Rotherwas estate, which had been just received by Mr. Parkes and belonged to the plaintiff, and was to the best of my recollection chiefly composed of country bank notes.” Mr. Parkes had at that time another account with the bank, entitled “Office Account,” and which related to his business as a solicitor, and in the ensuing month of December he opened a third account, which is not material to the present case. Nothing can be more precise and clear than this, that Parkes, having sworn that on the 10th of June he had promised to introduce the Rotherwas account to these bankers as soon as he was appointed receiver, according to his arrangement with Blount, his predecessor, whatever doubt might exist as to whether Parkes accurately stated the truth when he stated that he then represented to the bankers that this was a receivership account, for the purpose of keeping the account of the Rotherwas rents, and so forth,—whatever doubt, I say, might exist on Parkes's evidence, as to whether the bankers knew the nature of the account, and that in point of fact it was Bodenham's account, not his account, in the sense that Bodenham was to draw on it, but that the monies belonged to the estate of Bodenham, and that it was the account of Bodenham's receiver,—whatever doubt might exist on Parkes's evidence, here is Mr. Ward's evidence, shewing, that when the account was opened, at the moment when the very first sum was paid in to the credit of that account, the bankers were distinctly informed of the reason why it was kept as a separate account, why the cheques were to be entitled with the words, “The Rotherwas Account.” The reason was, because the monies which had been paid in to that account, belonged to Mr. Bodenham, the plaintiff. It appears to me beyond all question, therefore, that

from the very commencement of that account, the bankers knew that the money paid in to that account were the monies of Mr. Bodenham, arising from the rents and profits of his Rotherwas estate, and that the account was kept by Parkes, not as an account of his own, in relation to his own monies which belonged to himself, but in his character of receiver to Mr. Bodenham's Rotherwas estate.

Now, whether the bankers in their own minds, or even in their own books, if the fact had been so, treated the Rotherwas account as if it had been the private account of Mr. Parkes, the question is, whether they had a right to do so; whether they had a right to say,—knowing from the facts that the money placed to that account was Mr. Bodenham's money, and that any balance standing to the credit of that account at any time was Mr. Bodenham's balance,—that they could make such an arrangement with Mr. Parkes, as that at any time they should be at liberty to appropriate the balance to the credit of that account, towards the liquidation of the balance standing to the debit of the private account of Mr. Parkes. It appears to me that, on every principle of equity, they had no right to do so; it appears to me that it is not a question whether simply, at the time when the cheque was drawn for the 829*l.*, they had a right then to allow that cheque to be placed to the credit of the other account; but whether they had a right ever to make an arrangement with Parkes to that effect; whether they had a right to say that the receiver should so deal with them as to make his principal's money at any time liable to be appropriated to discharge the private debts of the receiver to the bankers. I am quite satisfied that upon all principles of equity that could never be done; and this case illustrates what has often struck me as a very remarkable view of the principles of equity, that almost all the principles which are acted upon by a court of equity, in point of fact, are pervaded by a higher, and purer, and more exalted tone of morality than that which prevails among mankind, even among the moral portion of mankind; and I wish it to be understood that I do not think there is to be imputed to these gentlemen any design of

doing that which in their minds was dishonest or improper. I believe they had no such intention. All, I think, that I can impute to them is, that they were not aware that, according to the principles—the moral principles—of a court of equity, and acted upon daily by a court of equity, a person who deals with another, which other he knows to have in his hands, or under his controul, monies belonging to a third person, cannot deal with the individual holding those monies for his own private benefit, when the effect of that transaction is, that that person commits a fraud on a third person. That Parkes was committing a fraud in appropriating to his own purpose the money of his employer, is beyond question. The bankers did not seem to feel or be aware that they had no right, and that Parkes had no right, to enter into any arrangement, the effect of which was to make the money (although Parkes was the only person who could draw on that particular account) liable to any defalcation, any deficiency that might exist upon the private account of Mr. Parkes with the bankers.

Now, I do not know that in the view which I take of this case, it is necessary to consider what the bankers, from time to time in the course of the transaction, considered to be the state of circumstances. The two witnesses, Messrs. Spozzi & Fryer, labour very much, or rather the interrogatories have laboured, to bring them over and over again to repeat this, particularly the deposition which is in answer to the twenty-sixth interrogatory, that Bodenham, the plaintiff, never told them that these were his monies; that Bodenham, the plaintiff, never told them that this was his account; that Bodenham, the plaintiff, never claimed to have any controul over that account, and so on: that is not the question. Again, it appears to me immaterial to consider whether their suggestion is well founded, that the bankers, at the time the account was settled, treated the three accounts as the accounts of one single customer. If it were necessary to consider what is meant by that deposition, I confess I am at a loss to know what was in the mind of the witnesses, when they so deposed; for the deposition amounts to this, that when the account was settled the bankers treated and

acted upon the three accounts, as the accounts of one single customer. Now, that led me to suppose that, when I came to look at the books, I should find that when the accounts were settled (which appears to have been done half-yearly or yearly), there was an amalgamation of the balances of these three accounts, to see what the result of the three would be. But so far from that, there is never anything of the kind in the books. If, by the term "the time of settling the accounts," they mean the 9th of July 1847, when two of the accounts were closed, even then the accounts are never treated as one and the same account, or the account of one customer, any further than this, that by arrangement between them and Parkes, the balance appearing to the credit of each of the two accounts, was carried to the credit of the other account (the private account), on which there was a debit; but in no other sense, at the time of settling the account, did the bankers treat and act upon the three accounts, as the account of one and the same customer. If it be meant that the accounts were kept in the name of the same individual, then it is perfectly true; but it is a strange mode of putting the proposition, namely, for the purpose of alleging that the accounts were headed in the name of Parkes, to put it in this shape, to say that the bankers, at the time of settling the accounts, treated and acted on the three accounts as one. It appears to me to be really immaterial what view the bankers took of it, between the time when the Rotherwas account was opened and the 9th of July 1847, when the balance of that account was transferred to the credit of the private account; because I find at the very opening of the account, nay, some months, three months at least, before the opening of that account, the bankers were well aware that that account was the account of Mr. Parkes, as receiver of the Rotherwas estate; and that the monies which were to be paid in to the credit of the account, were the monies of Mr. Bodenham, and that it was for these very reasons that that account was to be kept as a separate account, and so headed.

I am constrained to arrive at the conclusion that the bankers, although I must exonerate them from any deliberate intention

to commit a robbery or commit a fraud, still were not only parties to the simple fact of the transfer, but were parties to the fraud in question, in this sense, that they were aware of the circumstances which made it a fraud in Parkes, to make the transfer to his private account, and being cognizant of that, and having been cognizant of it before the time when the account was opened under the name of "The Rotherwas Account," and being cognizant of it throughout, they concur in a transaction, the effect of which is, that for their own pecuniary benefit an act is done by Parkes which is a fraud upon the plaintiff. Now, according to the plain principles of a court of equity, such an act never can be sustained; a party cannot retain the benefit which he has obtained from being a party to such an act, with such knowledge of the nature of the act.

I am, therefore, under the necessity of decreeing the repayment of the 829*l.* 11*s.* 9*d.* by the defendants, the bankers, to the plaintiff. With respect to the question of interest, it appears to me that I cannot give any higher interest than the interest which the bankers allowed upon the account. If there had been no interest allowed, I do not think I could give any interest at all; but considering that this was transferring, to the detriment of Mr. Bodenham, from an account which was yielding interest, a sum of money which if it had still stood there would be bearing interest, I think it ought to be with interest, at the same rate at which the interest was allowed by the bankers.

TURNER, V. C. }
Nov. 14, 21. } ALLIN v. CRAWSHAY.

Deed—Marriage Settlement—Omission—Life Interest implied.

A marriage settlement omitted, in an event which happened, to declare a life interest in the settled fund for the intended wife. The Court being of opinion that the settlor did not intend to reserve any portion of the fund for himself, declared the wife to be entitled by implication to a life interest in the settled property.

This was a claim by the assignees in insolvency of Clara Crawshay, widow, for the payment to them of the dividends in certain stock, settled by the father of the insolvent on her marriage with her late husband, deceased. The trusts of the settlement were declared to be to pay the dividends of 1,900*l.*, 3½*l.* per cent. annuities during the joint lives of the husband and wife, to the wife for her separate use, and if she died in the lifetime of her husband to transfer the stock to him absolutely; but if the husband should die in the lifetime of the wife, then to transfer the same to such persons as the wife should by will appoint, and in default of appointment to her next-of-kin, according to the Statute of Distributions. The question was, whether the widow took a life interest by implication in the dividends of the settled stock.

Mr. Renshaw appeared for the plaintiffs, and

Mr. Bacon and *Mr. Rogers*, for the trustees.

TURNER, V.C., after referring to *Tunstall v. Trappes* (1), said, that as he did not think the settlor intended to reserve to himself any portion of the trust fund, he was of opinion that the widow took a life interest in it by implication. His Honour, however, declined to make a decree in the absence of the settlor's personal representatives; but they having subsequently appeared and declined to contest the question, a decree was made, declaring the widow to be entitled to a life interest in the dividends of the trust fund, and directing the fund to be brought into court, and the dividends paid accordingly to the plaintiffs.

TURNER, V.C. } *In re* MAGDALEN LAND
March 27. } CHARITY.

Charity — Information — Petition — Sir Samuel Romilly's Act.

A claim to participate in charity funds, which had been appropriated for 240 years

(1) 3 Sim. 312 (*Margaret Tunstall's case*). .

to certain parishes, ought to be brought before the Court by information and not by petition, under Sir Samuel Romilly's Act (52 Geo. 3. c. 101).

This was a petition of the churchwardens of St. Clement's and All Saints', in Hastings, stating that certain lands had become vested in the mayor, jurats, and commonalty of Hastings, in the reign of Queen Elizabeth; that there was not any deed or instrument declaring uses of the lands; that the proceeds had been distributed yearly at Easter and Christmas for 240 years, by the petitioners' predecessors in office, amongst the poor of their respective parishes; that new trustees had been appointed in 1836, under the Municipal Corporations Act: and that by an order of the Court, made in January last, on the petition of certain parishioners of other parishes within the liberties, but not within the town and port of Hastings, and which petition had been served upon and was not opposed by the trustees of the charity property, but had not been served on the present petitioners, it was referred to the Master to inquire what parishes were within the town and port of Hastings, how the income had been applied, and to settle a scheme. The petition prayed that the above order should be discharged.

It appeared that a memorial had been made by the corporation of Hastings, in 1812, under the 52 Geo. 3. c. 102, stating that the poor of the town and port of Hastings were entitled to the charity property.

Sir W. P. Wood and *Mr. Pitman* appeared for the present petitioners.

Mr. Baily, for the former petitioners.

Mr. Welch, for the trustees of the charity; and

Mr. W. M. James, for the Attorney General.

TURNER, V.C.—I think that after the funds of the charity have been distributed, for so long a period, among the poor of two parishes, if a claim is set up by the poor of other parishes, the case is not one to be decided under Sir Samuel Romilly's Act, and that in the case of an adverse

claim, the Attorney General must be a party to the proceedings. The only evidence that the corporation were trustees for the poor of the town and port of Hastings appears to be the memorial made in 1812, and that document may admit of explanation if the case be brought before the Court upon an information, stating that the corporation had distributed the funds among the two parishes only, and contending upon that memorial that the two parishes within the town and port of Hastings are not entitled to the fund exclusive of the other parishes within the liberties. The order made on the former petition must be discharged, as it has been made adversely to the petitioners without their having been served with the petition. If the parties think that nothing can be added to the facts before me, I have no objection to state my opinion, that on the evidence which has been produced, the property has been applied for so long a period to the poor of the two parishes mentioned in the petition, they alone are entitled to it.

KINDERSLEY, V.C. } *In re MAI.*
June 26, 30.

Trustee Act—Trustee out of the Jurisdiction.

The Court will not, under the Trustee Act, order the removal of a trustee merely on the ground of his having gone out of the jurisdiction.

This was a petition, under the 22nd and 23rd sections of the Trustee Act, 13 & 14 Vict. c. 60, for the appointment of a new trustee in the place of a trustee who was stated to be residing in Jamaica, out of the jurisdiction of this Court. The petition also prayed that the new trustee and the continuing trustee of the fund, which amounted to 1,035*l.*, might be appointed guardians of the four infants who were entitled to the money; and that a sum of 263*l.* might be sold out and applied for the past and future maintenance of the infants.

Mr. E. Collins appeared in support of the petition.

The VICE CHANCELLOR reserved his judgment, in order to confer with the other Judges.

June 30.—KINDERSLEY, V.C.—It does not appear to me that I am authorized under the Trustee Act to remove a trustee merely because he is out of the jurisdiction. It might be that he is only absent for a limited time. The words of the act are certainly very general; but it never could have been the intention of the legislature that a trustee should be removed without some further reason than his being out of the jurisdiction; there being no evidence to shew that he does not intend to return to this country. I think, however, that there is no objection to the appointment of the two gentlemen proposed to act as guardians; and it seems quite right to order the sum stated in the petition to be paid for the past and future maintenance of the infants.

KINDERSLEY, V.C. } *In re BANGLEY'S*
July 16. } TRUST.

Trustees Relief Act—Costs of obtaining Money out of Court.

A sum of money having been paid into Court under the Trustees Relief Act, a petition was presented by the tenant for life for payment of the dividends:—Held, that the corpus of the fund was not liable to bear the costs of the application.

Sir George Bangley, by his will, gave and bequeathed a sum of 6,000*l.* (3*l.* per cent. Life Annuities) to trustees, upon trust, to pay the interest and dividends thereof to Isabella Emblen (afterwards married to William King), for her separate use; and after her decease he directed the said sum of stock to be held in trust for the children of the said Isabella King in manner therein mentioned. But in case she should die without children, then he directed the said sum of stock to be divided equally between three different charities specified. The trustees paid the money into court under the Trustees Relief Act, and Mrs. King, who had no children, presented a petition for payment of the dividends to her for

life; and the petition prayed that the costs of the application might be paid out of the *corpus* of the fund in court.

Mr. Goren appeared in support of the petition, and submitted that the costs ought to be paid out of the *corpus*. A similar case had been decided by Lord Cranworth, in *Re Ross's Trust* (1). This case had been recently followed by the Master of the Rolls. The charitable institutions which were entitled in remainder had not been served, in order to save expense; but if the Court thought they should be served, it could be done before the order was made.

KINDERSLEY, V.C.—I certainly do not think that the costs of this application ought to come out of the *corpus* of the fund. It was only a week ago that I consulted with the other Judges upon this very point, and I found that a difference of opinion existed as to what the practice ought to be; but, until the practice has been settled, I must act upon what I consider right. In this case the application is solely for the benefit of the tenant for life, and it would not be fair or just, in my opinion, to make the remainder-man bear the costs. Each party ought to pay the expenses of such proceedings as are necessary for the benefit of each. It is true that if the costs were paid out of the surplus, the tenant for life would lose a portion of income; but to make it fair for both parties, the tenant for life ought then to bear a proportion of costs of the remainder-man. I do not think that there is any analogy to the course pursued in an administration suit; the costs would then be computed up to the time of the fund being ascertained and realized. That would be equivalent to the costs of paying the money into court under the Trustee Act, which, as they affect the *corpus*, are properly made payable out of the fund; but these cases are more analogous to applications by parties who are entitled to specific funds which have been carried to their separate account. I shall follow the same rule in such cases as these; and direct that the costs be paid by the tenant for life.

TURNER, V.C. }
1851. } CHADWICK v. MADEN.
July 3, 8, 9, 28. }

Vendor and Purchaser—Specific Performance — Contract — Sub-Purchaser — Agent—Parties.

A. signed the usual agreement for purchase at an auction, and also a memorandum that he had purchased as trustee for B, who was present and paid the deposit. The abstract of title was sent to a solicitor, but whether he acted for A. or B, or both, was disputed, and was afterwards sent by the vendors to B's solicitor. On bill filed by the vendors against A. and B. for specific performance, A. stated as above, but B. stated that he had bought the property as sub-purchaser from B:—Held, that the contract having been entered into by the vendors with A, the bill must be dismissed as against B, but that A. was not bound by any communications or proceeding which had taken place as to title or otherwise between the vendors and B.

This was a suit by vendors for specific performance of a contract for sale. The property was sold by auction, at which the defendant Maden was declared the highest bidder, and signed the usual agreement to purchase, and also a memorandum stating that he had purchased as trustee for the co-defendant Lees, who was present at the auction and paid the deposit. The abstract of title was sent to a solicitor, but on whose behalf was in dispute. The abstract was subsequently sent to Mr. Hayworth, the solicitor of the defendant Lees. The bill was filed against Maden and Lees; the former stated that he purchased for Lees, and the latter that he had bought the property as sub-purchaser from Maden at a less sum than it had been sold for at the auction, subject to the title being approved. The other facts and the arguments for the defendants are stated in the judgment.

Mr. Rolt and Mr. W. M. James appeared for the plaintiffs.

Mr. Bethell and Mr. Pitman, for the defendant Maden; and

Mr. Bacon and Mr. Osborne, for the defendant Lees.

(1) 1 Sim. N.S. 196; s. c. 20 Law J. Rep. (N.S.) Chanc. 293.

The following cases were cited on behalf of the respective defendants—

Johnson v. Ogilby, 3 P. Wms. 279.

Ex parte Hartop, 12 Ves. 352.

Wilson v. Hart, 1 J. B. Moore, 45.

Maclean v. Dunn, 4 Bing. 722; s. c. 6 Law J. Rep. C.P. 184; 1 Moore & P. 761.

— *v. Walford*, 4 Russ. 372.

Tasker v. Small, 3 Myl. & Cr. 63;

s. c. 7 Law J. Rep. (N.S.) Chanc.

19; overruling s. c. 6 Sim. 625;

5 Law J. Rep. (N.S.) Chanc. 321.

Taylor v. Salmon, 4 Myl. & Cr. 134.

TURNER, V.C.—In this case, each of the defendants has insisted that the bill ought as against him to be dismissed. The defendant Lees contended that it should be dismissed as against him upon the ground that there was no contract between him and the plaintiff, and I think the bill must be dismissed against this defendant upon that ground. This defendant, repudiating any trust in Maden for his benefit, the Court cannot, in this suit, determine the question, whether such a trust exists or not. If Maden be compelled to perform the contract, he must seek his remedy against Lees in another suit, and the dismissal of this suit as against Lees will not affect the remedy; for the question between Maden and Lees will not be whether Maden was bound to perform the agreement, but whether, having been compelled to perform it, he is entitled to be indemnified by Lees; and he (Lees) having insisted on being dismissed from this suit, could not be allowed to set up against Maden that the proceedings were improperly had in his absence. But, although I think the bill must be dismissed against Lees, I think it must be dismissed against him without costs; for the evidence clearly proves that the memorandum signed by Maden was signed in his presence, and there being no proof on his part that he at any time communicated to the plaintiffs the parol contract with Maden which he now sets up, if, in truth, it ever existed, his conduct throughout must have led the plaintiffs to believe that he claimed under the contract; and I am of opinion that if he had claimed under the contract he would have been a proper party to the suit.

The defendant Maden contended that the bill should be dismissed as against him upon three distinct grounds: first, that the case made by the bill was not the case of purchase alone; secondly, that he bought, and was known by the plaintiffs to have bought, merely as the agent of Lees; and thirdly, that if he was ever liable on the contract the plaintiffs have discharged him from the liability by adopting Lees as the purchaser. But I am of opinion that the case of the defendant Maden cannot be maintained upon any of these grounds.

As to the first, the bill distinctly alleges that Maden became the purchaser at the auction and signed the agreement, and that Lees claims an interest in the contract under some agreement entered into with Maden; and it does not appear to me that the next allegation, which was most relied on in the argument on this point, that, in fact, Maden entered into the agreement as well on behalf of Lees as himself, is inconsistent with Maden's being the sole purchaser, as it may well be that he alone purchased from the plaintiffs, though he made the purchase on his own as well as on Lees's behalf; and the succeeding allegation proves that this was intended by the bill, for it is clear that Maden has by writing declared himself to be a trustee for Lees in respect of some interest in the contract, and in addition to this, the bill charges that the plaintiffs have never been parties to any substitution of Lees for Maden.

As to the second ground, it no doubt appears that Maden immediately after the auction represented Lees to be the purchaser, and therefore himself to be an agent merely; but it distinctly appears by the evidence that the plaintiffs' solicitor on being requested to insert the name of Lees in the agreement as the purchaser, declined to do so, and insisted on retaining Maden as the purchaser, and drew up the agreement of purchase in his name accordingly, and that Maden then signed the agreement; and I think that assuming Maden to have been an agent merely, and independently of the fact of his having become the purchaser at the auction, the signature of the agreement was sufficient to subject him to the liability of performing it, it being clear that an agent may become liable upon his own undertaking.

As to the third point insisted upon on Maden's behalf, I think that, in point of fact, the communications upon the title have, at all events since Mr. Hayworth was concerned, been had with him as the solicitor of Lees; but I am of opinion that Maden is not thereby discharged from the contract of purchase. Maden signed the memorandum to which I have referred, at the very time when he signed the agreement, and thereby and otherwise represented to the plaintiffs that Lees was entitled through him to the benefit of the contract, and in this state of circumstances I think the communications had with Lees must be taken to have been had in furtherance of the original contract, and not upon any new or substituted contract. Maden, as between himself and the plaintiffs, had represented himself to be placed in the position of a formal party, and he cannot, I think, claim to be discharged upon the ground that the plaintiffs so treated him. I think, therefore, there must be a decree against Maden for specific performance.

It was argued, on the part of the plaintiffs, that Lees had accepted the title, and that the decree, therefore, ought to proceed upon that footing. But it is one thing to hold that Maden is not discharged by the dealings with Lees, and another that he is bound by all that was done by Lees in the course of those dealings. I think that the communications had with Lees upon the title were had with him in his own right, as claiming through Maden, and not as the agent of Maden, and that Maden, therefore, is not bound by any acceptance of the title by Lees, if he, in fact, accepted it, as to which I entertain some doubt. There must, therefore, be the usual references as to title.

Another point which was raised on the part of the plaintiffs was, as to some machinery which was to be taken by the purchaser at a valuation, to be made by two arbitrators, to be nominated, one by the vendors and the other by the purchaser, or upon the purchaser's default, by the vendors, and in case the arbitrators did not agree, by an umpire to be appointed by them. Notice having been given to Maden to name an arbitrator to value this machinery, he omitted to do so,

and therefore the plaintiffs, the vendors, named an arbitrator for him, and the arbitrators having named an umpire, and not having agreed in their valuation, the machinery was valued by the umpire. The question was, whether Maden ought to be held bound by this valuation, and I think that he ought not: it was made at a time when the plaintiffs were in treaty with Lees, and when Maden might well expect that the contract would be performed by him.

TURNER, V.C. }
 1851. } COLLETT v. MORRISON.
 June 16.

Insurance Company—Agreement—Policy—Variation.

If the policy varies from the agreement to effect an insurance, a court of equity will interfere and deal with the case of the insured on the footing of the agreement, and not of the policy.

Observations on relief in equity against insurance companies in cases of fraud.

This was a bill by the plaintiff, John Collett, against the defendant, Peter Morrison (the managing director of the Britannia Life Assurance Company), and W. J. Richardson, to recover the amount secured by a policy of assurance effected on the life of the plaintiff's deceased wife, by the defendant Richardson as her trustee. It appeared from the pleadings that the defendant Richardson had insured the life of Mrs. Emma Collett, as her trustee, for 999*l.*, at an annual premium of 34*l.* 9*s.* 2*d.*, in the Britannia Life Office. Before paying the first premium, and in consequence, as it was stated, of being informed that the company would not recognize an insurance effected by a trustee without an insurable interest, the defendant signed another printed form of proposal, in which he simply gave his own name and residence and description as those of the party proposing to assure; but it did not appear that this second proposal had been laid before the directors. The policy recited that the defendant Richardson had agreed to effect an assurance with the com-

pany for the amount stated, on the life of the wife of the plaintiff, and had delivered a certain declaration as to her health and habits. Upon the policy was an indorsement, to the effect that if, either at or after the issuing of a policy, it should be subject to any trust, the receipt of the trustee for the time being should discharge the company. The policy was sent from the office of the company to Mrs. Collett. On the death of Mrs. Collett the defendant Richardson brought an action against the company on the policy, and claimed it for his own benefit. The company resisted the action on the ground that Richardson had not any interest in Mrs. Collett's life, and also on the grounds of fraud and misrepresentation. Pending the action, the plaintiff Collett filed a bill against Richardson, praying for a declaration that the latter was a trustee for the plaintiff, and for permission to use the defendant's (Richardson's) name in an action against the company, and for an injunction to restrain Richardson's action against the company. The Court directed an issue on the question of Richardson's trusteeship; and the question having been subsequently referred to arbitration, Richardson was declared by the award of the arbitrator to be a trustee for the plaintiff. The plaintiff then filed his present bill, stating as above, and charging, *inter alia*, Richardson with fraudulent acts towards and collusion with the company, in respect of his claim to the policy, both before and after the award. The bill prayed a declaration that in equity the insurance was effected by the plaintiff's deceased wife, through the defendant Richardson as her trustee, for her separate use for life; that the policy ought to be or considered as effected accordingly, and the amount paid to the plaintiff; that Richardson had committed a fraudulent breach of trust in collusion with the company, and that he and they ought to pay the costs of the suit.

The grounds of defence were that the first proposal had been abandoned, and the second accepted on Richardson's own account; and that the policy was not under seal, and might be sued upon at law in the name of the plaintiff without

the aid of a Court of Chancery or the necessity of a suit in equity.

The Solicitor General (Sir W. P. Wood) and *Mr. W. M. James*. appeared for the plaintiff;

Mr. Rolt and *Mr. Cairns*, for the defendant Morrison; and

Mr. J. Baily, for the defendant Richardson.

June 16, 1851.—TURNER, V.C., after stating the facts, said—The question first to be considered is, what is the course of the Court in cases of this nature? and fortunately there is no difficulty upon this point, as there is direct authority upon it. In *Motteux v. the London Assurance Company* (1) the insurance of a ship was made by the policy to commence from the time of her departure from Fort St. George, instead of commencing from the time she should arrive at Fort St. George, as according to the label of the agreement it ought to have been. Lord Hardwicke there says, "The label is a memorandum of the agreement, in which the material parts of the policies are inserted. In the label the words are *at and from*; this certainly includes the continuance at Fort St. George; and in the first part of the policy the voyage is described in the same manner; but in the latter, according to the constant form, it points out what shall be called the *risque* and the *adventure*; there it is confined to the departure only from Fort St. George. It has been contended, on the part of the plaintiffs, that it ought to be construed equally the same as if the words *at and from* were actually inserted in this part of the policy. It is pretty difficult to reconcile the first part of the policy and the latter; but the label makes it very clear, for that considers the voyage and the *risque* as the same, and therefore it was only the mistake of the clerk, which ought to be rectified agreeable to the label." This case appears to me fully to establish that if there be an agreement for a policy in a particular form, and the policy be drawn by the office in a different form varying the right

(1) 1 Atk. 546.

of the party assured, a court of equity will interfere and deal with the case upon the footing of the agreement and not of the policy. Authority, perhaps, was not wanted upon the point, as it is the constant course of the Court to rectify mistakes, and the decisions upon that subject would seem to govern the question; but it is satisfactory to find a case which in principle so nearly resembles the present.

Adopting, then, the principle of the case and decisions to which I have referred, I have next to consider whether there was in this case an agreement to grant the policy to Richardson in trust for Mrs. Collett. It is said on the part of the company that there was no such agreement: first, because the examination of the directors extended only to the age and the health of the party on whose life the insurance was proposed and to the amount of the insurance; and, secondly, because the approval of the directors was subject to its being afterwards found by the officers of the company that the proposal approved could be carried into effect consistently with its rules and regulations. But with reference to the first of these grounds, one of the defendants' own witnesses states, that the directors in considering proposals looked to the names of the proposers; and another of their witnesses states, that it seems impossible to have read the first proposal without seeing the words "Mrs. Emma Collett, by W. J. Richardson, Esq. her trustee." I cannot impute to the directors that they did not in this case look to a matter to which it was their habit to look; or that they overlooked what so clearly appeared on the face of the proposal. With reference to the second ground, which is very loosely if at all alleged by the answer, I do not find that the evidence goes nearly so far or at all shews that it was not the duty of the officers of this company to act upon any proposal approved by the directors, if it could in any way be carried out. Even supposing the officers had a more extended power, and could alter the substance of the agreement, and not merely the form of carrying it out, surely the agreement of the directors remained, if the officers acted

upon it, and meant to alter it in form only and not in substance. It is to be seen, therefore, what was the opinion of the officers of the company with reference to the proposal in question in this case. Did they or did they not take the second proposal, and prepare the policy in its present form for the purpose of carrying out the first proposal? The evidence I think leaves no doubt upon this subject. The witnesses on the part of the company do not state that the policy was prepared with any different view; and, indeed, the point raised by the answer is, that there was no original contract, not that there was a substituted one. The original proposal is not cancelled, but it is annexed to the second proposal, and the payment of the premium is indorsed upon it. The second proposal is not even submitted to the directors, by whom, and not by the officers, any contract binding upon the company would have to be made; and the policy when issued is sent to Mrs. Collett. I am of opinion, therefore, that the directors must be held to have accepted the first proposal wholly and not in part only, and that at the time when this policy was issued the agreement made with the directors by the acceptance of the first proposal remained in force: conclusions at which I arrive the more readily from its appearing, by the fourth condition indorsed upon the policy, that it was contemplated that policies might be issued which were subject to trusts at the time of being granted.

It may be said, indeed, that taking the rules and regulations of the company and the provisions of the statute (2) together, the agreement made upon the first proposal could not by any means have been carried out, and that the Court, therefore, ought not now to act upon it; but independently of what I have already observed as to policies in trust being contemplated, I think that the company having had the chance of the agreement turning out in their favour, cannot be permitted to escape from it now that it has turned out against them.

With reference to the questions raised upon the statute, I do not think it ne-

(2) 14 Geo. 3. c. 48.

cessary to enter into them. If the statute had prohibited any policy being granted to one person in trust for another, where both names appeared upon the face of the policy, or if the effecting such an assurance had in any manner contravened the policy of the statute, I might have felt myself bound to abstain from any interference, but I am of opinion that the statute has no such operation, and is directed to a wholly different object.

It was suggested on the part of the company that the policy, not being under seal, the plaintiff might bring an action upon it in his own name. I much doubt whether, under the circumstances of this case, such an action could be maintained, and at all events I think it would be attended with many difficulties, and the plaintiff having, in my opinion, a sufficient case in equity, I see no ground for exposing him to difficulties at law.

In dealing with this case I have abstained from entering into the question of fraud, as I do not believe that any actual fraud was intended; but in having taken this course I must not be understood to give any countenance to the notion that insurance companies, preparing and issuing policies under such circumstances as occurred in the present case, would not be held liable in equity on the ground of fraud. The case of fraud is more strong for the interference of the Court than the case of mistake. Lord Eldon in *Ex parte Wright* (3) refers to the distinction in cases where the duty of perfecting an instrument rests on the party who is to become liable under it. The distinction is clearly well founded in principle, and I believe supported by authority. I have abstained also from entering into the case of collusion; but I certainly must not be understood to express any favourable opinion of the conduct which has been pursued in this case, either by the defendants or by their legal advisers. In the result, I am of opinion that an issue or issues must be directed upon the question as to the health of Mrs. Collett at the time when the first proposal was made.

TURNER, V.C. }

1852.

July 18;

Aug. 20.

WATERHOUSE v. STANSFIELD.

Conflict of Laws—Colonial Law—Equity—Jurisdiction—Contract—Lex Loci Rei sitæ—Lex Loci Contractûs.

A mortgagor resident in this country mortgaged, by deed executed in England, to mortgagees also resident here, real estate in Demerara, and before the mortgagees completed their title to the mortgaged property according to the laws of Demerara, the mortgagor became bankrupt and his assignees in this country sold the property and received the proceeds. Whether the rights of the contracting parties have ceased to be governed by the law of Demerara, the lex loci rei sitæ, and must be governed by the law of this country, the lex loci contractûs—quære.

This was a claim by the plaintiffs as equitable mortgagees of a real estate in Demerara agreed to be purchased by Shute Barrington Moody (since become bankrupt), against his assignees in bankruptcy.

By indenture of the 10th of October 1846, between S. B. Moody, of Liverpool, of the one part, and the plaintiffs, brokers and co-partners at Liverpool, under the firm of Waterhouse & Sons, of the other part, reciting that Moody had, on the 14th of August 1845, agreed to purchase from William Grant, of Demerara, certain real property there situated, for 4,250*l.*, on the security of which he had borrowed 2,000*l.* from the plaintiffs, it was witnessed that Moody conveyed to the plaintiffs the property agreed to be purchased and the benefit of the agreement, and covenanted to do all necessary acts for conveying and transporting it to the plaintiffs, according to the laws of Demerara, with the power to nominate an attorney to accept the transport, &c., and under which an attorney was duly appointed. The trusts of the conveyance were to secure to the plaintiffs the repayment of the 2,000*l.* and interest. There being at the time of the conveyance the sum of 1,010*l.* due from Moody to W. Grant, on the balance of the purchase-

(3) 19 Ves. 255.

money, secured by the promissory note of the former, and which the plaintiffs, with his concurrence, paid to W. Grant, the latter duly authorized an attorney in Demerara to transport the property to the attorney of the plaintiffs. Previously to the completion of the transport, Moody, by indenture of the 15th of January 1847, mortgaged the property to Thompson, Hankey & Co. subject to the prior mortgage, for 1,000*l.* and interest; on the application of whom, the Supreme Court in Demerara interdicted the completion of the transport to the plaintiffs. Moody became bankrupt in May 1847, and the defendants completed his title to the property in Demerara, conveyed it to a purchaser for value, and received the proceeds of sale. The plaintiffs claimed a declaration that the defendants were trustees for them of the proceeds to the amount of 3,010*l.* and interest, and that they might be ordered to pay the same, with costs.

The claim was resisted by the defendants, on the ground that, by the law of Demerara, they were entitled to the proceeds of sale. They stated that real estate in that colony was not affected by a mortgage made in England; that a mortgage of such estate must be passed by one of the Judges of the Supreme Court, after notice by advertisement in the official gazette of Demerara on three successive Saturdays; that every creditor had a right by the law of the colony to prevent his debtor, whether solvent or insolvent, from giving a preference to another creditor by mortgage or otherwise; and that the bankruptcy of Moody having been pleaded in bar to the suits of his said mortgagees in Demerara, such suits had been abandoned, and become determined.

Mr. Bacon and *Mr. Glasse*, for the plaintiffs, contended that as the plaintiffs and the bankrupt (the contracting parties), as well as the assignees of the latter, were resident in this country, the property came to the hands of the assignees charged with the plaintiffs' equity, and therefore the defendants were bound to pay the mortgage debt out of the proceeds of the sale; and *à fortiori* as the plaintiffs had paid part of the purchase-money of the estate to the

vendor. They cited *Ex parte Pollard, re Courtney* (1), and *Martin v. Martin* (2).

Mr. Rolt and *Mr. Lewin*, for the defendants, cited—

Burge's Commentaries on Colonial and Foreign Laws, vol. 2, p. 582.

Van der Linden's Institutes of the Laws of Holland (Henry's translation), p. 177, n.

Voetius De Pignoribus, &c. lib. 20, tit. 1. ss. 9, 10.

Mr. Bacon replied.

Aug. 20.—TURNER, V.C. delivered the following judgment.—Upon the argument of this claim several points were made on the part of the plaintiffs. First, that the defendants, the assignees, are bound by all the equities by which the bankrupt was bound; and that the Court, finding them in possession of the proceeds of an estate which by contract with the bankrupt was bound in favour of the plaintiffs, will give effect to the contract against those proceeds. Secondly, that it is not clear that the creditors could have stopped the mortgage; and assuming that they could, that they took no steps for the purpose. Thirdly, that at all events the plaintiffs are entitled to a lien upon the proceeds of the sale for the purchase-money, which they paid to W. Grant.

The case of *Ex parte Pollard* was cited upon the first point; but in that case the law of Scotland presented no impediment to the mortgage being completed; the contract bound the bankrupt, and therefore his assignees, and there was no impediment to its completion. But in this case the contract indeed may bind the bankrupt and the assignees, and yet, by the law of Demerara, may not have been capable of being fulfilled. The two cases, therefore, are widely different; and I cannot hold this case to be governed by *Ex parte Pollard*.

If it can be decided in favour of the

(1) Mont. & C. 239, and 4 Deac. 27, reversing s. c. 3 Mont. & Ayr. 340; 2 Deac. 367; 6 Law J. Rep. (N.S.) Bankr. 95.

(2) 2 Russ. & M. 528.

plaintiffs without some further inquiry, it must, I think, be upon the more broad and general ground that the property having been sold, and the proceeds of the sale received by the defendants, the assignees, the rights of the parties have ceased to be governed by the law of Demerara, the *lex loci rei sitæ*, and must be governed by the law of this country, the *lex loci contractus*. No authority has been cited, nor have I been able to find any which touches this point; but I think it must depend upon the question, how far the *lex loci rei sitæ* extends. If it regulates not merely the disposition of the estate itself, but also the disposition of the proceeds of the estate, it cannot, I think, be permitted that a different law should intervene and defeat those regulations. The interest in the proceeds is in substance and effect an interest in the estate itself, and no rule is more universal than that the *lex loci rei sitæ* governs the disposition of the estate. If the *lex loci rei sitæ* only permits the alienation of the estate upon the terms of the proceeds being applied in a particular manner, this is a restraint upon the alienation; and there is no doubt that the restraints which may be put upon alienation must in all cases be governed by the *lex loci rei sitæ*. Again, how could a contract to dispose of the proceeds of an estate in a manner contrary to that prescribed by the *lex loci rei sitæ* be enforced? I cannot, therefore, adopt the broad position contended for on the part of the plaintiffs, but must send the matter to the Master for further inquiry as to the law of Demerara.

The second point is also one upon which further inquiry must, I think, be directed.

Upon the third point it was argued, on the part of the defendants, that the monies paid by the plaintiffs to W. Grant were part of the monies advanced upon the mortgage; and that the plaintiffs, therefore, could claim no lien in respect of such monies: and further, that the plaintiffs have, by the claim, put their case wholly upon the mortgage, and could not, therefore, be permitted to maintain it upon the claim of lien. But the claim states the payment to W. Grant; and I think there is enough upon it to warrant the Court in acting upon the lien, if it in fact exists. Whether it

exists or not is a question of Demerara law, and must therefore, I think, also be the subject of inquiry.

LORDS JUSTICES.
1852.
July 20, 26.

{ *Ex parte* WOOLMER AND
OTHERS, *in re* THE DIRECT
EXETER, PLYMOUTH AND
DEVONPORT RAILWAY
COMPANY.

Company — Winding-up Acts — Appeal from Order for Winding up and for Calls for Expenses.

Seven persons were elected the managing committee of a company, and performed acts in that character. The scheme proved abortive. Actions were brought against one of the seven, and he obtained an order for winding up the company. Others of the seven had made a similar attempt, but were not in time to do so before the order was actually obtained. An official manager was appointed, and the order was prosecuted with the concurrence of all seven. Four of the seven appealed from the order for winding up, and also from an order for a call to pay the costs and expenses and the debt; but it was held, first, that whether the order for winding up were rightly or wrongly made, the four could not move to discharge it; and, secondly, that the order for the call was properly made on the seven members of the managing committee.

The above-named abortive company was started by persons who denominated themselves "the provisional committee," and they provisionally registered the association, and afterwards called a meeting of the committee, on the 7th of October 1845, at which thirty-one persons attended, and out of them seven, namely, Mr. Woolmer, Mr. Bastard, Major D'Urban, Col. Ellis, Mr. Kingdon, Mr. Salter, and Mr. Tanner, were elected the committee of management. That body opened a banking account, appointed engineers, surveyors, and solicitors; and under their direction the line was surveyed; they published the parliamentary notices, and did other acts. They allotted shares in December, and no deposits being paid, the scheme was abandoned in January following. Several of the creditors

of the company brought actions in 1848 against Col. Ellis, and among these actions was one by Mr. Floud, the solicitor of the company, for 1,508*l.* Some of the members of the managing committee intended and (on the evidence) endeavoured to obtain an order for winding up the company, but Col. Ellis anticipated them and obtained such an order on the 8th of June 1849, and the order was served on Mr. Salter, one of the seven. Mr. Sandeman was appointed official manager on the 10th of July, the appointment having been discussed before the Master in the presence of the solicitors for Mr. Woolmer, Mr. Bastard, Mr. Kingdon and Mr. Salter. The claims made against the company exceeded 1,700*l.* For a time the provisional committee-men and the allottees were placed on the list of contributories, but they subsequently were removed on appeals, and the seven were ultimately declared the only contributories, and the proceedings thus taking place were the occasion of a large amount of costs being incurred. The four gentlemen, Mr. Woolmer, Mr. Bastard, Mr. Kingdon and Mr. Salter presented a petition to Vice Chancellor Parker, on the 15th of May 1851, to discharge the winding-up order, but on the 26th of January 1852 it was dismissed, with costs. The Master then made a call of 400*l.* on each of the seven managing committee; but that order, on appeal, was discharged, on the ground that the debts had not been ascertained nor the costs taxed. It then appeared that only 86*l.* 3*s.* of debts were demanded, all other persons having withdrawn their claims, although some actions were pending. The four gentlemen now appealed against the order made by Vice Chancellor Parker, and the same was ordered to stand over until the Master could ascertain the debts and expenses, and make such call as he deemed right. These proceedings were taken, and the debts were found to be only 86*l.* 3*s.*, and the costs and expenses 3,019*l.* 4*s.*, and the costs had been taxed. On the 3rd of July 1852, the Master made a call on the seven for the full amount in unequal sums, because each of them had paid money, and after deducting such money, these several sums would make up the amount in equal sevenths.

The four gentlemen now appealed from the order of the Vice Chancellor, and against the order for the call.

Mr. Bacon and *Mr. Terrell*, for the appellants.

Sir W. P. Wood and *Mr. Roxburgh*, for the official manager.

Mr. Malins and *Mr. Daniel*, for Col. Ellis.

LORD JUSTICE LORD CRANWORTH.—This case comes before us upon two proceedings: first, upon a petition by four out of seven gentlemen, who constitute the list of contributories, as ultimately established in the Master's office, to discharge the winding-up order; and, secondly, upon a motion by those same gentlemen, to discharge an order made for a call to raise a sum of 3,019*l.* 4*s.* We have already intimated in the progress of the argument, that when the affidavits came to be fully stated before us, the first application—the application by the petition to discharge the winding-up order which Vice Chancellor Parker had refused to discharge—was entirely without foundation. We not only intimated that, but we intimated pretty clearly the ground on which we came to the conclusion, that the winding-up order, whether rightly or wrongly obtained, was an order obtained practically as much by the present petitioners as by Col. Ellis. They were both proposing to obtain what they thought, and perhaps rightly thought, was a fit and expedient course to take. They were both proceeding in that course; and Col. Ellis got the order first. It was prosecuted by him, but evidently with the sanction and concurrence of the other parties, who took as much part in the proceeding as he took. We are clearly of opinion that they could not say that Col. Ellis had done wrong in obtaining the order from the commencement. If he had not done it—if he had been a fortnight later, or a week later, they would have got it themselves. Both parties were proceeding to obtain the order. Col. Ellis obtains it, and the other party cannot now say that the order was wrongly obtained. We think the Vice Chancellor was right in refusing the present petition to discharge that order;

and, consequently, that the appeal from him must be dismissed, with costs.

Now, how is the matter with regard to the motion to discharge the order for the call? When it comes to be sifted, the way the matter stands is this, the great object of the parties obtaining the order—I say the parties, because I consider Mr. Woolmer and Mr. Kingdon, and other gentlemen who are trying to discharge the order, were just as much applicants for the order as Col. Ellis himself—was to fix the liability to the expenses of this company, not upon the managing committee only, the seven who were eventually constituted the only contributories, but to throw that liability over a much wider surface, to include among the contributories either the whole body of the provisional committeemen, or certain of the provisional committeemen who were supposed to have rendered themselves more liable than the general body, and, in short, to disperse among thirty or forty the liabilities which have been eventually thrown upon the seven, and for that purpose they endeavoured to place upon the list of contributories a great number of other persons. They succeeded in doing so, as far as the Master's office was concerned; but those parties, from time to time, appealed against the decision of the Master, and, it turned out, successfully appealed; so successfully, that instead of the number, thirty or forty, that was originally put on the list as being contributories, by successful appeals made by those parties so placed, their names were removed, and the number reduced to the present seven that constituted the managing committee. The result of all these appeals was, that very heavy costs were incurred: costs that practically amount to the whole of the sum now sought to be recovered; because, although there is one creditor of 83*l.* he may be put out of the case; and, therefore, it turns out that the attempt to wind up the affairs of the company, and to diffuse the liability among other persons besides the seven eventually found to be liable, has occasioned the sum, which the Master estimates at 3,019*l.* 4*s.* I say estimates, for I will assume, for the purpose of the present argument, that the exact amount has never been conclusively established, but this

estimate is made, not on any loose grounds, for, even if Mr. Bacon is right in saying that there has never been any taxation, properly so called, at which the parties interested in cutting down the amount of the bill have been heard as against the party setting up the bill, yet the bill has been in a sense taxed. The Master has had it laid before a party competent to exercise a judgment upon it, and that party, one of the taxing Masters, has reduced it to an amount that leaves it at 3,019*l.* 4*s.* for the whole demand. The Master thinks it reasonable that that amount should be raised, and we both concur in thinking that was a very reasonable conclusion. It is true that this is a sum for which the parties that will be liable to pay it have, in one sense, had no value, that is, they get nothing; but I think the observation is very truly made on that remark, that that may be said of any person who having resisted a demand has to pay large costs. It is true that in one sense he gets nothing, because he was wrong, yet he got a *locum standi* to contest the point, whether he was right or wrong. If his views of the law had been right, he would have got a great benefit; it turns out that he was wrong, consequently he is like any other parties, litigants in a court of justice, who have *bond fide* endeavoured to resist a demand, thinking they have a legitimate defence, and it turns out that they have no such defence. Who is to pay? Why, the parties who have caused this expense. They have been endeavouring to satisfy the Court that they were not the only contributories, but that others were liable with them, and they endeavoured to reduce the sum to a very small amount. They failed in doing so, and for their attempt they must pay. Now, we are desired to make a final end here. Probably it may be exceedingly reasonable that these parties should acquiesce in the taxation, on the arrangement which the Master has made about the amount that is to be raised. But we do not think that by our decision we necessarily conclude the parties, if they mean to say that this sum when raised is not to be applied in the manner proposed, because some of it will be unnecessary. That is open to them, if they should be so advised.

It would be a very unwise thing so to act, but that is a matter in which they must exercise their own judgment. All that we can say is, that the Master exercised a sound judgment in directing that this amount, which has been ascertained as nearly as it can be, must be raised for the purpose of paying these costs.

Then, that being so, the only question is, has he assessed it in a reasonable and proper manner? Here, again, not meaning to say a case might not be made hereafter to shew that some of this must be returned to the parties, yet, *prima facie*, we think the Master has taken the most convenient and only practical course that could be taken; he has found seven people who are among themselves liable to pay this sum of money. In what proportion have they hitherto paid? He has taken the payments *de facto* made, and all made *bond fide*. It may be that what the present petitioners say is right, that Col. Ellis was less justified in incurring his costs in resisting the creditors than they were in resisting their creditors, because their liability was more clear at the time Col. Ellis resisted than at their time; but these are niceties which, in the present state of our information, we cannot possibly inquire into. It appears to us, not only that the Master has done right in saying that this sum must be raised, but that he has taken the only legitimate mode of ascertaining the proportion in which each party is to contribute. He has taken the proportion arising from what each party has contributed: then, finding that what he contributed shews what he is to pay on the shares, he makes a ratio of equality among them. I do not know that it is an absolute equality, but they have all the same amount of shares. It seems to us that this is a reasonable and proper course to be taken, and, consequently, that this application ought not to have been made; and, therefore, this motion must be refused, with costs, in the same way as the petition of appeal.

LORD JUSTICE KNIGHT BRUCE expressed himself to be of the same opinion.

TURNER, V.C.
Feb. 9, 10.

{ THE WARDEN AND ASSISTANTS OF THE HARBOUR OF DOVER v. THE SOUTH-EASTERN RAILWAY COMPANY.

Railway Company—Railway Act—Construction—Buildings connected with Railway.

A local railway act enacted that the whole of certain ground in a seaport town, conveyed to the company, should be used solely for the purposes of the railway and the buildings connected therewith, except for coke ovens or any purposes (other than the necessary purposes of the railway), which might cause nuisance or damage to the vendors' other property:—Held, not to restrain the company from allowing part of the building to be used as the Custom-house, for passing the luggage of passengers and travellers and other Custom-house duties.

Whether part of the buildings could be used as sleeping rooms in connexion with an hotel built by the company on the adjoining ground—quære.

This was a motion, by the plaintiffs, for an injunction to restrain the South-Eastern Railway Company, their servants and agents, from using or allowing a certain building erected by the company, or any part of such building, to be used for any other than the purposes of their railway; and in particular from the same being used for the examination of luggage or other purposes as a Custom-house; or as lodging or sleeping rooms for travellers or passengers, or for the business of an inn or hotel. And that the company might be restrained from permitting the building to remain in its present or any form, the elevation of which was unapproved of by the surveyor of the plaintiffs; and from using, or permitting to be used, any part of the building for any purposes whatever until the elevation had been approved by the said surveyor.

The bill stated that by the 8th and 15th sections of an act of parliament (6 & 7 Vict. c. li.), intituled "An Act to enable the South-Eastern Railway Company to extend the line of their railway into the town of Dover," it was enacted to the following effect, viz. by the

8th section, "that no erection or building should be made without the consent of the plaintiffs or their surveyor, on certain land conveyed by them to the company, exceeding the respective heights therein specified;" and by the 15th section, "that the whole of the land to be sold by the plaintiffs to the company should be appropriated to, and used solely for, the purposes of the railway and the buildings connected therewith, except such part as might be required by the Board of Ordnance, or might be necessary to be left open for the increased width of the streets, in order to form the necessary approaches to the railway station: provided always, that the said ground should not be used or employed for building or erecting thereon any coke ovens or for any other purposes (the necessary railway purposes only excepted), by which any nuisance might be created or the other property of the plaintiffs in any way damaged." The plaintiffs also stated that a plan had been approved by their surveyor in 1843 of buildings then proposed to be erected by the company, but which were not completed, and that in 1851 the company erected the present building, and contrary to the approved plan, and that part of it was now used as Her Majesty's Custom-house for examining the luggage of passengers and travellers, collecting duties, granting certificates to aliens, &c. And further that the upper floors of the building were laid out and intended to be used as bed-rooms in connexion with an hotel erected by the company on the ground held by them on lease from their chairman, and which if so used would be to the injury of the plaintiffs' property, consisting of several large inns and hotels in Dover, and to prevent which injury, the stipulation in the above act had been inserted to restrain the use of the plaintiffs' ground conveyed to the company from being used for buildings otherwise than for railway purposes.

Mr. Rolt and *Mr. Renshaw*, for the motion.

Mr. Roundell Palmer and *Mr. Simpson*, against it.

The VICE CHANCELLOR disposed during

the argument of that part of the injunction which sought to restrain the keeping and using of the building at its present elevation; upon which point the following authorities were cited—

Lane v. Newdigate, 10 Ves. 192.

Blakemore v. the Glamorganshire Canal Company, 1 Myl. & K. 154; s. c. 2 Law J. Rep. (N.S.) Chanc. 95.

Greatrex v. Greatrex, 1 De Gex & S. 692.

The London and Brighton Railway Company v. Cooper, 2 Rail. Cas. 312.

Lord Petre v. the Eastern Counties Railway Company, 3 Rail. Cas. 367.

Mr. Rolt replied.

TURNER, V.C.—After the consideration which I have had the opportunity of giving to this case, I do not think that any further time I might take would enable me to arrive at a conclusion more satisfactory to me than that which I am now prepared to state; and, therefore, I do not think it right to delay my judgment. With reference to the question which has been raised upon the subject of elevation, I wish to add to what I said yesterday that I by no means intend to lay down, that if a building should be erected contrary to a contract between the parties, it would not be within the power of this Court to restrain the use of that building. I think that *Lord Petre's case* would go to that extent. What I meant to say on the question whether a building of the height of forty feet, or of forty-six feet, is to be allowed to be used, there being no doubt that the building might be erected of the height of forty feet, although it could not be erected of the height of forty-six feet, is, that such is not a case in which the Court would interfere by injunction, unless some irreparable injury was shewn to be likely to arise in the mean time. The question remaining to be considered is on the subject of the use of the building for the purposes of the Custom-house, and in connexion with the bed-rooms; and the argument has been properly dealt with in the reply, and considered as confined merely to the 15th section of the act. In truth, it is on the

15th section of the act that the question wholly depends.

The first consideration which arises is, what are the purpose and object of the 15th section? I think the primary object of that clause is the laying out of the land purchased by the railway company from the warden and assistants, and I think so for this reason: the words of the clause are not that the whole of the land or ground to be sold by the warden and assistants to the company and the buildings thereon shall be appropriated to and used solely for the purposes of the railway, but that the land or ground to be sold shall be appropriated solely to and for the purposes of the railway, and the buildings connected therewith. It is, therefore, the use of the land and ground at which the clause properly looks; and, on the second branch of the clause, I think the same view arises. It is "except such part or portion thereof as may be required by the Board of Ordnance, or may be necessary to be left open for the increased width of streets, in order to form the necessary approaches to the station:" still looking not to the use of the buildings to be erected on the land or ground, but to the mode in which the land or ground is to be laid out or applied. The proviso seems to bear the same construction: "provided that the said ground shall not be used or employed for building or erecting thereon any coke ovens, or for any other purposes (the necessary railway purposes only excepted) by which any nuisance may be created or the other property of the said warden and assistants in any way damaged." Looking at this clause with that view, as directed to the use to be made of the land or ground, and not specifically to the use of the buildings on it, I think that this question really depends upon the narrow words which are contained in the clause "and the buildings connected therewith." The contract is, that the whole of the land or ground shall be appropriated to and solely for the purposes of the railway and the buildings connected therewith; and the first question to be considered is, what is the principle to be applied to the construction of this clause? This is a purchase, in effect a deed of conveyance, a parliamentary conveyance under a parlia-

mentary power to sell to a party, as owner in fee; and I think, therefore, that every sound construction requires that the restriction which is imposed upon the owner in fee, who becomes the purchaser under that clause, shall not be enlarged or extended beyond its necessary limits. Let us then consider what is the meaning of the words "buildings connected therewith."

I quite agree with the construction that "connected therewith" means connected with the railway; and I think there are three meanings which may be attached to those words. They may mean locally connected with the railway, or connected with the railway in the sense in which other buildings are connected with other railways, or connected with the railway as buildings applicable to that particular railway. I concur with Mr. Rolt's argument upon that point, that they do not mean locally connected with the railway. I think that the mere fact of the buildings being locally connected with the railway could not be meant by the expression "buildings connected therewith," as used in this act. Do they then mean buildings connected with this railway, in the same sense as other buildings connected with other railways? I do not think that that limited construction can be put on them, for the words are "solely for the purposes of the said railway, and the buildings connected therewith." I think this must be read "for the purposes of the said railway and the buildings connected with such particular railway." The construction of this clause, therefore, cannot be governed by considerations of what would or would not be connected with other and different railways. Taking the clause, then, as applying to buildings connected with this particular railway, it follows to be considered what is, within the language of this clause, properly a building connected with the particular railway. I really do not know what construction can be put upon, or what meaning can be attached to, the words "buildings connected with the railway," unless it be buildings which are used in some portion, or in some sense for the purposes of the railway. How, then, does the case stand with reference to these buildings being or not being used for the purposes of the railway? Why the fact,

so far as it relates to one portion of the case, as to the Custom-house, is, that one of the rooms in this building is exclusively appropriated for the use of the Custom-house; and I think I may take this to be so. But by the side of that room there is another room, in which the passengers wait whilst their luggage is being examined by the Custom-house officers; and on the other side, there is another room into which the luggage, after it has been examined, is passed from the centre room, and then the luggage is separated and packed up again by the town porters (whose business seems to be, according to the evidence, to manage and carry the luggage in Dover), and then it is handed over a rail, or partition, to porters who carry it either to the railway or to any other place where it may be required.

Now is or is not that building so used connected with the railway? It is a building which, to some extent, at least, is used for the purposes of the railway. Can I then say that a building which is, to a certain extent, used for the purposes of the railway is not to be considered as a building connected with the railway, because other purposes are added to the use of it, and because in that building are examined not merely the luggage of passengers who pass along the railway, but the luggage of other persons who may not leave Dover, or who may go to hotels in the town? I do not think it is a fair and reasonable construction of this act of parliament to hold that because a building is used, and, I think, according to the evidence in this case, principally used for the purpose of examining the luggage of passengers coming from abroad and passing along the railway (one of the affidavits states that there are very few other purposes for which it is used), it, therefore, follows that it is not a building used for purposes connected with the railway. I think, that being the primary purpose, I should not be justified in holding this use of the building to be such as the act of parliament does not authorize.

The last branch of the clause in the act itself seems to me to throw some light upon the construction on this point. The first branch of the proviso is a restrictive clause, and the second branch contemplates that the restriction imposed by the first would not be

sufficient, and, therefore, extends it. It is by the first branch of the clause that the company are enabled to appropriate and use the building for the purposes of the railway; but still they might appropriate and use it for purposes that are a nuisance to the adjoining property, and the proviso is that they shall not use it even for those purposes if they produce any nuisance to the adjoining property. I think this shews that it was in the contemplation of the parties and the legislature, that the property might be used for other purposes of the railway, provided no nuisance was created by such use; otherwise I do not understand what is the meaning of that clause "or for any other purposes (the necessary purposes of the railway excepted) by which a nuisance might be created." It seems to contemplate that it might be used for other purposes than the necessary purposes of the railway, and that these other purposes might be a nuisance; and, therefore, it provides that it shall not be used for a nuisance.

Upon the whole construction, therefore, of this clause, I am of opinion that I cannot grant this injunction with reference to the Custom-house. As to the bed-rooms I think the same argument that applies to the one applies also to the other. I am not prepared to say that there may not hereafter be such a use of these bed-rooms as would induce this Court to interfere; but as the case at present stands, I think there is no evidence before me that there is any intention to use them for any such purposes as would warrant me in holding that the building is not *bond fide* intended to be used, and to be considered as a building connected with the railway. Upon the whole I must refuse this motion, but I shall certainly refuse it without costs.

Motion refused, without costs.

TURNER, V.C. }
Jan. 22. } CROSSE v. LAWRENCE.

Vendor and Purchaser—Specific Performance—Contract—Construction—Freeholds and Copyholds intermixed—Timber.

Where there is one entire contract for the sale of intermixed freehold and copyhold

lands, and of the timber on both lands, and the vendor stipulates against distinguishing the freeholds from the copyholds, the title to the timber follows the land, and the purchaser cannot insist upon having the timber growing on the copyholds distinguished from that growing on the freeholds, although the price for the timber is in addition to that for the land.

This was a claim by the vendor against the purchaser for the specific performance of an agreement to purchase, by private contract, according to particulars and conditions which had been prepared for an intended sale by auction, a certain farm for 3,000*l.*, and the timber, &c. (at a valuation) for 263*l.* 1*s.*, total 3,263*l.*; upon which the purchaser had paid a deposit, leaving a balance of 2,237*l.* 1*s.* still due. The particulars stated that the property consisted partly of freehold and partly of copyhold lands, and that the copyhold parts could not be distinguished from the freehold; that the timber was to be paid for by the purchaser, in addition to the purchase-money for the lots, and had been carefully valued for the purposes of the sale; and that the purchaser would also be required to take and pay for the crops, dressings, &c. to the out-going tenant. By the conditions of sale it was stipulated—

Condition 3. That each purchaser should pay a deposit of 20*l.* per cent. in part of the purchase-money (including the value of the timber).

4. That if the purchase was not duly completed, the purchaser should pay interest upon the purchase and timber money remaining unpaid until the actual completion.

7. That as to such of the lots as were described to be partly freehold and partly copyhold, the purchasers should not be entitled to have it shewn how much of such lots respectively were freehold and how much copyhold, nor have the freehold and copyhold parts respectively identified and distinguished, or the boundaries thereof respectively ascertained, nor to make any inquiry into or concerning the same.

9. That upon payment of the remainder of the purchase-money and of the amount of the valuation according to the particu-

lars of sale, the vendors would, subject to the conditions, execute and perfect proper assurances to the purchasers.

The defendant objected to pay for such of the timber as could not be shewn to be growing on the freehold part of the farm, and he stated that he had bought the property for building purposes.

Mr. James Russell and Mr. W. D. Lewis, for the vendor, submitted that the contract for the purchase of the land and timber was one entire contract, and not divisible into two contracts for the separate purchases of the land and timber, and, consequently, that the purchaser was restricted by the conditions of sale from requiring the copyhold timber to be distinguished by the vendor from the freehold portion of it. They cited the following cases on the right of a tenant in respect of copyhold timber, minerals, &c.—

Ashmead v. Ranger, 1 *Ld. Raym.* 551.

Whitechurch v. Holworthy, 4 *M. & S.* 340.

Lewis v. Branthwaite, 2 *B. & Ad.* 437; *s. c.* 9 *Law J. Rep.* K.B. 263.

The Solicitor General (Sir W. P. Wood) and *Mr. W. M. James*, for the defendant, argued that the restriction as to inquiries concerning the freehold and copyhold parts of the property was limited to the land, and did not extend to the timber. A copyhold tenant could not cut timber without the sanction of, or grant from, the lord. No grant could be presumed in this case, because the manor (Leswery) of which the copyholds were part, was vested in the Crown, against whom no grant could be presumed. It would, therefore, be as unjust to require the purchaser to pay for timber which he could not fell, as it would be to require him to pay to the out-going tenant the value of the crops to which a stranger might have a title.

Mr. J. Russell replied.

TURNER, V.C.—The question in this case appears to me, principally, if not wholly, to depend upon the point of whether the contract for the purchase of the timber and the purchase of the land are to be considered as separate and distinct contracts, or as constituting together one

contract; for, undoubtedly, if the contract for the purchase of the timber is to be considered as a separate and distinct contract, it would be incumbent upon the vendor to prove either that there was a custom of the manor entitling the vendor to cut timber, or that it was a case in which a grant of right to cut timber might be presumed in favour of the tenant.

It was argued, on behalf of the purchaser, that the contract for the timber and the contract for the land are to be considered as separate and distinct contracts. This argument was founded on the terms of the stipulation with regard to the timber, and the words "in addition to the purchase-money for the lots," contained in this stipulation, were adduced as constituting a separate and distinct contract for the purchase of the timber. But it is to be observed, that that stipulation speaks of the valuation of the timber having been made "for the purposes of this sale." Now the purposes of the sale were clearly not for the sale of the timber, but for the sale of the estate; and, therefore that stipulation itself connects the sale of the timber with the sale of estate. But further than this, the third condition of sale seems to incorporate the value of the timber with the purchase-money for the estate, for it provides for the payment of the deposit and of the remainder of the purchase-money, including the value of the timber. The fourth condition also incorporates the purchase of the estate and the timber together, by stipulating that the interest shall be paid on the purchase and timber money remaining unpaid. The ninth condition is to the same effect, for it makes no distinction between the assurances of the timber and the assurances of the estate, but deals with them as one complete and entire subject of one entire contract; and there are, moreover, no stipulations whatever on the face of the conditions of sale as to any title whatever being shewn to the timber. I cannot, therefore, consider upon the result of the particulars and conditions of sale, taken as a whole, that this can be considered as a separate and distinct contract for the purchase of the timber. If the contract for the timber is not to be considered as distinct, this is in truth a contract for the purchase of the land with

the timber upon it, and the title to the land is the title to the timber, and so considering it, we must see what are the other conditions of sale with reference to the land.

Now, with reference to the land, there is a distinct stipulation by the seventh condition, that the purchasers thereof shall not be entitled to have it shewn how much of the lots referred to (of which this is one) is freehold, and how much copyhold; nor to have the freehold and copyhold parts respectively identified and distinguished, or the boundaries thereof ascertained, nor to make any inquiry concerning them; and in the description of the lot itself, it is stated that the vendors had not distinguished the copyhold part from the freehold. Now, considering the timber as part of the land which is contracted to be sold, this is in truth a stipulation that the purchaser shall not inquire into the title of the timber—that he shall require no separate title to the timber. I think, therefore, that this is to be considered as one entire contract, and that the title to the timber depends on the title to the land. I will put this case as if it were the case of a valuation. Suppose that, appended to the ninth condition of sale, you had found a stipulation that the timber should be taken at a valuation, how would that have to be valued? Undoubtedly, not according to the value of the copyhold interest, for the vendor says, "I am not bound to distinguish, and will not be bound to distinguish what is freehold and what is copyhold." You cannot attribute any other meaning to the stipulation that the timber is to be paid for at a valuation, than that it should be valued as timber, and not according to the interest that was incident to the tenure of the land. But suppose again that all this land turned out to be copyhold, it could not be an answer to the claim on the part of the vendor (taking it as one entire contract, and the price to be paid as one entire amount), that the value which was agreed to be paid for the timber was the value of timber on freehold land, and not of timber on copyhold land. It is quite consistent with these conditions of sale, that the whole of the land might have been copyhold; and if the purchaser could not excuse himself in that case, I do

not think he can excuse himself in a case where part of the land only upon which the timber is standing may be copyhold. Again, in cases of this description, where a purchaser buys on such conditions, he must be considered as estimating, in the price he pays for the land, the price he pays for the timber. He knows that part of the land which he buys is or may turn out to be copyhold; that, if it be copyhold he can only have a certain interest in the timber. He agrees to pay a certain price for the timber; and I think he must be considered as calculating in his own mind, at the time he makes the purchase, that he agrees to give a certain sum for the timber, of which he may not be entitled to have that full ownership that he would if the timber stood upon freehold land; and that, therefore, he makes a deduction from the purchase-money which would compensate him for what he might not get. A case was very ingeniously put as to fixtures, which I do not think is applicable in the way it was used on behalf of the purchaser. I take this case as to fixtures to be much more resembling the present case than that suggested. Suppose a man to say, "I agree to sell you the house with the fixtures in it. I cannot tell you what fixtures belong to the landlord, and what to the tenant; but you shall give me a certain sum for the fixtures." I think this Court would have no hesitation in saying, in a case of that description; it would enforce a contract against the purchaser who had entered into such a stipulation. And so it is here, where the vendor says, "I cannot tell which is copyhold;" he sells the timber as incident to the land: he says, "I cannot tell you what your interest in the timber will be; but I stipulate that you shall pay a certain sum for the value of that timber."

I think, therefore, on all these grounds, the purchaser must complete the present contract according to the conditions of sale, and pay the purchase-money, and the interest at 5*l.* per cent. and the costs.

TURNER, V.C. }
Jan. 22. } CROSSE v. KEENE.

Vendor and Purchaser—Specific Performance—Copyhold Timber—Contract—Construction.

Under a contract to sell a copyhold estate and the timber upon it, at a certain price for the estate, and an additional price for the timber, according to the amount at which the timber had been previously valued for the purpose of the sale, the vendor is not bound to shew any licence, custom, or grant to sell or cut the timber.

This was a claim by the plaintiff in *Crosse v. Lawrence*, *ante*, against a purchaser under a similar contract to that in the last-mentioned case. The only difference between the two cases was, that in the present case the property contracted to be purchased consisted entirely of copyhold land.

Mr. James Russell and *Mr. W. D. Lewis* appeared for the plaintiff; and

The Solicitor General (*Sir W. P. Wood*) and *Mr. W. M. James*, for the defendant.

The argument for the defendant was, that the purchaser was entitled to evidence that the vendor could by licence, custom, grant, or otherwise shew a right to sell the timber to the purchaser; but

TURNER, V.C., said, that he could not in principle distinguish this case from that of *Crosse v. Lawrence*; and that it appeared to him, though the conditions of sale did not specifically apply to the present case, that they applied to the question for the purpose of considering whether there was one contract or two. With respect to a case which had been suggested in argument, of selling the crop of corn, his Honour thought the distinction between that and the present case was, that the crop of corn was not capable of continuous enjoyment with the estate, but that the timber was. This, equally with others, appeared to be an agreement for the purchase of the estate with timber, to be enjoyed upon it, at a value derived from

that consideration. A decree must therefore be made similar to the decree in *Crosse v. Lawrence*.

LORDS JUSTICES.
1852. } MONEY v. JORDEN (1).
April 26, 27, 28, 29.

Injunction—Debt—Promise to forego—Irrevocable Engagements contracted.

The Court below having held that a party who, by representations, had induced another to enter into irrevocable engagements, must be restrained from taking proceedings to enforce obligations and promises, the abandonment of all intention to enforce which was the subject of those representations, the decree granting a perpetual injunction to restrain such proceedings was on appeal confirmed; Lord Justice Lord Cranworth dissenting: first, because this case was not within the principle of the cases on which the decree below was professed to be grounded, those cases depending on misrepresentation of fact, while here there was no misrepresentation of fact; and, secondly, because the promise alleged by the plaintiff was supported by the evidence of one witness only (who had since died), and which was not, in his Lordship's opinion, supported by the surrounding circumstances, and was positively denied by the answer.

This case was heard, before the Master of the Rolls, in January 1852, and he made a decree in the plaintiff's favour. The facts are stated in the judgment of his Honour, *ante*, pp. 531—536, and are somewhat fully entered into below, in the judgment of the Lord Chief Justice. It will, therefore, be necessary merely to state that Mrs. Jorden, when Miss Louisa Marnell, became owner of a bond and warrant of attorney, upon which judgment had been entered up, and which Mr. J. W. B. Money had given to secure payment of 1,200*l*. This security she promised not to enforce; and, on the strength of that promise, Mr. J. W. B. Money married, the promise having been

given in consideration of the father of Mr. J. W. B. Money abstaining from making a settlement on his marriage of real property, which he had conveyed to Miss Marnell, without consideration. The defendant Mrs. Jorden having issued execution on the judgment, and taken the plaintiff in execution, the bill was filed for a perpetual injunction, which was granted by the Master of the Rolls; and from that decree the defendants appealed.

Mr. Roundell Palmer and Mr. Bates were for the respondent, the plaintiff, in support of the decree of the Court below, and cited, in addition to the cases relied on by the plaintiff below, the following:

Gale v. Lindo, 1 Vern. 475.

Scott v. Scott, 1 Cox, 366.

Podmore v. Gunning, 5 Sim. 485.

Mr. Willcock and Mr. F. T. White, for the appellants, cited the following additional cases:—

Montefiori v. Montefiori, 1 W. Black. 363.

Pasley v. Freeman, 3 Term Rep. 51.

Ames v. Milward, 8 Taunt. 637.

Maunsell v. White, 1 Jo. & Lat. 539, 557.

April 29. — LORD JUSTICE KNIGHT BRUCE.—In this case, which is before us on an appeal presented by Mr. and Mrs. Jorden, two of the defendants, against a decree made in the plaintiff's favour at the Rolls, in February last, the object of the suit was to be relieved against a debt, or an alleged debt, claimed to be due from him to the defendants, Mr. and Mrs. Jorden, or to them and the defendant Mr. Money, as a trustee in effect for Mr. and Mrs. Jorden, upon a bond and a judgment, or upon the latter, under which Mr. and Mrs. Jorden, in the names, I believe, of themselves and the other defendant, issued execution against the plaintiff's person, after the common injunction obtained in this cause in the year 1850, had been by an order of the 5th of August in that year dissolved, or as to Mr. and Mrs. Jorden dissolved absolutely (whether regularly or otherwise) upon the case stated in the answers of Mr. and Mrs. Jorden, or in the earlier of them. From the caption, how-

(1) This case is reported on a point of practice, 20 Law J. Rep. (N.S.) Chanc. 174; and on the main question, *ante*, p. 531.

ever, the plaintiff was speedily released by means of another order in this cause, dated the 12th of December 1850.—[This order was an order under which the money due on the bond was paid into court by the plaintiff. The Lord Chief Justice then entered into the history of the speculations which Miss Marnell's brother had suggested, and in which Mr. Money, jun. engaged: and proceeded]—Miss Marnell, who had been known for years to the plaintiff's family, was under obligations to his father, and appears to have regarded the plaintiff not merely with friendship but with affection,—that affection, I mean, which a kind aunt or an elder sister feels for a favourite nephew or a much younger brother. Miss Marnell, I say, thus circumstanced, not only did not regard her brother's conduct in this affair with approbation (it would, indeed, have been very odd if she had), but openly and repeatedly condemned it in very plain and strong terms, and after she had become his representative declared often to the plaintiff and to various persons, in effect that she would never claim the debt of the plaintiff, but would abandon, and indeed had abandoned it. * * * The plaintiff became engaged in 1844 to marry the lady whom in the following year he married. The engagement was, of course, communicated to his almost maternal friend, and if anything could have diminished her proneness to converse upon the debt and all its history, this, at least, seems not to have been so. She, or a solicitor for her, had retained the bond on which Mr. Hooper was, as one of the obligors, considered to be liable, if his certificate under the bankruptcy could be avoided, of the probability of which there seems to have been some belief, though whether he would, under any circumstances, have paid, may be questionable; but she appears to have thought this chance worth something, and on that ground—and perhaps, also, from other easily conjecturable feelings—to have made a point of not parting with the instrument, though perpetually declaring in substance that the plaintiff should never be troubled about it. Endeavours, however, after the announcement of the plaintiff's intended marriage, were renewed or made to obtain her consent to the destruction or delivery

up of the document, which every one seems to have considered as in force, notwithstanding the judgment, and as representing the debt. But the bond was too favourite a possession as well as too favourite a topic to be parted with, and was still kept by herself, or for her by a solicitor, who was not desirous that it should be given up.—[His Lordship then entered into a detail of the early history of the acquaintance between the parties in India, the acquisition of the Midnapore property, and stated his opinion to be that it was plainly impossible upon the evidence to conclude that there was any valuable consideration for the conveyance, and then proceeded to read the answer of Mr. George Money, to the ninth and tenth interrogatories, as follows:—]

"I say that shortly before the marriage of the said plaintiff, I had a conversation with the said defendant Louisa Jorden respecting the then intended marriage of the said plaintiff, and that on that occasion I said to the said defendant, Louisa Jorden, that I had given up the property at Midnapore to her without any consideration or sum of money for it, and that as the plaintiff was about to be married I should settle that property at Midnapore on the said plaintiff, unless the said defendant Louisa Jorden wholly relinquished all claim on the said plaintiff for or in respect of the said Charles Brown Marnell, and that the said Louisa Jorden, in reply, said, 'No, don't do that, I will never make any claim on your son William for or in respect of that debt, if you will let me remain in possession and enjoyment of the Midnapore property.' And I say that it was on the occasion of that interview, agreed by and between the said defendant, Louisa Jorden, and myself, that in consideration of my permitting her to continue in the possession and enjoyment of that property, she should, and did, wholly abandon the said debt. And I say that such conversation had reference to the marriage of the said plaintiff; and I say that at that time, or soon afterwards, I had a conversation with the said defendant, Louisa Jorden, respecting any marriage which she might contract. To the tenth interrogatory I say, that she on that occasion repeated her desire to have the matter so

settled that any husband she might marry should have no claim on the said plaintiff; and that she then repeated to me that in consideration of my having allowed her to continue in the enjoyment of the Midnapore property, she had wholly abandoned the said debt, and that she would never make any claim in respect of it against the said plaintiff. And I say that I then informed the said plaintiff the particulars of the said agreement with the said defendant, Louisa Jorden, and told him that he might safely marry, and that the said alleged debt due to the said defendant, Louisa Jorden, as an executrix of the will of the said Charles Brown Marnell, was wholly abandoned; and I say, that in consequence of such agreement with the said Louisa Jorden, I omitted to make and did not make any settlement of the said property at Midnapore upon the said plaintiff on the occasion of his said marriage." That is the whole of that witness's testimony. Now, in what Mr. Money has deposed, especially upon the ninth and tenth interrogatories, is he a witness of truth and accuracy? [His Lordship then stated his reasons at length for giving credence to Mr. Money, who, since his depositions, had died, and then, after stating that Mrs. Jorden's account of the interview was different, proceeded to read her answer and that of her husband.]—"They say the defendant Louisa, speaking positively, and the defendant William Pru Jorden, speaking from the information of the defendant Louisa, that prior to the said marriage of the said plaintiff, George Money had a conversation with the defendant, Louisa Jorden, with reference to a marriage then contemplated between the defendant and a Mr. Newman, in the said bill called Newenham, but in no manner relating to the marriage, or intended marriage, of the plaintiff, and that the said George Money told the defendant, Louisa Jorden, that the plaintiff threatened to annoy the defendant, Louisa, about the Midnapore property, but did not tell the defendant, Louisa Jorden, that the said conveyance of the said property at Midnapore (as a voluntary gift) was void if he, the said George Money, chose to settle the same on the plaintiff on

the occasion of his marriage, or sold it to any purchaser for a valuable consideration, and that his sons had discovered, and were then aware that such would be the case, and that they had requested him to make such settlement, and that he intended to do so as a security against the possible revival of any claim against the plaintiff by virtue of the said bond or warrant of attorney on the said judgment, by any person or persons into whose power the said documents might at any time come, and who might be ignorant of the total abandonment by the defendant, Louisa, of the share of the plaintiff in the said debt, or to such or the like effect, and the defendant, Louisa, in reply to the statement which the said George Money did make, indignantly asked what he, the said plaintiff, could do? To which the said George Money replied, 'Nothing; but he might annoy you,' and he asked the defendant Louisa if she meant to give up the bond, to which she replied that she would not; that Mr. Newman might give it up if he thought proper, but she would not. On which the said George Money observed, 'why put William,' meaning the plaintiff, 'under an obligation to a perfect stranger?' Whereupon the conversation ended."

[After enlarging on the discrepancies of these two accounts, his Lordship pronounced that of Mrs. Jorden's to be erroneous, inaccurate, incredible; and then referred to a large body of evidence of Mr. Money and other witnesses, and after commenting on the truth of Mr. Money's testimony, notwithstanding the precise and technical nature of the language, and referring to the alleged, and, as his Lordship believed, proved declarations of Mrs. Jorden, proceeded thus:—]I am convinced, as I have said, of the truth of the assertion, that she had on many occasions before the interview declared, after she had become the personal representative of Charles Brown Marnell, that she would not claim the debt in question from the plaintiff, but meant to abandon, and had abandoned it. I believe, moreover, that these declarations were sincere, and considered by the Money family to be sincere, but Mr. Money's acquaintance with legal subjects must have made him doubt,

at least, whether any court of justice would, or could, treat them as binding on her. He must have known how liable to change are the intentions even of ladies ; that this lady was likely to marry ; that she might allow herself, or be allowed by others, to do so without a settlement, and that her husband might be a person of views and feelings very different from hers, and having no sympathy with her recollections. As the plaintiff was about to marry, therefore, nothing can consistently with the undisputed facts be more likely than that Mr. Money should have sought and had an interview with Miss Marnell for the purpose which he states, and that the conversation at it should have been of the direct, practical and technical kind which he mentions. He had been for years at the bar ; he must have wished to have the abandonment of the debt placed on a basis firmer than it was. * * *

Considering as I do that the marriage was had with such and only such a settlement as was, in fact, made upon it in the belief created or sanctioned by Miss Marnell, in the faith induced by her language and conduct, that the debt in question never would be in the whole or in part demanded, and so thinking, independently of Mr. Money's evidence, I should possibly have held the decree before us to be altogether correct, if he had not been examined : but his testimony forms part of the case. I believe him to be substantially accurate as a witness ; and so believing, I find that he proves an agreement with Miss Marnell for valuable consideration, by which she was, in my opinion, at and before the time of her own marriage, bound—bound, I think, upon equitable as well as legal principles ; not the more, though certainly not the less, for the high authority of *Haigh v. Brooks* (2). It was a breach of that agreement to seek to enforce the bond or the judgment obtained by Mr. Marnell (and under whatsoever circumstances of credit or discredit to his memory) against the plaintiff ; a breach in respect of which, if not the only proper person, he was at least a proper person to sue, for he was told of

the agreement before his marriage, and told that he might safely marry ; safely, meaning freedom from the debt. That communication to him must be taken to have been authorized by Miss Marnell, and he must be taken to have married on the faith of it. I hold, therefore, with the decree, a decree possibly not unfitting the original merits, but certainly in my judgment forming a fit and just conclusion to the later history of this much-celebrated bond.

LORD JUSTICE LORD CRANWORTH.—Not being able to concur in the result at which both the Master of the Rolls and my learned Brother have arrived, I feel bound shortly to state the view which I take of the case, though it is hardly necessary to say that I feel great distrust of the accuracy of that view, differing, as it does, from such authorities. The plaintiff rests his title to relief on one of two grounds : either, first, that the marriage having taken place on the repeated assurances of Mrs. Jorden that she never would enforce payment of the debt secured by the bond and judgment, it would now be a fraud on her part to act in violation of those assurances ; or, secondly, that a valid and binding contract was entered into between the plaintiff's father and Mrs. Jorden, before the plaintiff's marriage, whereby she stipulated for a valuable consideration, the benefit of which she has had, that she would never enforce payment against the plaintiff of the money so secured.

The Master of the Rolls decided in favour of the plaintiff on the first ground. His Honour thought the case was brought within the authorities which established this principle ; namely, that where a person represented a particular state of circumstances as existing with a view to induce another to act, or under circumstances when it must have been obvious that another would probably act on the faith of such representation being true, and such person has so acted, there it shall not afterwards be permitted to him who has made such a representation to enforce against the person whom he has misled, any rights to which he may be entitled by reason of the facts not having been such as he represented. His Honour referred especially to the

(2) 10 Ad. & E. 309, 320 ; s. c. 2 P. & D. 477 ; 9 Law J. Rep. (N.S.) Q. B. 99, 194.

cases of *Gale v. Lindo*, *Montefiori v. Montefiori*, and *Neville v. Wilkinson* (3). With the most sincere respect for the judgment of Sir John Romilly, I do not think that the doctrine on which he relies is applicable to the case now before us. In all the cases referred to, there had been the misrepresentation of a fact material in influencing the conduct of the person to whom it was made, and what the Court has done has been to hold the party making the representation bound by what he has stated. It has considered that it would be to permit a fraud, if it were to allow any one first to gain an object by representing a particular fact to exist, and then, when the purpose has been accomplished, to turn round and say, "I shall now act on the very truth, which is not such as I represented it." In all such cases the Court acts merely on the principle of preventing fraud, not at all on contract. But here there was no misrepresentation of any fact whatever. Mr. C. B. Marnell died in 1843; on that event Mrs. Jorden, then Miss Marnell, as his executrix and residuary legatee, became entitled to the money secured by the bond and judgment. That she did between that time and the plaintiff's marriage in June 1845 repeatedly state her positive determination never to enforce payment of that money is a point on which I have no doubt. The evidence abundantly establishes that to have been the case. I think, further, she must be taken to have made such statements, though not to Lady Poore, the mother of the plaintiff's intended wife, yet under circumstances which she could not but know that what she said would probably be communicated to her, and might very likely influence her in the arrangements to be made on the occasion of her daughter's marriage. Still there was no fact misrepresented. Mrs. Jorden never concealed the existence of the bond or judgment. If she had with a view to the arrangements to be made on the plaintiff's marriage, said that she had no legal demand on the plaintiff, that the defendant had been released or paid, or that for any reason the bond and judgment were

legally invalid, or had made what amounted to such a representation, then indeed the cases referred to would be strictly applicable. It would then be a fraud in her now to attempt to enforce a security which she had so represented as having no valid existence. But no such statement ever was made; Mrs. Jorden always stated that she had the bond, and in effect that it gave her a legal right against the plaintiff, though at the same time she stated that she had abandoned all intention of enforcing it. After such a statement the parties contracting marriage cannot justly say that they were deceived as to the facts; they knew the facts as well as Mrs. Jorden herself knew them; that is, that Mrs. Jorden had a legal demand on the plaintiff, but which, from what had passed, they were fully persuaded she would never enforce. This is a state of things which does not, as I think, entitle the plaintiff to any relief in this court, on the ground of its being a fraud in Mrs. Jorden now to enforce her securities.

But though the plaintiff may not be entitled to relief on the head of fraud, yet if Mrs. Jorden did before and in consideration of the marriage, bind herself not to enforce the bond or judgment, the plaintiff might be entitled to relief on the head of contract, which leads me to consider whether, on a fair view of the evidence, she ever did so contract.—[His Lordship then entered into a minute examination of the evidence, and proceeded]:—Now as we intimated more than once during the argument, if we can act on that as testimony to which we are judicially warranted in giving credit, the plaintiff has no doubt established a title to relief. Mrs. Jorden, according to this evidence, certainly bound herself, for a valuable consideration, never to enforce the bond against the plaintiff. It was, at least, doubtful whether Mr. Money, the father, had not the power of defeating Mrs. Jorden's title to the Midnapore property. The evidence to which I have referred goes to shew that he agreed with Mrs. Jorden shortly before the marriage, and with a view to his son's interests on that event, that her title to the Midnapore property should never be disturbed, in consideration of an agreement at the same time

(3) 1 Brown's C.C. 543.

entered into by her, that she would never enforce the bond. This would be a valid contract, whether in truth Mrs. Jorden's title to the Midnapore property could or could not be questioned. The doubt existing on the subject was a sufficient consideration, as was established by the case of *Haigh v. Brooks*, referred to by my learned Brother in the course of the argument. If, therefore, it is made out by evidence on which this Court can safely and properly act, that this agreement was in fact come to, then undoubtedly the plaintiff is entitled to the relief he asks. But I feel great difficulty in saying that this is evidence on which, according to the doctrine of this Court, it is open to us to act. The evidence of contract rests on the testimony of Mr. Money alone, not confirmed, in my opinion, by surrounding circumstances, and positively denied by the answer, and cannot be relied upon consistently with the rules of this court. The rule of the court acted upon from the earliest times on this subject is clear. It is stated by Lord Eldon, in *Evans v. Bicknell* (4). "A defendant," Lord Eldon says, "in this court has the protection arising from his own conscience in a degree in which the law does not affect to give him protection. If he positively, plainly, and precisely denies the assertion, and one witness only proves it as positively, clearly, and precisely as it is denied, a court of equity will not act upon the testimony of that witness." The alleged agreement, then, being as positively denied by Mrs. Jorden, as it is affirmed by Mr. Money, is there anything in the testimony or in the surrounding circumstances enabling the Court to say it will disregard the answer, and act on the evidence of a single witness? I confess I think not.

Having thus stated my reasons I have only to add that I can feel no regret in knowing that my doubts will not influence the decision, as my learned Brother, being of opinion that the decree of the Master of the Rolls is right, it will remain unaltered.

L.C. }
May 22, 26. } LUMLEY v. WAGNER.

Injunction—Negative Covenant.

Mdlle. J. W. agreed in writing with L. that, for certain considerations therein expressed, she would sing and perform at his theatre for a specified period; and that, during her engagement with L, she would not sing elsewhere without his licence in writing. Afterwards, J. W. contracted with G. to sing and perform at his theatre during the period specified in her engagement with L. Upon bill by L. praying simply that J. W. might be restrained from singing and performing elsewhere than at his theatre during the period specified, the Court granted an injunction accordingly.

Where a contract contains covenants to do certain acts, and also to abstain from doing certain other acts, the Court has jurisdiction to restrain the breach of the negative covenants, though there may be no jurisdiction to specifically perform the affirmative covenants. —Kemble v. Kean (1) and Kimberley v. Jennings (2) disapproved of.

But in such cases the Court will decline to interfere where the jurisdiction cannot be beneficially exercised, as in Collins v. Plumb (3), or where its exercise would work injustice, as in a case where the consideration for the negative covenant of the one party is the affirmative covenant of the other party, which latter the Court cannot specifically perform —Hills v. Croll (4).

In November 1851, Joanna Wagner and Albert Wagner her father, by Dr. Joseph Bacher as their agent, entered into an agreement in writing with B. Lumley, the plaintiff, in the French language, which, as translated, was as follows:—

"The undersigned, Mr. B. Lumley, possessor of Her Majesty's Theatre in London, and of the Italienne at Paris, of the one part, and Mdlle. Joanna Wagner, cantatrice of the Court of His Majesty the

(1) 6 Sim. 333.

(2) Ibid. 340; s. c. 5 Law J. Rep. (N.S.) Chanc. 115.

(3) 16 Ves. 454.

(4) 2 Phil. 60; s. c. 14 Law J. Rep. (N.S.) Chanc. 444.

King of Prussia, with the consent of her father, Mr. Albert Wagner, residing at Berlin, of the other part, have concerted and concluded the following contract:—First, Mdle. J. Wagner binds herself to sing three months at the theatre of Mr. Lumley, Her Majesty's at London, to date from the 1st of April 1852 (the time necessary for the journey comprised therein) and to give the parts following—1. *Romeo*, 'Montecchi'; 2. *Fides*, 'Prophète'; 3. *Valentine*, 'Huguenots'; 4. *Anna*, 'Don Juan'; 5. *Alice*, 'Robert le Diable'; 6. An opera chosen by common accord. Second, the three first parts must necessarily be—1. *Romeo*; 2. *Fides*; 3. *Valentine*, &c. &c. Third, these six parts belong exclusively to Mdle. Wagner, and any other cantatrice shall not presume to sing them during the three months of her engagement. If Mr. Lumley happens to be prevented by any cause whatever from giving these operas, he is nevertheless held to pay to Mdle. J. Wagner the salary stipulated lower down for the number of her parts, as if she had sung them. Fourth, in the case where Mdle. J. Wagner should be prevented by reason of illness in singing in the course of a month as often as it has been stipulated, Mr. Lumley is bound to pay the salary only for the parts sung. Fifth, Mdle. J. Wagner binds herself to sing twice a week during the run of the three months; however, if she herself was hindered from singing twice in any week whatever, she will have a right to give at a later period the omitted representation. Sixth, if Mdle. J. Wagner, fulfilling the wishes of the direction, consent to sing more than twice a week in the course of three months, this last will give to Mdle. J. Wagner 50*l.* sterling for each representation extra. Seventh, Mr. Lumley engages to pay Mdle. Wagner a salary of 400*l.* sterling per month, and payment will take place in such manner that she will receive 100*l.* sterling each week. Eighth, Mr. Lumley will pay by letters of exchange to Mdle. Wagner at Berlin, on the 15th of March 1852, the sum of 300*l.* sterling, a sum which will be deducted from her engagement, in his retaining 100*l.* each month. Ninth, in all cases, except that where a verified illness would place upon her a hindrance, if Mdle. J. Wagner shall not

arrive in London eight days after that from whence dates her engagement, Mr. Lumley will have a right to regard the non-appearance as a rupture of the contract, and will be able to demand an indemnification. Tenth, in the case where Mr. Lumley should cede his enterprise to another, he has the right to transfer this contract to his successor, and, in that case, Mdle. Wagner has the same obligations and the same rights towards the last as towards Mr. Lumley.

“(Signed) Joanna Wagner.
Albert Wagner.”

“Berlin, Nov. 9, 1851.”

Shortly after the execution of the above contract Dr. Bacher produced the same to Mr. Lumley in Paris, whereupon the latter objected that it did not contain the usual clauses prohibiting Mdle. Wagner from singing or performing, during her engagement with Mr. Lumley, in any other place in England without his consent, whereupon Dr. Bacher, on the 15th of November, as agent of the Wagners, added thereto a clause to the following effect:—

“Mdle. Wagner engages herself not to use her talents at any other theatre, nor in any concert or reunion, public or private, without the written authorization of Mr. Lumley.—(Signed) Dr. Joseph Bacher, for Mdle. Joanna Wagner, and authorized by her.”

Early in March the Wagners wrote to Mr. Lumley, requesting an enlargement of the time for the lady's appearance in London, which was consented to. Subsequently, on the 5th or 6th of April, Mdle. Wagner and her father entered into an agreement with the defendant Gye, whereby it was agreed that they should abandon the contract with Mr. Lumley, and that the defendant, Mdle. Wagner should sing at the “Royal Italian Opera,” Covent Garden, instead of “Her Majesty's Theatre.” The bill was filed on the 22nd of April 1852, by Mr. Lumley, against Mdle. Wagner, Albert Wagner, and F. Gye, praying that the defendant Joanna Wagner might be restrained by injunction from singing and performing, or singing at the Royal Italian Opera, Covent Garden, or at any other theatre or place, without the sanction or permission in writing of the plaintiff during the existence of the

agreement with the plaintiff mentioned in the bill. The Vice Chancellor Parker, on the 9th of May, granted the injunction in the terms of the prayer; and the defendants now moved to dissolve it.

Mr. Bethell, Mr. Malins, and Mr. Martindale, for the motion.

Mr. Bacon and Mr. Hislop Clarke, contra.

The following cases were cited :—

Martin v. Nutkin, 2 P. Wms. 266.

Robinson v. Lord Byron, 1 Bro. C.C. 588; s. c. 2 Cox, 4.

Morris v. Colman, 18 Ves. 437.

Kemble v. Kean, 6 Sim. 333.

Kimberley v. Jennings, 6 Ibid. 340; s. c. 5 Law J. Rep. (N.S.) Chanc. 115.

Gervais v. Edwards, 2 Dr. & War. 80.

French v. Macale, Ibid. 269.

Barret v. Blagrove, 5 Ves. 555.

Collins v. Plumb, 16 Ibid. 454.

Clark v. Price, 2 Wils. C.C. 257.

Baldwin v. the Society for the Diffusion of Useful Knowledge, 9 Sim. 393.

Hooper v. Brodrick, 11 Sim. 47; s. c. 9 Law J. Rep. (N.S.) Chanc. 321.

Rolfe v. Rolfe, 15 Sim. 88.

Whittaker v. Howe, 3 Beav. 383.

Dietrichsen v. Cabburn, 2 Phil. 52.

Hills v. Croll, 2 Phil. 60; s. c. 14 Law J. Rep. (N.S.) Chanc. 444.

Smith v. Fromont, 2 Swanst. 330.

Stocker v. Brockelbank, 3 Mac. & G. 250; s. c. 20 Law J. Rep. (N.S.) Chanc. 401.

Swallow v. Wallingford, 12 Jur. 403.

The LORD CHANCELLOR.—This case arises out of a very simple contract. Without considering for a moment the difficulties which have been raised by the conduct of the parties, and independently of the question of law, the contract simply is, that this young lady should sing at the Queen's Theatre, for a certain number of nights, and that she should not sing elsewhere during (for that is the true construction of it) that period. Nothing can be more simple than the case on which I have to decide the points of law that have now been so elaborately and so well argued. As I can understand the objection,

it is this: that there is no case in which this Court can—that is, in which this Court ought to—grant an injunction, unless in cases that are connected with specific performance, or cases where, if the injunction is to compel a party to forbear from doing an act, or to compel a party not to perform an act, the injunction will execute the whole of the agreement or the whole of that which remains to be performed. Without going into other cases of injunction, I understand that to be the precise case that is now presented before the Court. The point, therefore, first is, how that stands upon principle; and, in the next place, how it stands upon authority. Before I consider it upon principle, I will refer to two or three of the cases that have been cited by the defendants, the appellants, in support of the argument.

The first case was that of *Martin v. Nutkin*, where an injunction was granted to prevent the ringing of a bell. That was a case in which the Court did issue an injunction restraining an act from being done, which can in no respect be considered as a case in which the Court could have granted a specific performance; but that case falls within the second of the class of cases which the defendants admit are proper cases for the interference of the Court, because there the ringing of the bell had been agreed to be suspended by the churchwardens, who represented the parish, in consideration of money paid by Martin and his wife in the erection of a cupola and clock and so on, the price in fact stipulated for by the parish in consequence of their relinquishing the great enjoyment of constantly hearing the church bell ringing at five o'clock every morning at certain periods of the year. In that case, the parish accepted the benefit, but refused the compensation. Lord Macclesfield granted an injunction, and the Lords Commissioners, on the hearing of the cause, continued the injunction during the lives of Martin and his wife. That is a case in which the Court did grant an injunction to prohibit a party from doing an act, in which this Court could never have interfered by way of directing a specific performance. The next case referred to is *Barret v. Blagrove*, which came before Lord Rosslyn. There

a lease had been granted by the proprietors of Vauxhall Gardens, with a negative stipulation that the tenant of the house was to do no act to damage the custom or business of Vauxhall itself. After some time the proprietor of Vauxhall filed a bill for an injunction against the then tenant of the house for breaking that stipulation, and Lord Rosslyn granted an injunction; but Mr. Bethell observes, how remarkable are the words which Lord Rosslyn made use of; for he said it was a case of specific performance. Next, a case is referred to that came before Lord Eldon, where he dissolved the injunction; there being so much acquiescence, he said that the Court could not interfere, but he also treated it as a case of specific performance.

So far as the words go, the decisions of those eminent men would seem to justify the argument addressed to me. But what is the fact with respect to the case decided by Lord Rosslyn? The granting of the injunction was, in that case, a specific performance; because the prohibition, preventing the man from doing the act, does as effectually make him perform his agreement, as if the Court compelled him to do the act by compelling the direct performance of it. The Court said, you shall not open your house as a house of entertainment. That was the performance of the agreement in substance, because the man could not then do the act complained of. Therefore, the term "specific performance" was aptly applied to such a case; but not in the sense addressed to me under the first general head. It is no objection to this jurisdiction to say, that the remedy is at law; the decision in *Robinson v. Lord Byron* is a clear illustration of that. There the remedy was at law; but this Court felt no difficulty in restraining Lord Byron from abusing the right of the head of the water which he had. There are cases, such as that cited for the appellants, *Collins v. Plumb*, in which the power was not exercised; but it was there admitted that the Court had the power of preventing the act from being done; though the power will not be exercised, because it cannot be exercised properly or beneficially. The negative covenant not to sell water was not enforced by Lord Eldon, not because he had any doubt of the jurisdiction, but

because it was impossible to measure the damage sustained by the different parties, and from the nature of it the Court could not interfere. The learned Judge did not mean to break in on the general rule, whatever it may be; but refused to exercise the jurisdiction on very sufficient grounds.

I took the liberty of calling counsel's attention to those familiar cases of attornies' clerks and surgeons' or apothecaries' apprentices and the like, that are frequently arising in this court. On what principle are they decided? I am told that they are decided upon this principle: that they arise out of benefits received and out of concluded contracts, and that, therefore the prohibition finishes everything and brings it within the second category. I do not apprehend the jurisdiction of the Court depends upon that. Take the case of landlord and tenant. When that relation is fixed and consummated by the contract and by the lease executed, what is there to make that case differ from any other? No doubt, in a contract to grant a lease, there might be a specific performance; but the lease being executed with a negative covenant not to do a particular act, the moment you are called upon to perform that covenant by inhibition, you have to deal upon that covenant alone. And scarcely, I think, a case has occurred in this court in that relation, in which there were not many stipulations affirmative remaining to be performed in the very contract from which the Court picks out this particular negative covenant for the purpose of enforcing it by prohibition. In leases there are often twenty affirmative covenants, and, perhaps, but one negative covenant, that the tenant, for example, is not to cut timber trees, or lop them, or do any similar act. The Court does not ask what remains to be performed under the contract; but the Court gives effect to the negative contract, and specifically executes it by prohibition. All these cases are in direct contradiction of the rules that have been so elaborately pressed upon me.

This is a mixed case: but of this nature; it consists not of two acts to be done by each of the parties;—not that Mr. Lumley is to do one act, and the

young lady is to do another, but the acts are to be done by the young lady alone. The one is ancillary to the other; they are co-equal and co-existent, and operate together, and not in opposition. She says, "I will sing for three months at your theatre, and during that time I will not sing for any one else." In fact, it is one contract, and according to all sound and judicious construction, and according to the true spirit and essence of men's acts, an agreement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another. It appears that according to the lady's capacity and physical powers, she was by the exertion of her abilities to aid the theatre to which she attached herself; and if there was no such stipulation not to perform at another theatre, she would have broken the spirit and true meaning of the contract by entering into this other contract. Let us see for a moment what is the principle of the jurisdiction of the Court. That principle is to bind men's consciences to a fair and liberal performance of their agreements. I have always thought you may attribute a great deal of the right feeling and fair dealing that exists between Englishmen to the exercise of this jurisdiction. Men are not suffered by the law of this country to depart from their contracts at their pleasure. It does not leave the party with whom the contract has been broken to the mere chance of what a jury may give in the shape of damages, but it enforces, where it can, the literal performance of the contract; and this I believe has mainly tended to produce the good faith that exists to a greater extent in this country than in many others. Although the jurisdiction of the Court is not to be extended, a Judge would desert his duty if he did not act up to the rule which his predecessors have laid down as the proper exercise of a most valuable and wholesome jurisdiction. Where is the mischief in this case of exercising that jurisdiction? It is objected that if I refuse this application, I exclude this lady from performing at Covent Garden, when I cannot compel her to perform at the Queen's Theatre. I cannot compel her to perform, of course; that is a jurisdiction that the Court does not

possess, and it is very proper that it should not possess that jurisdiction; but what cause of complaint is it that I should prevent her from doing an act which may compel her to do what she ought to do?—though that is not the object the Court has in view; for the Court cannot indirectly do a thing, and I disclaim doing a thing indirectly which I cannot do directly. In my opinion this is a proper case for interference, and, though I cannot compel the execution of the whole of the contract, I leave nothing unaccomplished by my order which I hold it is in the power of the Court to accomplish. She will be committed to prison by this Court if she does any act in breach of this injunction; and it will have this effect: by preventing her from doing the act, there will be no case, in an action by Mr. Lumley against her, for such an amount of vindictive damages as a jury might probably be disposed to give, if she exercised her talents in the rival theatre. It appears to me that, in granting the injunction, I shall do nothing contrary to the settled rule of the Court, but merely carry out, as far as I can, the whole power of the Court on one subject, which fortunately has a bearing upon another subject which I cannot directly touch.

This case has been elaborately argued upon the authorities. I bow to the authorities. I mean to execute the authorities; I am giving no authoritative decision from myself; I mean to follow the current of authority of my predecessors; to weigh their opinions where there is a difference of opinion between the Judges, that have preceded me, calmly and patiently to consider them, and to arrive at the best conclusion I can as to the meaning to be drawn from the various expressions which I find in those decisions. With respect to the case of *Morris v. Colman*, it was said that Lord Eldon had decided that case as a case of partnership, but he did not exclusively decide it as a case of partnership; and I have come to a clear conclusion that Lord Eldon would have granted the injunction in that case, though it had not been a case of quasi-partnership. The case of *Clark v. Price* does not apply, for there was no negative stipulation, and therefore Lord Eldon very properly refused an injunction.

As to the case of *Kemble v. Kean*, decided by Sir L. Shadwell (of whom I wish it to be understood that I speak with the highest respect), I should have come to a different conclusion; for there was in that case a negative covenant. My apprehension is that the case of *Kemble v. Kean* was wrongly decided, and could not be maintained. That learned Judge followed that decision up in *Kimberley v. Jennings*; but with great submission, it appears to me that the whole of the authority of Vice Chancellor Shadwell is removed by himself, and I think the case of *Rolfe v. Rolfe* displaces the entire of his authority upon this question. In the case which has been referred to, *Hooper v. Brodrick*, though the Court would not enforce the affirmative covenant, yet it would have restrained the defendant from breach of the negative covenant. This case is directly against the appellants. In *Smith v. Fromont*, there was no negative covenant, and consequently it does not bear upon this question. An observation has been made upon an opinion of my own in Ireland, *Gervais v. Edwards*, and I abide by that opinion. There the whole case was properly a case of specific performance; but, from the nature of the contract itself, there was a portion that could not be executed. It is said that in *Hills v. Croll*, Lord Lyndhurst refused to enforce by injunction a negative contract. But I find in that case, that while A. was to supply B. with certain acids, and B. was not to get the acids anywhere else, there was no power to compel A. to supply B. with the acids; and therefore B.'s manufacture might be paralyzed, and he might be ruined if A. did not supply him; therefore Lord Lyndhurst said, I cannot interfere. It is supposed that Lord Lyndhurst improperly applied there the rule that was properly applied in *Gervais v. Edwards*; but he did not improperly apply it; as he could not enforce an affirmative covenant with respect to one part, he would not enforce a negative covenant as to the other, for by doing so he might ruin the man. With respect to the case of *Dietrichsen v. Cabburn*, I wholly deny that it was a case of partnership; it was strictly a case of principal and agent, and it was only because there was that negative contract that the Court gave effect to it.

The clear result from all those cases in my mind is, that the point of law has been properly decided in the court below, and that I must, as regards that point, affirm the decision. As there has been so much controversy about the case, I am not sorry that it has been brought here for further consideration. Whether my opinion is enough to settle the point is another question; but I entertain no doubt whatever upon it. It was thought necessary, also, to go into the merits, and it was insisted that if, upon the merits, I ought not to give relief to Mr. Lumley, I should not interfere, even if the point of law was in his favour. The merits rest upon two points: first of all, that there was an abuse of confidence on the part of Dr. Bacher, who was constantly represented to be the paid agent of Mr. Lumley, of which there is no evidence; though the fair inference is, that Dr. Bacher is not a gentleman so very fond of music as to be travelling over the Continent with two terms in his pocket without getting some payment for his trouble. It is always desirable to avoid harsh representations, and there has been a wilful charge of misrepresentation against Dr. Bacher by this young lady and her father. I never saw a case in which there was less foundation for that charge. The young lady got introduced to Dr. Bacher, and she was so anxious that he should ascertain her musical talents that, as he had no opportunity of seeing her in public, she sang to him in private, that he might represent her vocal abilities to the proprietors of theatres; and Dr. Bacher, approving of Mdlle. Wagner's abilities, put himself in communication with Mr. Lumley and with the director at that time of the French Opera House in Paris, to procure her engagements. This case admits of no doubt as regards this transaction. Mr. Lumley had a printed form of agreement, containing many onerous penalties, no doubt, and containing the precise provision on the introduction of which into the agreement the charge of misconduct is founded. That printed form was signed by Mr. Lumley and sent to the Wagners. The provision was not introduced to deceive the young lady, because it was contained in the general form of agreement entered into by Mr. Lumley; and when

the young lady and her father received the document, with which they were dissatisfied, they must have known that it was the common and usual form of agreement used by him. The father appears to be as capable of drawing an agreement as Mr. Lumley. He repudiated Mr. Lumley's agreement, and drew the agreement now before me, and excellently well drawn it is; and I never knew a man so unlikely to be deceived by the introduction of a term of which he did not approve. Dr. Bacher took back the agreement drawn up by the lady's father to Mr. Lumley, and the provision being omitted he added it, stating that he was authorized by Mdle. Wagner to do so. The Wagners do not tell us when they received that; but it is perfectly clear that they received it before the several letters now before the Court; and in no one of those letters do they reject the term that has been introduced. Mdle. Wagner and her father grumble about its introduction; but the fact of finding fault with it without saying they will not be bound by it, is an acquiescence. They had full opportunity to reject the contract; but instead of rejecting it, they accepted it. It is much too late now to raise any objection on that ground, and therefore I overrule that objection.

The remaining objection is a very simple one. It appears that a sum of 300*l.* was to be paid to this young lady on a day named; and I am told by the decision of the Court below that that was not a reciprocal obligation, that that was an independent contract; in which I cannot agree; and certainly so far I shall come to a different conclusion. Mr. Lumley could never have come here unless he set himself right by tendering the 300*l.* which he had agreed to pay within a reasonable time. I am certainly of opinion that Mr. Lumley was bound to pay the 300*l.* before he could enforce the contract; and the question is, when he was bound to pay it. By the original contract he was to pay it by a given day in March; but before that day arrived the young lady and her father applied to Mr. Lumley to enlarge the terms of the contract. He accedes to that, and the father writes to him, saying where he is to send the money. In the mean time a letter was written by Dr. Bacher, on the

9th of March, to the Wagners, saying he had the 300*l.* to pay Mdle. Wagner, and asking her how and when he should send it. He swears particularly to the contents of that letter, and he swears he received no answer to that letter. Now, what is the allegation of the other side? They say they remember that they received the letter, but contradict in the flattest terms Dr. Bacher's statement with regard to the contents of that letter. One naturally then calls for the production of that letter, and I am not satisfied with the grounds that have been given for the non-production of that letter. I need not repeat my reasons. I have stated them in the course of the argument; but then it is said that Dr. Bacher might make this statement, and declare, if the letter was produced, that he had forgotten the contents. Now, can there be any stronger proof of the truth of what he says than this, that he made that statement when he had reason to expect that the letter would be produced? He did not know, at the time he swore, but that it was in existence, and might be produced the next moment to contradict him. If a party at his peril makes that statement, when the other party merely says in reply, "The contents are not true, the letter is in my depository at Berlin; but though I have written for it, and other letters have been sent to me, that letter has not been sent, and I have no doubt but it is destroyed," nothing can be more unsatisfactory than that answer. On the 18th of March Mr. Lumley wrote to them, stating that Dr. Bacher had undertaken to pay to them a bill of exchange for 300*l.*, and by that time he had no doubt but all was in order. What was done by M. Wagner and his daughter? They never say a single word or make the slightest complaint. They make no communication to Mr. Lumley or Dr. Bacher, but quietly remain satisfied, the money being, as I suppose, in Dr. Bacher's hands. When the necessity for producing the money arose, the sum was forthcoming. It is quite clear to me that whatever difficulty there might be in raising the money, it would have been sent as a matter of course, if the lady had insisted upon it. I consider, when she was obtaining a favour from Mr. Lumley by re-opening the contract,

which could only be done by the compliance of Mr. Lumley, she was not at liberty to lull his prudence to sleep or leave him under the impression that the bill for payment to her had been appropriated, as he believed it was. Observe what happens besides. Very violent affections are suddenly raised up between persons abroad on a very short acquaintance. This young lady suddenly becomes attached to Dr. Bacher, she calls herself his child, she says no person had ever such a *chargé d'affaires*, and asks him to go to Hamburgh, to accompany her to London to fulfil her engagement,—though he is afterwards represented as a false friend. He writes to her to say that he will do so; but not a word is said by her about the non-payment of the money, and then the money would have been perfectly in time to answer the very object for which it was agreed to be paid. Under these circumstances, this gentleman comes to Hamburgh to accompany the young lady to London; but instead of going to London for that purpose, she enters into an agreement with Mr. Gye on the 5th of April, and on the 6th she goes before a notary, and makes an absurd declaration that she is released from her previous contract. But this Court says she is not released from her contract; the order of this Court is greater than the release of the notary, and she must obey the order of this Court. She has nothing to complain of; it is entirely her own fault; she wished to prevent the money being paid that she might escape the liability to perform the contract that was entered into with good faith on the other side; and, therefore, though finding no fault that the point of law was raised, I must refuse this motion, with costs.

L.C. }
July 24, 27. } DYKE v. RENDALL.

Dower—Equitable Bar.

In the deed of settlement, made on the marriage of E. S., an adult female, it was recited, that "for providing a competent jointure and provision of maintenance for the lady in case she should survive her husband," the father of T. D., the intended husband, had paid to T. D. 3,000l., and the

father of the lady had paid to T. D. 851l. and had covenanted to pay him a further sum of 500l.; and that it had been agreed that T. D. should give a bond to the trustees of the settlement, conditioned for the payment of 2,000l. within six months after the marriage; and it was declared that the trustees should hold the 2,000l. upon trusts for the benefit of the husband and wife for their respective lives in succession, &c. T. D. gave the bond accordingly, and died, leaving E. S. surviving him, having paid 500l. only in discharge of the bond. After the marriage, T. D. acquired real estate which he sold during the coverture. Upon bill by the wife against the purchaser, claiming dower:—Held, upon appeal, that the settlement, being expressed to be "for providing a competent jointure," must be understood to be in bar of dower; and, reversing the decision below, that the partial non-payment of the money secured by the bond, did not entitle the widow to claim against the purchaser of the husband's real estates her dower pro tanto.

Equitable bar of dower depends altogether upon contract; and has no analogy to legal bar of dower under the Statute of Uses.

The observations of Sir A. Hart, in Power v. Sheil (1) disapproved of.

By a deed of settlement, dated the 20th of June 1810, and made between W. Dyke of the first part, T. W. Dyke, the son of the said W. Dyke of the second part; Elizabeth Dyke, the plaintiff, then Elizabeth Skinner, of the third part; John Skinner, the father of the said Elizabeth Skinner, of the fourth part, and certain trustees of the fifth part, reciting an intended marriage between Elizabeth Skinner and T. W. Dyke, and that "in consideration of the said intended marriage, and for providing a competent jointure and provision of maintenance for the said Elizabeth Skinner in case she should, after the said intended marriage, survive the said T. W. Dyke, and for securing a provision for their issue," the said W. Dyke had paid to the said T. W. Dyke the sum of 3,000l.; and that John Skinner had paid to the said T. W. Dyke the sum of 851l. 10s., and had covenanted that his executors should

(1) 1 Moll. 311.

pay to the said T. W. Dyke the further sum of 500*l.*, which two sums were the marriage portion of the said Elizabeth Skinner; and that it had been agreed that the said T. W. Dyke should give his bond to the said trustees in the penal sum of 4,000*l.*, conditioned for the payment of 2,000*l.* with interest at 5*l.* per cent. per annum, within six months from the solemnization of the said intended marriage, upon the trusts thereafter mentioned; it was declared that the trustees should stand possessed of the said sum of 2,000*l.* upon trust for T. W. Dyke for life, and, after his decease, upon trust for the said Elizabeth Skinner for life; and, after the decease of the survivor of them, upon trust for the issue of the said intended marriage.

At the date of the settlement, Elizabeth Skinner was of full age. T. W. Dyke gave his bond to the trustees, of even date with the settlement, conditioned for the payment of 2,000*l.*, and died in December 1846, leaving the plaintiff (his widow) surviving him; and at the time of his death there had been paid, in respect of the said bond, the sum of 484*l.* 18*s.* and no more. During the existence of the coverture, T. W. Dyke became seised in fee simple in possession of certain real estate called the Bulford estate, containing seventy-two acres and upwards, which in 1831 he sold and conveyed to Richard Cox. In 1847, the devisees in trust of R. Cox sold and conveyed this estate to the defendant Rendall. The plaintiff then filed her bill, praying that it might be declared that she was entitled to dower out of the Bulford estate, and that it might be assigned to her accordingly. The defendant, by his answer, insisted that she was barred by the settlement executed previously to her marriage. The cause coming on for hearing before Wigram, V.C., a reference was directed to the Master to inquire and state what settlement was made on the marriage, and whether such settlement was productive of any, and what benefits to or in trust for the plaintiff, &c. The Master found that the only sum paid in respect of T. W. Dyke's bond for 2,000*l.* was the sum of 484*l.* 18*s.*, leaving the residue of 1,515*l.* 2*s.* unpaid. The cause coming on for further directions, before Knight Bruce, V.C., his Honour con-

sidered that he was bound by the authorities to hold that the effect of the words in the settlement, "for providing a competent jointure and provision of maintenance for the said E. Skinner," was to shew a contract between the lady and her intended husband, that in consideration of the provisions made for her by the settlement, she would waive her right to dower: but that, the consideration being unpaid, the plaintiff had a lien upon her dower to the amount unpaid, analogous to a vendor's lien for unpaid purchase-money; and he declared that the plaintiff was entitled in respect of her dower, to one-third of the rents of the Bulford estate, not exceeding 60*l.* 12*s.* per annum; being the interest, at 4*l.* per cent. per annum on the sum of 1,515*l.* 2*s.*, the principal remaining due upon the bond. The defendant appealed from this decree.

Mr. Greene and *Mr. Vance*, for the plaintiff, in support of the decree.—Two questions arise: first, whether there was any bar of dower by the settlement; and, secondly, whether the provisions of the settlement must not be productive to the full extent intended, in order to make a complete bar of dower. On the first point, the Vice-Chancellor considered himself bound by the case of *Walker v. Walker* (2), that the provision was to be taken in bar of dower. But that case did not raise the question; the provision there made being expressed to be in full bar of dower. As to the second point; to make a provision an equitable bar of dower, you must follow, in all respects, the rules as to a legal bar; and, therefore, if the widow be evicted of her jointure, she is restored to her rights of dower. The bar will not take effect unless the substituted provision be made good; *Power v. Sheil*. This is no case for election; for the widow has sold her dower, and has a lien upon it, as in the case of a vendor for unpaid purchase-money.

Mr. Malins and *Mr. Bird*, for the appellant.—If the argument for the plaintiff is sound, a purchaser would be bound to investigate, not only whether a provision was made for the wife, but also as to the solvency of the husband; whether the

jointure fund is in a state of security, &c. In fact a purchaser would not be safe even after the wife was in possession; for she might still be evicted. But the law is not so—*Vizard v. Longdale*, cited in *Tinney v. Tinney* (3), *Simpson v. Gutteridge* (4). The case of *Power v. Sheil* may be explained by the fact that the dowress there was a defendant; and the Court refused to interfere against her by injunction, as the jointure had failed.

Mr. Greene replied.

The LORD CHANCELLOR.—I shall not dispose of this case without further consideration. The real question here is, what has the lady contracted for? I am much inclined to think that the real consideration for the bar was the payment of the 3,000*l.* by W. Dyke to the husband. I do not understand Sir A. Hart's observations in *Power v. Sheil*; for I think a woman may do a very wise thing in enabling her husband to deal with his estates. My impression in this case is, that the lady has chosen her security, and upon that she must rely. I will, however, look through the authorities again, and give my judgment on Tuesday morning.

July 27.—The LORD CHANCELLOR.—In this case the Vice Chancellor decided that the settlement was to be taken in bar of dower, and so far the decree is right. But there is another question of a very different nature, namely, whether the plaintiff is entitled to a lien upon the estate, in respect of the consideration agreed to be given for the bar of dower; and to come to a proper decision upon that question it will be necessary to consider the difference between a legal and an equitable bar of dower. *Vernon's case* (5) explains how it was that the Statute of Uses provided for dower. At the time of passing that statute, a great portion of the lands in this kingdom was dedicated to uses; and consequently the wife was not entitled to dower out of such lands. When the statute passed which converted the use into the legal estate, the wife would immediately have

become entitled to dower. But as it had constantly happened that in settlements made upon marriages, upon the ground that the husband's estates had been vested in trustees to uses, the husband had been required to take a conveyance to the use of himself and his wife, or otherwise, so as to make a competent provision for the wife, the statute provided that, where an estate had been conveyed for the maintenance of the wife if she survived, there the wife should not be entitled to dower out of the residue of the husband's lands. But the act went further, and said that, if the widow should be evicted from her legal jointure, there she should be remitted to her right of dower in proportion. That was reasonable enough; so that when the eviction operated, it operated upon the legal jointure made a bar by the statute; that is, the statute created the bar, with an exception in the case of eviction; so that, as it seems to me, the clause of eviction never could operate, except where the bar had been created by the statute. But how does this apply to an equitable bar of dower? For it was soon settled that, though there was no legal bar of dower, there might be an equitable bar under the rules of this court. It is perfectly clear to me that the true ground of equitable bar is contract, and, that independently of the statute. If this Court acted by analogy to the statute, the rule would only operate in cases where there would be a bar at law, supposing the provision made to be clothed with the legal estate; but this Court, disregarding altogether the provisions of the Statute of Uses, not only did not require any real estate to be settled, but also did not require any certain provision to be made for the wife. In *Caruthers v. Caruthers* (6), Lord Alvanley says, and he was only stating the well known rule of the Court, that an adult female might have even taken a chance in satisfaction of her dower, though under the Statute of Uses that would be good for nothing. But when this Court began to give effect to equitable bars of dower, it not only disregarded the nature of the property, or the *quantum*, but it did not consider it necessary that it should be sure.

(3) 3 Atk. 8; a.c. *nomine* *Vizard v. London, Kelynge*, C.C. 17.

(4) 1 Madd. 609.

(5) 4 Rep. 1.

(6) 4 Bro. C.C. 500.

An equitable bar, therefore, has none of those qualities which are absolutely essential to a bar under the statute. Analogy has nothing to do with the question; the contract is everything; and you may deal with your rights in this Court for any possible contingent advantage, provided the contract is fairly entered into. This observation applies to *Birmingham v. Kirwan* (7). As regards the authorities, they are very few. In *Simpson v. Gutteridge*, Sir Thomas Plumer decided that a purchaser had no right to call for the title of the jointure rent-charge. But it is said that it was the practice of conveyancers to call for such title. I never did it in a single instance, nor do I believe that it was the practice of conveyancers to do so: and that practice has considerable influence on a question of this kind. If, indeed, the jointure purported to be a legal bar within the statute, the wife might stand upon her legal rights, if evicted; but in this Court she will stand simply upon contract; and if a woman, being of age, contracts to accept any given thing as satisfaction of her dower, that she must take with all its defects: she must look to her contract alone; and by no analogy to legal jointure, or the Statute of Uses can she, in case of eviction, come against any person in possession of her husband's lands. This has nothing to do with the performance of the covenant by the husband to give the bond; he, of course, must do that act if he wishes to keep his estate free from dower.

The question, therefore, is, did this lady, or did she not, consent to accept this settlement, such as it is, in bar of dower?

My opinion is, that she did accept the payment of those sums to her husband, and his bond in lieu of her dower; and though in the event the bond has not been paid, she has no right to come against the lands of her husband, acquired after the marriage, and sold during the marriage, against a purchaser who bought on the faith that the settlement was a bar. I wholly dissent from the observations of Sir A. Hart in *Power v. Sheil*; but as that case may have misled the plaintiff, I shall dismiss the bill, without costs.

(7) 2 Sch. & Lef. 444.

L.C. }
July 22, 24. } NAVULSHAW v. BROWNRIGG.

Factors' Act, 5 & 6 Vict. c. 39.—
Validity of Pledges.

The plaintiff consigned pearls to a Liverpool merchant for sale, and drew bills upon him to an amount greater than the value of the pearls, which bills he accepted. The Liverpool merchant then handed the pearls to his London agent to be sold, and drew bills upon him, as an advance, upon account of the pearls. The London agent accepted the bills, having notice that the pearls had been consigned by the plaintiff for sale. The Liverpool merchant became insolvent, and the bills drawn upon him by the plaintiff were not paid. The London agent sold the goods to recoup himself the bills drawn upon him by the Liverpool merchant. Upon bill by the consignor alleging fraud and collusion, and praying that the London agent might be decreed to pay him the amount produced by the sale of the pearls—Held, affirming the decree of the Court below, that the pledge was valid within the 5 & 6 Vict. c. 39. as made bonâ fide and in the ordinary course of business.

Notice to the pledgee of the fact that the goods were transmitted to the consignee, with directions to sell simply, will not vitiate the pledge; secus, if the pledgee had notice that the consignee was prohibited from pledging.

This was an appeal, by the plaintiff, from a decision of the Vice Chancellor, Lord Cranworth, dismissing the bill. The case is reported, *ante*, p. 57, where the facts are fully stated.

Mr. Bethell and *Mr. Lewis*, for the appellant.

Mr. Rolt and *Mr. F. Goldsmid*, contra.

The following additional cases were cited—

Gill v. Kymer, 5 Moore, 502.

Haynes v. Foster, 2 Cr. & M. 237.

Stedman v. Martinnant, 13 East, 427.

Ex parte Skinner, 1 Deac. & C. 403.

And as to the equity of the bill—

Mackenzie v. Johnston, 4 Mad. 375.

Mitford's Pleading, p. 159, ed. 1827.

Adams v. Fisher, 3 Myl. & Cr. 526;
s. c. 7 Law J. Rep. (N.S.) Chanc. 289.
Lockwood v. Abdy, 14 Sim. 437.
King v. Rossett, 2 You. & J. 33.

Jan. 24.—The LORD CHANCELLOR.—This is a case of very much importance to the mercantile world, and depends upon the construction of certain acts of parliament. The general question is as to the right of the plaintiff to recover back certain pearls which he consigned to this country for sale, and which were pledged by his consignee to his agents, and were afterwards sold by his pledgee under circumstances which I shall presently state. The first point to ascertain is, what is the law as regards the right of the factor to pledge goods which are intrusted to him for sale?

The common law was upon the subject very strict; for not only could not the factor pledge the goods, however necessary it might be to raise money for the purposes of the principal, so as to give the pledgee the right to retain the produce of them if he sold them, but not even to pay bills drawn upon the original agent, and paid by the pledgee to the credit of the original holder; so that, in point of fact, by the common law there could be no dealing by way of pledge in this country with goods which had been remitted to an agent without an express authority to pledge. To meet that inconvenience, several acts of parliament were successively passed. The first of them was the act of 4 Geo. 4. c. 83. That statute merely gave to the person who took the pledge, the right of the person who pledged; so that, if the agent had a right as against his principal, that right was communicated to the pledgee and nothing further. Then came the 6 Geo. 4. c. 94, which, by section 2, provided that persons in possession of any bill of lading and so on, should be deemed the true owners of them, so far as to give validity to any contract or agreement to be made by such person or persons intrusted and in possession, with any person or persons for the sale or disposition of those goods, or for the deposit or pledge thereof, provided such person or persons should not have notice by such documents, or either of them or otherwise, that such person or persons so intrusted as aforesaid, were not actually owners of the

goods. So that the statute enabled the agent, as regarded third persons, to sell or to pledge, provided the persons with whom he pledged did not know that he (the person that pledged) was not the actual and *bond fide* owner of the property. That section was to operate in the case of a person who was dealing with an agent, not knowing him to be such, apparently as the owner. Then section 4. provided that any person might contract with any agent entrusted with any goods, &c., or to whom the same might be consigned; (not saying for what purpose, but generally with any agent entrusted with the goods or to whom the same might have been consigned), for the purchase of any such goods, and to receive the same and pay for them; and such contract should be binding upon the owner, provided such contract and payment be made in the usual and ordinary course of business, and that such person should not, when such contract was entered into or payment made, have notice that such agent was not authorized to sell the goods or receive the purchase-money. Here, although you are dealing with an agent, if you do not know that he has not authority to sell, you are perfectly safe in buying the goods.

As the law, therefore, stands, any one may safely buy of an agent if he does not know, and it is absolutely necessary that he should not, that the agent is not authorized to sell; and if the person selling is known to be an agent, then the law gives to persons accepting goods in pledge from known agents the interests of the person who makes the pledge. There is also a provision making the act of the agent, where he acts contrary to his authority, a misdeemeanour; so that, whilst the legislature gives to an agent and the persons dealing with him every possible security, it does not give impunity to an agent who does a wrongful act in making a pledge or a sale, for which he had not, as between him and his principal, any authority. Here, then, there was this difficulty. The 2nd section related only to purchases and pledges from agents who were not known to be such, and the 4th section to sales by agents who had not authority to sell. The 5 & 6 Vict. c. 39. was then passed, which, after reciting that, under the said acts and the present state of the law advances could not safely

be made upon goods or documents intrusted to persons known to have possession thereof as agents only; and that advances on the security of goods and merchandise had become a usual and ordinary course of business, and it was expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bond fide* advances upon goods and merchandise as by the said recited act was given to sales, and that owners intrusting agents with the possession of goods and merchandise, or of documents of title thereto, should in all cases where such owners by the said recited act or otherwise would be bound by a contract or agreement of sale be in like manner bound by any contract or agreement of pledge or lien for any advances *bond fide* made on the security thereof, declared, "that any agent who should thereafter be intrusted with the possession of goods, or of the documents of title to goods, should be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bond fide* made by any person with such agent, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement should be binding upon and good against the owner of such goods and all other persons interested therein, notwithstanding the person claiming such pledge or lien might have had notice that the person with whom such contract or agreement was made was only an agent." Under the 6 Geo. 4. c. 94. you might purchase from a known agent, provided "it was in the usual course of business," and that you did not know that the agent had not authority. Those two things only were necessary to give validity to a sale by even a known agent; and the late act intended to put pledges upon exactly the same footing as purchases. There is this difference between the two acts: the one says you are safe if, buying of a known agent in the ordinary course of business, you are not aware that he had not authority to sell; but the other merely recites that the pledge is in the ordinary course

of business. It no longer makes it a condition that the pledge should be, but it assumes that it is, in the ordinary course of business; and for the purpose of giving title to the pledge it treats the agent as the owner.

The act says that, in dealing with any agent in the pledge of property, you may safely consider him as owner if you are acting *bond fide*, though you know he is the agent; and you are not bound to ask for his authority. It is the usual course of business to take for granted that he has authority, and if you do not know he has not authority you are perfectly safe; he shall be deemed the owner of the property and you may deal with him as such, provided you are acting *bond fide*: though you know he is the agent you may deal with him as the owner. Then comes this proviso in section 3, upon which everything turns: "Provided always, and be it enacted, that this act, and every matter and thing herein contained, shall be deemed and construed to give validity to such contracts and agreements only, and to protect only such loans, advances, and exchanges, as shall be made *bond fide*, and without notice that the agent making such contracts or agreements as aforesaid has not authority to make the same, or is acting *malá fide* in respect thereof against the owner of such goods and merchandise; and nothing herein contained shall be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt, owing from any agent to any person with or to whom such lien or pledge shall be given, nor to authorize any agent intrusted as aforesaid in deviating from any express orders or authority received from the owner; but that, for the purpose and to the intent of protecting all such *bond fide* loans, advances, and exchanges as aforesaid, (though made with notice of such agent not being the owner, but without any notice of the agent's acting without authority), and to no further or other intent or purpose, such contract or agreement as aforesaid shall be binding on the owner and all other persons interested in such goods."

You may therefore, by this act, treat any agent, whom you know to be so, as owner, in accepting any pledge of goods from him which you know to have been deposited with or transmitted to him as

agent, if you are acting *bonâ fide* and have not notice that he is making the contract either *malâ fide* or beyond his authority. It is assumed it will be in the ordinary course of business.

There is a different provision as regards the misdemeanour; the misdemeanour still continues, but with a very important alteration, to which I shall presently refer.

Nothing then can be plainer than the act of parliament; but the question which must arise is, what is the notice which is to bind the person accepting the pledge? Lord Tenterden, in *Evans v. Trueman* (1), referring to the statute 6 Geo. 4. c. 94. lays it down very generally. He says: "The expression of the statute is, that a party to be entitled to its protection, if 'he shall' not have notice, by the documents or otherwise, that the pledger was not the actual and *bonâ fide* owner of the goods pledged. A person may have knowledge of a fact either by direct communication, or by being aware of circumstances which must lead a reasonable man, applying his mind to them, and judging from them, to the conclusion that the fact is so. Knowledge, acquired in either of these ways, is enough, I think, to exclude a party from the benefit of the provisions of this statute: slight suspicion, I think, will not." Now, that is laid down, I confess, a little too much at large; because slight suspicion is out of the question in this act. I do not say that some circumstances may not be equivalent to an actual notice; because some may be stronger than any words can express. Lord Tenterden says, "slight suspicion will not affect it." I should say that no suspicion will affect it. This was an act intended to enable general dealings between man and man in the city of London; and it would never do to say, you may deal with a man who is an agent and who, as regards you, is considered the owner, provided you will not notice he goes beyond his authority and is acting *bonâ fide*; if there is not any *malâ fides* there is an end of the case. It is impossible to say that a mere suspicion, or slight suspicion, of notice can take from you the protection with which you are surrounded by this act. I think, therefore, that that is not put so strongly as it should be in favour of the pledgee.

(1) 1 Mco. & Rob. 10.

In this case, the goods were sent by the plaintiff to Messrs. Brownrigg & Co. for sale; and it was well argued, and properly argued, that by the common law, the power of transmission for sale would not authorize a pledge. This was the very thing intended to be struck at by the act. Unless you can bring it within the proviso, it was the very thing intended to be remedied. The plaintiff almost immediately drew bills upon Messrs. Brownrigg & Co. as against his consignment, for the sum exceeding by 400*l.* what the pearls were really worth. There is no doubt that the act under the old law would have given the pledgee no right, even if he had paid the bills, to have retained the goods; yet under the clause to which I have just referred, it is impossible not to see that the very act of drawing rendered a pledge almost necessary, unless you are to suppose that the Liverpool house could do without it. You have no right to look at the insolvency—that must be considered as a matter of accident or misfortune; it bears very hard on Mr. Navulshaw, but it has nothing to do with the law of the case. In drawing, therefore, for that great amount he did give a colour to the very right to pledge in order to meet those very bills; and he drove the house, no doubt, to the necessity of pledging in order to obtain funds to meet them. If you are dealing with an agent you must take for granted that he has a power to sell in every case. The act says it has become a usual course of business to pledge, not that it was legal; on the contrary, it says that it was not legal, but it had become the usual course of business, and it meant to give legal effect to that course of business. When, therefore, you are dealing for a pledge with an agent who has a consignment, the knowledge that he has the power to sell appears to me to amount to nothing, for every agent must be supposed to have a power to sell who has the disposition of goods. What were these pearls sent over to Brownrigg & Co. for? That they might dispose of them. They have, then, the power of sale; and having such a power this act meant to give them the power of pledging in the clearest and strongest terms.

Assuming, then, that Collett & Co. knew expressly, before they accepted the bills and took the pledge, that Brown-

rigg & Co. had a power of sale only, even that would not alter the right ; because if they had not been informed of it, they would have been considered to have known it, inasmuch as they were dealing with an agent in the possession of goods. But it wants something more than merely the right positively to sell ; it wants a prohibition from the owner not to pledge. If when the plaintiff sent over the goods he had said, " I send these goods for sale, but I direct you not to pledge them," and that had been communicated to Collett & Co., I am perfectly clear that, in such a case, they could not safely have advanced their money by way of pledge ; because though they might have known that Brownrigg & Co. were agents, they would have had notice that the contract was one from which they were expressly prohibited. In any other view, I do not see where the safety of the act lies. Now, if we are to speak of probabilities in dealing in a great city like this, where there are ten thousand such transactions occurring constantly, what presumption can be more reasonable than this ? If a man is in possession of goods like these, and is known to possess them as agent, that he should come to your house, and say, " We have received these pearls from India (and I will suppose that he has received them for sale), and we desire you to have them valued with a view to sale." The actual deposit, it will be observed, was in clear furtherance of the directions of the plaintiff himself ; for it must be presumed that the pearls were intended to be sold in London. They were accordingly valued at 2,050*l.* Brownrigg & Co. then go to Collett & Co., who had been in possession of the goods for nearly a month, and ask for an advance of 2,000*l.* The case was that these goods, being fancy articles, would not then meet with a ready or good sale. Now the circumstances attending that application constituted as good a security as a man could have, under this act, of the transaction being *bond fide*. It was in the ordinary course of business, and there was nothing to lead to suspicion. And, though Collett & Co. did not know this fact, Brownrigg & Co. had already accepted bills to the amount of 2,400*l.* in favour of the plaintiff, for which, of course, they would have been entitled to hold the pearls as security.

The application for the loan, therefore, was, as I think, an assurance on the part of Brownrigg & Co. that they had the right to pledge ; and in that view Collett & Co. had a right to deal with them as the owners of the property, dealing as they did with perfect *bona fides*.

Again, what was there to have prevented the plaintiff, when he was drawing these bills for 2,400*l.* (which sum must have been a large proportion of the value) from saying, " I shall not object to your pledging them for that sum in case you find it inconvenient to make the advance " ? The plaintiff did not desire the goods to be sold at once, so much as to have a beneficial sale. Supposing, therefore, a full knowledge in Collett & Co. that the goods were transmitted for sale, there is nothing to lead them to the conclusion that there might not have been a subsequent authority to pledge.

In regard to the advances and the renewal of the bills, both acts provide that an agent exceeding his authority by pledging shall be guilty of a misdemeanour ; and in the 6 Geo. 4. c. 94, it is provided expressly " that the acceptance of bills of exchange by such person or persons drawn by or on account of such principal or principals, shall not be considered as constituting any part of such debt so due and owing from such principal or principals within the meaning of the act, so as to excuse the consequence of such a deposit or pledge, unless such bills shall be paid, when the same shall respectively become due." If an agent had accepted bills in favour of the owner, he could not have escaped the penalty of the misdemeanour unless he paid them. But the later act took a very different form ; for it says expressly " that no such agent shall be liable to any prosecution for depositing goods," and so on, " in case the same shall not be made a security for, or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bills of exchange drawn by or on account of such principal and accepted by such agent." So that this later act allows the party to bring into account, in order to save him from punishment, any bills of exchange drawn

by or on account of such principal, and accepted by an agent, and does not clog it with the condition that the bills shall be actually paid by the agent; so that the drawing of the bills by Brownrigg & Co., though to an amount greater than the value of the goods, would not subject them to a misdemeanour. That, I think, puts an end to the case, as regards the renewal of the bill. I am clear that the second bill was, in substance, a continuance merely of the original transaction, and there was nothing to alter the original advance. I see no necessity for this bill; this is no doubt a single transaction, and the plaintiff had his remedy by action without coming here. The foundation of the bill is the allegation of fraud, contrivance, &c., and that having entirely failed, I am of opinion that the appeal must be dismissed, with costs.

M. R. }
March 17, 18. } WHIELDON v. SPODE.

Legacies—Fund for Payment—Personality—Exemption.

*A testatrix by will gave real and personal estate to trustees to pay debts and legacies; by a codicil she devised the said estate to her sister for life, and directed it, at her death, to be sold for payment of legacies; she then gave various legacies, amounting to 50,000*l.*—Held, upon the personal estate proving insufficient to pay the legacies, that the said estate was not made the primary fund for payment of legacies, and that, subject to the life estate of the sister, the said estate was an auxiliary fund.*

Elizabeth Bree, by her will, dated the 7th of May 1840, gave, devised, appointed, and bequeathed all her freehold, copyhold, and other real property, and all her personal estate of every kind and description, and whether in possession, remainder, or expectancy, unto and to the use of George Whieldon, Robert Gordon, and William Harrison, their heirs, executors, administrators, and assigns, upon trust thereout, in the first place, to pay and discharge all her just debts and funeral and testamentary expenses. In the next place, to pay

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all and every the legacies which she might bequeath by any codicil, &c., "and as to all the residue and remainder of my said real and personal estate and property, I appoint, give, devise, and bequeath the same unto and to the use of G. Whieldon, Robert Gordon and William Harrison, in equal shares as tenants in common, and to their respective heirs, executors, administrators, and assigns, for their absolute benefit." The testatrix made two codicils to her will, both dated the 31st of August 1841; by the first she devised "to my dear sister, Mary Birch, the Tradeswill estate, for her life, at her death to be sold for the payment of legacies." The testatrix then gave legacies to various parties, amounting to above 50,000*l.* By the same codicil the testatrix devised the Ash estate to the two sons of George Whieldon.

The second codicil was executed to confirm her will, under the 7 Will. 4. & 1 Vict. c. 26.

This suit having been instituted for the administration of the estate of the testatrix, a decree was made, referring it to the Master to take the usual accounts; and he, by his report, found that the value of the testatrix's personal estate was about 48,000*l.*; that the real estate to which she was entitled consisted of the Tradeswill estate, which was specifically devised to Mary Birch for life, and was valued at 43,000*l.*, the Ash estate was valued at 88,000*l.*, and the Stoke estate was valued at 11,000*l.*

The personal estate of the testatrix proved insufficient to pay the debts and legacies; and, on the 25th of March 1850, a decree was made, directing the Stoke estate to be sold, the produce of which was to be paid into court.

At this time Mary Birch was living. William Harrison, one of the residuary devisees, died in the lifetime of the testatrix, and a question was now raised between the heir-at-law and the next-of-kin of the testatrix, whether the Tradeswill estate had or not been made the primary fund for payment of legacies, in exoneration of the personal estate.

Mr. Roupell and Mr. Evans, for the plaintiffs, the executors.

Mr. Lloyd and Mr. Lean, for Josiah Spode, the heir-at-law.—The real estate is not made a primary fund for the payment of debts or legacies. It is not denied that it is secondarily liable; but before the next-of-kin can succeed, they must shew a clear intention on the part of the testatrix, either to exempt the personal estate, or to postpone it to the real estate, and such intention must be collected from the will, and not from anything extraneous. The plaintiffs are the executors and devisees of the testatrix, and that alone affords an argument against the exoneration of the personal estate—*Boote v. Blundell* (1). In this will, there is no apparent intention to exempt the personal estate; and when the real and personal estates are placed upon an equal footing, the rule of law making the personalty the primary fund must be regarded. The direction in the codicil to sell the Tradeswill estate is no exoneration of the personalty; it is a mere repetition of the purpose of her will, and there is no intention even to create a mixed fund.

Davies v. Ashford, 15 Sim. 42; s. c.

14 Law J. Rep. (n.s.) Chanc. 473.

Mirehouse v. Scaife, 2 Myl. & Cr. 695; s. c. 7 Law J. Rep. (n.s.) Chanc. 22.

Roberts v. Walker, 1 Russ. & M. 752.

The Attorney General v. Southgate, 12 Sim. 77; s. c. 12 Law J. Rep. (n.s.) Chanc. 147; reversing 10 Law J. Rep. (n.s.) Chanc. 241.

Boughton v. James, 1 Coll. 26; 1 H.L. Cas. 406.

Earl of Inchiquin v. French, 1 Cox, 1. 2 Jar. on Wills, 587, 597.

Watson v. Brickwood, 9 Ves. 447.

Rhodes v. Rudge, 1 Sim. 79; s. c. 5 Law J. Rep. Chanc. 17.

Walker v. Hardwick, 1 Myl. & K. 396; s. c. 2 Law J. Rep. (n.s.) Chanc. 104.

Mr. R. Palmer and Mr. G. L. Russell, for the next-of-kin.—It is not upon the will that the question arises; but by the codicil the Tradeswill estate is taken out of the general charge, and, after the death of Mary Birch, is made the primary fund for the payment of the legacies, which the

codicil gives and postpones until after the death of the tenant for life.

The MASTER OF THE ROLLS.—I cannot consider the personal estate exonerated from the payment of legacies; to effect that, a clear intention must be apparent on the will. In this case all the property, real and personal, is given to the executors, subject only to the payment of the debts and the legacies to be given by codicil. The legacies given by the codicil amount to 52,000*l.*, while the personal estate amounts only to 48,000*l.*; the testatrix, therefore, must have been aware of the insufficiency of her personal estate, and have contemplated a contribution from her real estate. The purpose apparent on the codicil seems to have been to exempt the life estate given to Mary Birch from the payment of legacies; after which she again says it is to be sold. It would be strange to say that the legacies were postponed until the death of Mary Birch; in that case some of them might be defeated, though the legatee survived the testatrix. It would seem, therefore, that the codicil merely exempted the life estate of Mary Birch from the payment of legacies; but that it was the intention of the testatrix to make all the real and personal estate an auxiliary fund for the payment of debts and legacies.

M.R. }
April 20. } TRILLEY v. KEEFE.

Decree Absolute—Bill pro Confesso.

An order of Court duly served on a defendant is a sufficient notice under the 86th and 87th Orders of May 1845, to enable the Court to make a decree absolute on a bill taken pro confesso.

In this case the defendant was out of the jurisdiction, and a decree had been taken on the bill *pro confesso*. Under the 87th Order of May 1845 (1), an order had been obtained which limited the time for the defendant to apply to the Court to set aside this decree: this was served upon

(1) Ord. Can. 316; 14 Law J. Rep. (n.s.) Chanc. 292.

(1) 19 Ves. 527; s. c. 1 Mer. 193.

the defendant together with a copy of the decree; but no other notice was served upon the defendant, as directed by the 86th and 87th Orders of May 1845. The time limited by the order for setting aside the decree expired.

It was suggested that the service of the order of the Court limiting the time for applying to set aside the decree was not a sufficient notice within the meaning of the 86th and 87th Orders of May 1845.

Mr. Batten now moved under the 90th Order of May 1845, to make the decree absolute.

The MASTER OF THE ROLLS.—I consider the order made by the Court and the service of it a sufficient notice to the defendant, and I shall accordingly make the order asked.

M.R. }
April 26. } WITHAM v. SALVIN.

Misnomer—Copy Bill—Service—23rd Order of August 1841.

Where service of a bill has been made upon a defendant incorrectly named in the bill, leave will be given to enter a memorandum of service upon such defendant, stating his name correctly.

William Henry Charlton was, by mistake, named in the bill as William Charlton only, and service of a copy of this bill was made upon him under the 23rd Order of August 1841 (1).

Mr. Ridley, upon an affidavit identifying the defendant served as being the same person named in the memorandum of service, asked that he might be at liberty to enter a memorandum of service of the copy of the bill, stating correctly the name of the defendant to avoid the necessity of amending and serving the defendant with a copy of the amended bill—*Glover v. Cockerell* (2).

(1) Ord. Can. 171; 10 Law J. Rep. (N.S.) Chanc. 413.

(2) 9 Jurist, 890.

The MASTER OF THE ROLLS.—I think I may make the order upon the authority of the case cited.

KINDERSLEY, V.C. }
July 18. } HARRIS v. POYNER.

Will—Construction—Repairs—Tenant for Life and Remainder-Man—Conversion.

A testator gave all his real and personal estate whatsoever to his wife and son, whom he appointed executrix and executor, upon trust, to permit his wife during her life to receive the clear rents, issues and profits, interest, dividends, and annual proceeds thereof, subject to all out-goings; and upon the death of his wife, then, as to all his said devised and bequeathed freehold and residuary real and personal estate, with their appurtenances, and of which his wife was to have the clear yearly income for her life, upon trust for his son absolutely:—Held, that certain leaseholds belonging to the testator were to be held by his widow in specie, no intention of conversion being expressed.

Shortly after the testator's death his widow was called upon to make good the dilapidations to the leaseholds, under a covenant in the lease:—Held, that these expenses, which the widow had paid out of her income, were properly chargeable upon the corpus of the estate.

William Poyner, by his will, dated the 10th of November 1834, gave to his wife, Sarah Poyner, all his household goods and furniture, plate, china, books, pictures, prints, glass, and all other his household effects, and likewise all his wines, liquors and household stores, severally, for her absolute use. And the testator gave to his son, William Stapleton Poyner, during the life of his (the said testator's) wife, one annuity or clear yearly sum of 100*l.*, which he directed to be paid out of the yearly income of his thereafter devised and bequeathed freehold and residuary real and personal estate and effects; and he subjected and charged all such estate and effects with the payment of the said annuity. And the said testator gave, devised and bequeathed his freehold messuage in Buckingham Street in the Strand, and all his

real estate whatsoever and wheresoever, and all stocks in the public funds, mortgages and security for money, and all other his personal estate and effects not thereinbefore disposed of, and every part thereof, and all his estate, term and interest therein, with their respective appurtenances, unto and to the use of his said wife, and the said William Stapleton Poyner, his executrix and executor thereinafter named, their heirs, executors, administrators and assigns, according to the respective natures, tenures and qualities thereof, upon trust, during the life of his said wife and her remaining his widow, to pay to or permit and suffer her to receive and take the net or clear rents and profits, interest, dividends, and annual proceeds and income of all his said devised freehold and residuary real and personal estate as aforesaid, after paying all out-goings and expenses and the annuity of 100*l.* thereinbefore bequeathed, for her absolute use; and in case his said wife should marry again, then, upon trust, during the remainder of her life, to receive and pay the said net or clear rents, profits, interests, dividends and annual proceeds and income of all his said freehold and residuary real and personal estate, after discharging all out-goings and expenses, and the aforesaid annuity, into the hands of his said wife, for her separate use; and after her decease, then, as to all his devised and bequeathed freehold and residuary real and personal estate, with their appurtenances, of which his said wife was to have the clear yearly income, for her life (subject as aforesaid), upon trust for, and he gave, devised and bequeathed the same and every part thereof, and all his estate, term and interest therein, with their appurtenances, unto and to the use of his said son, W. S. Poyner, his heirs, executors, administrators and assigns, for his and their own absolute use and benefit for ever; and he directed that the same should be conveyed as aforesaid and paid to him and them accordingly; and the said testator appointed his wife and his son, the said W. S. Poyner, executrix and executor of his said will.

The testator died on the 10th of April 1843, leaving his widow, Sarah Poyner, and his son, W. S. Poyner, him surviving, who duly proved his will on the 9th of June following. The widow possessed herself of

the household goods, furniture, and effects, and paid the annuity of 100*l.* to W. S. Poyner, up to the 24th of June 1848, on which day he died, having made his will, and thereby devised and bequeathed all his property, estate, and effects whatsoever, both real and personal, to his wife, the plaintiff, afterwards Mrs. Harris, absolutely; and upon her marriage with the defendant Charles Harris, such property, in expectancy upon the decease of Sarah Poyner, was made the subject of settlement. The testator was possessed of several leasehold houses; but the only real estate consisted of the before-mentioned freehold house in Buckingham Street in the Strand. The leaseholds at the testator's death, were in very bad repair, and it was computed that 900*l.* would be necessary to make them tenable. In consequence of this fact, the superior landlord gave notice to repair under the usual covenant contained in the lease, and threatened an action of ejectment; the son, W. S. Poyner, who had managed the affairs with the advice of his mother, employed a surveyor, and contracted with a builder to execute the necessary repairs. The expense thus incurred amounted to double the net income, and it was ultimately agreed that the executors should defray these expenses by monthly payments of 20*l.* each, and in fact the whole sum was paid out of the mother's life income, she agreeing to do so to avoid the necessity of a sale. This suit was then instituted by the plaintiff, the widow of W. S. Poyner, for the administration of his estate, and the main question raised was, out of what estate the sum expended for repairs of the leasehold premises should come? The other question was, whether the testator had directed his leasehold estate to be converted?

Mr. Baily and *Mr. Rawlinson*, for the plaintiff, contended upon the principal question, as to repairs, that they were out-goings and expenses to be paid out of the income under the directions of the will. This was a claim by the landlord under a covenant to repair, and the tenant for life being in possession was the person legally liable to repair. The reversioner was entitled to have the estate free from all

charges incurred during the tenancy for life, for the covenants ran with the land. In this case the tenant for life had enjoyed the estate for a considerable period, and it was for her own benefit that the repairs were executed—*Hickling v. Boyer* (1), *Hibbert v. Cooke* (2), *Talbot v. the Earl of Radnor* (3) and *Bostock v. Blakeney* (4). It was also contended that the testator intended the leaseholds to be converted and invested in property of a permanent character.

Mr. Walford appeared for other parties in the same interest, and cited *Caldecott v. Brown* (5).

Mr. Bacon and *Mr. Baggallay*, for the widow of the testator, contended that the expense of making good the dilapidations, ought to be paid out of the *corpus* of the property, and not out of the rents, and that the testator intended this for the following reasons: that had it been otherwise, the widow would for several years have had no income and the son no annuity, since the net income of the property did not then exceed 400*l.* per annum. The dilapidations took place in the testator's lifetime; they were an immediate burthen, which the landlord could have enforced by action, and to meet which, there were no assets whatever, except the premises themselves. The sale was avoided at the desire of the son, who was co-executor with his mother, and who being entitled to the reversion, would have been prejudiced by a sale. Under these circumstances, the defendant was entitled to claim credit for the dilapidations as for any other debt which she might have paid out of the income. It was also submitted that there was no intention that the leaseholds should be converted. The rents and profits were directed to be paid to her, which was sufficient to shew that she was to enjoy the estate as it was and unconverted—*Pickering v. Pickering* (6).

Mr. Baily was heard in reply.

(1) *Ante*, p. 388.

(2) 1 Sim. & S. 552.

(3) 3 Myl. & K. 252.

(4) 2 B. C. C. 653.

(5) 2 Hare, 144.

(6) 4 Myl. & Cr. 289; s.c. 8 Law J. Rep. (n.s.) Chanc. 336.

KINDERSLEY, V.C.—One question in this case is, whether that portion of the estate which consists of leaseholds ought, as between the tenant for life and the reversioner, to be converted and invested in property of a permanent character; that is a question of construction. After giving specific chattels to his wife and two legatees, and an annuity of 100*l.* a year to his only son during his wife's life, the testator proceeds thus:—"As to all that my freehold messuage or tenement, with the appurtenances, in Buckingham Street in the Strand, and all my real estate whatsoever and wheresoever, my stock in the public funds of this country, mortgages and securities for money, and all other my personal estate and effects not hereinbefore by me disposed of, or wherein the absolute interest has not been given, I give the same, and all my estate, term and interest therein, with the appurtenances, unto and to the use of my dear wife Sarah Poyner, and my said only son (the executrix and executor), their heirs, executors, administrators, or assigns, according to the respective nature, tenures, and qualities thereof, on the trusts following." So far there is a gift of all the testator's real estate, and all his residuary personal estate to his wife and son upon certain trusts. He specifies a particular freehold estate, stock in the public funds, mortgages, and securities for money, but does not specify any other portion which would describe the leaseholds, according to the respective natures and qualities thereof; and the question therefore is, what are the trusts, and what property they relate to?

The trustees are, during the life of the wife, or her remaining a widow, to permit and suffer her to receive the net clear rents, interests, and dividends of all and every his devised freehold and residuary personal estate as aforesaid. So far, although it is not conclusive, there is no indication of an intention to convert. The testator meant that his wife was to have the income of the real and personal estate which he had thus given, and after paying the annuity, such rent and personal estate during the life of the wife or annuitant, for the wife's absolute use and benefit. Though the mention of

the word "rents," I agree, as it was argued, might apply to real estate not leasehold, still, although I do not think it conclusive, yet I think the indication of intention was not to convert. "And in case my wife shall marry again, then upon trust during the remainder of her natural life, to receive and pay the net or clear rents, profits, interests, dividends, and annual proceeds and income of all my said freehold and residuary real and personal estate" (using the same set of words) to the wife, for her separate use, and with the usual direction that her receipt should be a good discharge; the same life interest being, in effect, given, but for her separate use. Then comes this limitation, "from and after the decease of my said wife, then as to all my said devised and bequeathed freehold and residuary real and personal estate, with their appurtenances, of which my wife is to have the clear yearly income for her life, upon trust for, and I do give, devise and bequeath the same and every part thereof, and all my estate, term and interest therein, with their appurtenances, unto and to the use of my only son, his heirs, executors, administrators and assigns, for his and their own use and benefit for ever; and I direct the same to be conveyed as aforesaid, and paid to him and them accordingly." Now it appears to me clear that what the testator considered he was giving to his son on his wife's death was the same property which he had bequeathed to trustees upon trust. He uses the expression, "term and interest." It was, therefore, the same estate, term and interest, he meant the remainder-man to take; the same, was that of which the income was to be enjoyed by the widow for life. It appears to me clear that the testator intended there should be no conversion. It is true that the son would have less in value because a part was wearing out, but that does not alter the case. I am of opinion, therefore, that there was no intention to convert, but the property was to be enjoyed in specie.

With respect to the other question, the testator when he died had been in pos-

session of the leaseholds, and had suffered that property to become dilapidated, and in consequence, a sum of 900*l.* was estimated as the amount of dilapidations at his death. I must assume that the testator would have been liable under his covenant to repair, for this sum. Shortly after his death, the landlord seems to have called upon the parties to make good the dilapidations; he seems to have given some formal notice; the widow and son consider the matter, and the widow appears to have made various payments towards the amount of the dilapidations, so as to satisfy the landlord. Then comes the question, is the widow to bear that out of her own pocket; or is it to come out of the residuary estate? The question is, the testator having incurred dilapidations, whether, as between the tenant for life and a specific legatee, you can say, pay it out of the general personality. A number of authorities were cited, but they do not govern this case; there, the questions were between a specific legatee and a residuary legatee of general personality; but here it is as between the tenant for life and the remainder-man, of an aggregate mass, all residuary, composed of realty and personality, of which the leaseholds in question form only a component part. It appears to me in this case, without pretending to infringe upon Lord Truro's authority, which, indeed, I should be bound to follow, were it in point; it appears to me that this is a case so entirely different,—where there is a tenant for life and reversioner, under the same will, of property subject at the testator's death to 900*l.* then incurred,—that upon general principle the tenant for life ought not to bear the charge. In fact, if the landlord had thought fit, he might have entered for a breach of the conditions; these parties being also executor and executrix, and having arranged that payment should be made, the result was, that the property was preserved for the benefit of the tenant for life and remainder-man. If any stock ought to be applied in payment of the 900*l.*, it is the residue.

The following cases will appear in the Volume for 1853, it being found impossible to publish them in the present Volume :—

LORD CHANCELLOR'S COURT.

STROUGHILL v. ANSTET.

LORDS JUSTICES COURT.

GLASS v. RICHARDSON.

ROLLS COURT.

BLACKIE v. CLARK.
BUTTERFIELD v. HEATH.
CLEGG v. FISHWICK.
COCK v. CLARK.
DUBERLEY v. DAY.
SHORTRIDGE v. BOSANQUET.
THOROLD v. PARKIN.

VICE CHANCELLOR TURNER'S COURT.

BEADON v. KING.
BLACKWELL v. PENNANT.
BROMITT v. MOOR.
BRUCE v. ELWIN.
BURBOUGHES v. BROWNE.
Re BURT.
CHESTERMAN v. MANN.
DEVY v. THORNTON.
FALKNER v. GROVE.
FLINT v. WOODIN.
FORBES v. FORBES.
GOLDER v. GOLDER.
GREENWAY v. BROMFIELD.
GREGORY v. WILSON.
HAKWELL v. WEBBER.

Re HEATH.
Re HEY'S WILL.
JONES v. MAGGS.
KING v. MALLOTT.
LOVEGROVE v. COOPER.
MACBRIDE v. LINDSAY.
Re MACHIN'S TRUST.
PADWICK v. STANLEY.
PHILLIPS v. PHILLIPS.
SWANN v. WORTLEY.
Re TAYLOR'S SETTLEMENT.
WILKINSON v. FOWERS.
WILKINSON v. WILKINSON.

VICE CHANCELLOR KINDERSLEY'S COURT.

THE FREEMEN OF SUNDERLAND v. BISHOP OF
DURHAM.
HARVEY v. STRACEY.

VICE CHANCELLOR PARKER'S COURT.

ABBOTT v. SWADER.
In re THE BRITISH ALKALI COMPANY.
BRYAN v. MANSION.
CONSTABLE v. BULL.
In re THE GREAT WESTERN EXTENSION ATMO-
SPHERIC COMPANY.
MOORES v. WHITTLE.
Re PATTESON'S TRUSTS.
STEAD v. BANKS.
Re THOMSON'S TRUSTS.
WATERS v. WOOD.



RULES AND ORDERS

MADE IN PURSUANCE OF

“THE BANKRUPT LAW CONSOLIDATION ACT, 1849.”

12 & 13 VICTORIÆ, c. 106. s. 8.

ABSTRACT OF THE RULES AND ORDERS.

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| <i>Definition of Terms.</i> | 1. <i>Definition of terms, &c.</i> |
| <i>Petition for Adjudication of Bankruptcy.</i> | 2. <i>Petition for adjudication of bankruptcy to be on parchment.</i> |
| | 3. <i>Petition and affidavit in support thereof to be examined by Registrar before filing.</i> |
| | 4. <i>Search to be made for previous fiat or petition.</i> |
| | 5. <i>Where two or more petitions, receipt of one by lot.</i> |
| | 6. <i>Second petition by creditor neglecting to prosecute a former petition.</i> |
| | 7. <i>Allotment of petitions for adjudication of bankruptcy in London. See section 94.</i> |
| | — <i>In District Court.</i> |
| | 8. <i>If Commissioner absent, Registrar may ballot.</i> |
| | 9. <i>Second or subsequent petition for adjudication to be prosecuted before the same Commissioner.</i> |
| | 10. <i>Question on allotment of petition, how determined.</i> |
| <i>Disputing Adjudication of Bankruptcy. Section 104.</i> | 11. <i>Investigation of the petitioning creditor's debt.</i> |
| | 12. <i>Personal attendance of petitioning creditor, &c., how to be dispensed with.</i> |
| | 13. <i>Applications for adjudication in London, when to be made.</i> |
| | 14. <i>Notice to dispute adjudication. 12 & 13 Vict. c. 106. s. 104.</i> |
| | 15. <i>Names of witnesses to be given, &c.</i> |
| | 16. <i>Shewing cause against adjudication and grant of further time.</i> |
| | 17. <i>Modes of application to the Court, under 12 & 13 Vict. c. 106. s. 12.</i> |
| | 18. <i>Service of order to shew cause.</i> |
| | 19. <i>Previous to issuing warrant of commitment, under section 266, for disobeying any rule or order of Court, notice of motion or order to shew cause to be personally served, &c.</i> |
| | 20. <i>Service of notice of motion, or order to shew cause.</i> |
| <i>Jurisdiction of the Court of Bankruptcy, under Sect. 12. Motions and Petitions, and Practice thereon.</i> | 21. <i>Signature and attestation of petitions in general.</i> |
| | 22. <i>To be entered with the Registrar.</i> |
| | 23. <i>Affidavits to be filed.—No affidavit in reply.</i> |
| | 24. <i>Affidavits to be indorsed by the Registrar, with the day when left for filing.</i> |
| | 25. <i>Affidavits to be intituled.</i> |
| | 26. <i>Hearing motions and petitions.</i> |
| | 27. <i>Motions, order of making.</i> |
| | 28. <i>Note of motion to be delivered to the Registrar.</i> |
| | 29. <i>Deposit on Appeal. 12 & 13 Vict. c. 106. s. 12.</i> |
| | 30. <i>Amendments may be allowed by leave of the Court.</i> |
| <i>Deposit of Costs on Appeal. Section 12.</i> | |
| <i>Allowance of Amendments.</i> | |

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| <p><i>Removal of Commissions and Fiats issued on or before the 11th of Nov. 1842. Section 22.</i></p> | <p>31. <i>Transfer of commissions and fiats into Court.</i> 12 & 13 Vict. c. 106. s. 22.
 32. <i>Division of certain transferred commissions and fiats amongst Commissioners in London.</i></p> |
| <p><i>With respect to the Chief and other Registrars.</i></p> | <p>33. <i>Chief Registrar's office.</i>
 34. <i>Affidavits to be filed.</i>
 35. <i>Roll of attorneys.</i>
 36. <i>Book, with Chief Registrar in London, for names and places of abode or business of enrolled attorneys and solicitors, where they may be served with notices, &c.</i>
 37. <i>Like book in district courts in the country.</i>
 38. <i>Substituted place for serving notices, &c. on attorneys and solicitors, when their place of abode or business is above a certain distance, &c.</i>
 39. <i>Existing commissions and fiats, when transferred, to be entered in books, &c.</i>
 40. <i>Transmission of minutes of proceedings from the country districts.</i> Section 23.
 41. <i>Proceedings to be on parchment or paper of uniform size, &c.</i>
 42. <i>Proceedings to remain of record in the Court, and shall not be removed without special direction.</i></p> |
| <p><i>Of the Proceedings.</i></p> | <p>43. <i>A Registrar to attend in each court, and to take minutes, &c.</i>
 44. <i>Registrar not to sit for Commissioner without his request in writing.</i>
 45. <i>Memorandum of advertisement in Gazette, &c., when in lieu of copy of Gazette.</i></p> |
| <p><i>Office Copies of Proceedings under Sections 53. and 232.</i></p> | <p>46. <i>Charge for office copies under section 232.</i>
 47. <i>Office copies.</i> 12 & 13 Vict. c. 106. s. 53.</p> |
| <p><i>Duties of the Master.</i></p> | <p>48. <i>Bills to be taxed by the Master.</i> 12 & 13 Vict. c. 106. s. 37.
 49. <i>Office of the Master.</i>
 50. <i>Business of the Master to be transacted by him in person.</i>
 51. <i>Copies of bills.</i>
 52. <i>Taxation of bills, &c. in the country districts.</i></p> |
| <p><i>Proof of Debts.</i></p> | <p>53. <i>Debts may be proved at sitting for dividend, see sections 164. and 187.</i>
 54. <i>Separate debts may be proved under joint petition, and distinct accounts to be kept of joint and separate estate; application thereof in case of overplus.</i></p> |
| <p><i>Taking Accounts of Property mortgaged or pledged, and of the Sale thereof.</i></p> | <p>55. <i>Directions for taking accounts, and sale.</i>
 56. <i>Conveyance where necessary.</i>
 57. <i>Application of proceeds.—Proof by creditor for deficiency.</i>
 58. <i>All parties to be examined.</i></p> |
| <p><i>Bankrupt's Balance Sheet.</i></p> | <p>59. <i>Bankrupt's balance sheet must be filed in duplicate ten days before the day appointed for last examination.—Last examination will not otherwise be passed.—Office copies of balance sheet, or any part, to be provided by proper officer.</i> Section 160.</p> |
| <p><i>Advertisement of Certificate and Transmission to Chief Registrar, and Appeal against Allowance thereof.</i></p> | <p>60. <i>Advertisement of certificate.</i> 12 & 13 Vict. c. 106. s. 199.
 61. <i>Certificate to be transmitted to Chief Registrar.</i>
 62. <i>Deposit of costs before application for recall of certificate.</i> Sections 203, 206, 207, and see section 12.
 63. <i>Notice to the Court of an appeal.</i> Section 206.
 64. <i>Affidavits in support to be filed with petition of appeal.</i></p> |
| <p><i>Audits.</i></p> | <p>65. <i>Bills of solicitors and messengers to be delivered to Registrar for taxation five days before the audit.—If audit adjourned by default of solicitor or messenger in that behalf, the solicitor or messenger to pay the costs of the adjournment.—No sum to be paid to any solicitor or messenger on account of his bill until it has been taxed.</i>
 66. <i>Audit account of official assignees or creditors' assignees to be made out in a particular form, to be uniform in all the courts.</i>
 67. <i>At every audit the Debtor and Property Book of the official assignees to be examined, and compared with Audit Paper; cause of monies remaining uncollected to be ascertained, and a minute thereof made, and filed with proceedings.—The debtors to be summoned, and examined on oath, and examination filed.—Court to give directions as to further proceedings against such debtors.</i></p> |
| <p><i>Summoning of Trader. Sections 78. to 86.</i></p> | <p>68. <i>Summoning of trader debtors.</i> 12 & 13 Vict. c. 106. ss. 78. to 86.—<i>Particulars of demand and notice how to be signed.—N.B. The particulars of demand and notice of demand must be a copy of the particulars of demand and notice required to be annexed to the affidavit of debt.</i>
 69. <i>How such particulars of demand and notice should be directed.</i>
 70. <i>The account to be expressed with reasonable certainty as to dates, &c., and where credit is given in the account, payment of the balance only to be required in the notice.</i>
 71. <i>If affidavit for summoning debtor not filed within a certain time, fresh particulars of demand and notice required.</i>
 72. <i>Affidavit of debt, what certainty required in.</i></p> |

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| <p>Summoning of Trader.
Sections 78. to 86.</p> | <p>73. The parties, how to be described in summons.
74. Notice to be indorsed on summons in the form given, to make known to the party summoned the provisions of the Act relating thereto. See sections 78. to 86.
75. Summons to be indorsed with the name of the attorney suing out the same, or with a memorandum expressing that it was sued out by the creditor in person.
76. Summons to be served four days before time for appearance.
77. Summons to be served between 9 o'clock A.M. and 9 o'clock P.M.
78. If plaintiff makes default in appearance, the defendant entitled to discharge from summons, &c.
79. If defendant appear, when in such case entitled to discharge from summons.
80. Want of compliance with these rules, consequence of.
81. Application to enlarge time.
82. Notice to be given of defendant's intention to enter into bond.
83. Notice of sureties to be accompanied with copy affidavit of sufficiency.—Form of affidavit of sufficiency.
84. Sureties to justify in what amount.
85. Liberty to except to sureties.
86. Attendance in court to justify and opposition thereto.
87. Penalty of the bond and form of.
88. Where no notice of exception, course of proceeding.</p> |
| <p>Arrangements between Debtors and their Creditors, under the Superintendence and Control of the Court.</p> | <p>89. Presentation and allotment of petitions. 12 & 13 Vict. c. 106. ss. 211. to 223.
90. Two copies to be delivered to Registrar.
91. Deposit with official assignee.
92. Certificate of causes of detention to be annexed to petition.
93. Sending and serving of notices.
94. Petitioner's account to be attested and furnished to official assignee.
95. Right to attend sittings and inspect proceedings.
96. Minutes of sittings.
97. Title of affidavits.
98. Forms.</p> |
| <p>Arrangement by Deed. Sections 224. to 229.</p> | <p>99. Forms of certificates, account and affidavit, under 12 & 13 Vict. c. 106. ss. 225, 226, 227.</p> |
| <p>Orders for Payment of Money and Costs, and Execution thereon. Sections 123, 132, 151, 249.</p> | <p>100. Order for payment of money for costs. 12 & 13 Vict. c. 106. ss. 123, 132, 151, and 249.
101. Order for costs to contain leave to issue execution.
102. Taxation of costs.
103. Chief Registrar to issue execution.
104. Præcipes to be filed.
105. Præcipe Book to be kept.
106. Forms of writs of execution and of the execution thereof.
107. Teste and return.
108. Indorsement of amount.
109. Venditioni exponas.
110. Returns to be filed with Chief Registrar and entered in Præcipe Book.
111. Entry of satisfaction.
112. Order for entry of satisfaction.
113. Amendment of writs, &c.</p> |
| <p>Course of Priority of payment out of the Estate of the Bankrupt, of the Costs of the Petitioning Creditor, Section 114, and of payment of Costs out of joint or separate Estates.</p> | <p>114. Course of priority for payment of the costs of the petitioning creditor. 12 & 13 Vict. c. 106. s. 114.
115. In case joint estate insufficient, Court may order costs to be paid out of separate estate, and vice versa.</p> |
| <p>Composition after adjudication of Bankruptcy, under Sections 230, 231.</p> | <p>116. Minutes of first meeting. 12 & 13 Vict. c. 106. ss. 230, 231.
117. Second meeting to be before Commissioner.
118. Certificate of Commissioner.</p> |
| <p>With respect to Official Assignees and their Duties.</p> | <p>119. Appointment by Commissioners of official assignees to act.
120. Same as to existing commissions and flats.
121. Appointment of assignees and the certificate thereof.
122. Official assignee not to trade, &c.
123. Official assignee to find sureties.
124. Liability of official assignee and sureties.
125. The official assignee annually to make declaration that his sureties, to the best of his belief, are alive and solvent, and also state any change of residence.</p> |

RULES AND ORDERS IN BANKRUPTCY.

With respect to Official Assignees and their Duties.

126. *Official assignee to give notice of death, bankruptcy or insolvency of his sureties.*
127. *Official assignee to follow the instructions of the Commissioner.*
128. *No official assignee to have under his controul more than 100*l*. under any one estate, or in the aggregate more than 1,000*l*.*
129. *Form to be adopted on payment of money into the Bank by an official assignee.*
130. *Allowance of official assignees.*
131. *Official assignee to keep a register of the bankruptcies to which he has been appointed.*
132. *Particular sets of books to be kept by the official assignee.*
133. *Official assignee to sort and number books, &c. of bankrupt.*
134. *Official assignee to direct the payment of monies due to a bankrupt's estate from persons in England, and exceeding a certain sum in amount to be made direct into the Bank of England.*
135. *Party making such payment to take a receipt for the same.*
136. *Accountant in Bankruptcy to notify such payment to the proper official assignee.*
137. *All monies under the controul of the official assignee to be kept at a banker's, to his account as official assignee, and not mixed with his own monies.*
138. *Order for payment of money out of the Bank of England under any bankrupt's estate to be made by a Commissioner in writing under his hand, and testified by a Registrar; the application of the money to be specified in the order.*
139. *Orders for payment of money, &c. to be signed in triplicate.*
140. *Official assignee to enter in a book the names of all debtors to the bankrupt's estate, and state therein the reasons why debts are not paid, and to produce the book at the audit.*
141. *Bills of exchange, notes, &c. to be deposited in the Bank by official assignees, &c.*
142. *Bill, &c., when due, how to be dealt with.*
143. *In case of non-payment, &c.*
144. *Bank of England to certify to Accountant the receipt of money on bill, or dishonour, &c.*
145. *Official assignee to give notice of dishonour, &c.*
146. *Commissioner to order delivery out of bills, notes, &c. to official assignees.*
147. *Commissioner may order money to be invested in Exchequer bills, or sale of Exchequer bills, &c.*
148. *The official assignee to give notice in Gazette, and to send through the Post-office a printed circular letter to each creditor, giving him notice of the time and place of the delivery of the dividend warrant.*
149. *Payment of dividend.—The duty of solicitors.—Duty of official assignee.—Accountant's duty.*
150. *Official assignee's duty.—Commissioner to order payment of dividend in cases where securities cannot be produced.*
151. *Dividend warrant, how paid.*
152. *When order of Commissioner for payment of dividend warrant.*
153. *Transfer of money from general account to dividend account.—Commissioners authorized to carry back dividend not called for to the original account of estate.*
154. *Unpaid dividend warrants of above twelve months date to be returned to the Accountant in Bankruptcy by the official assignee, and cancelled.*
155. *Official assignee to deliver quarterly accounts of balances, together with his cash-book and pass-book.*
156. *The quarterly accounts to be kept by Registrar of the Court, and open to the inspection of creditors at convenient times.*
157. *Monies or bills, &c. may be paid or delivered to the Bank of England through any of the branch banks thereof.*
158. *Other forms in the Schedule to be followed where applicable.*
159. *Official assignee keeping under his controul more than 100*l*. under any one estate, or more than 1,000*l*. in the aggregate, to be charged with 20*l*. per cent. on the excess, and unless the money has been kept from proper causes, to be dismissed from his office, on the report of the Commissioner, or upon petition to the Lord Chancellor by a creditor, and be liable to costs and expenses, and have no claim to remuneration.*
160. *Forms relating to payment, &c. of money under bankruptcies in the country to be printed in red ink.*
161. *Orders as to official assignees under bankruptcies to be applicable to official assignees under petitions for arrangements, &c.*
162. *Printed copies of rules to be supplied by Chief Registrar, &c.*
163. *Rules and Orders, when to take effect.*

RULES AND ORDERS IN BANKRUPTCY.

v

WITH respect to the several matters hereinafter mentioned—IT IS ORDERED AS FOLLOWS,
that is to say,

Definition of Terms.

I.—That all words and expressions used in these Rules or Orders, shall be construed in conformity with the interpretation clause (section 276.) of "The Bankrupt Law Consolidation Act, 1849."

Petition for Adjudication of Bankruptcy.

II.—Every petition for adjudication of bankruptcy shall be fairly written or printed on parchment in the form given in the Schedule M. or O. of "The Bankrupt Law Consolidation Act, 1849," (as the case may be), and no alterations, interlineations or erasures shall be permitted without leave of the Court; except so far as the same may be necessary, in order to adapt the printed form to the circumstances of the particular case.

III.—All petitions for adjudication and the affidavits in support of the same shall be carefully examined by the Chief Registrar in London, or by one of the Registrars in the country districts, before they are filed, and any petition or affidavit not being in conformity with the provisions of "The Bankrupt Law Consolidation Act, 1849," and these Orders, shall be rejected, subject however to an appeal to the Commissioner of the day in London; or to the Commissioner in attendance in the country.

IV.—The Chief Registrar shall carefully search whether any fiat in bankruptcy or petition for adjudication of bankruptcy has been issued or filed against or by the same person or persons, alone or jointly with any other person or persons, and shall indorse the result of such search on the petition previous to transmitting the same to the Registrar of the day. Similar searches and indorsements shall be made by the Registrar in attendance in the country.

V.—That in case two or more persons shall apply at the same time to present petitions to the Court in London or to a district court for adjudication of bankruptcy against the same person, and shall both be prepared to prosecute the same immediately, it shall be determined by lot which petition shall first be received and filed, but if one of such persons only is prepared to prosecute his petition immediately, such person shall be preferred; and in case one of such petitions shall be by the debtor or debtors, then the other petition, (or one of the other petitions, to be ascertained as above,) shall be preferred; and no subsequent petition for adjudication of bankruptcy against the same trader, either alone or jointly with any other person or persons, shall be proceeded with further than receiving and filing the same, until after the dismissal of the first, or other petition, or the expiration of the time allowed for prosecuting the same.

VI.—That if any creditor shall petition for adjudication of bankruptcy, and shall neglect to prosecute his petition within the time limited for that purpose, no subsequent petition for adjudication of bankruptcy against the same trader or traders, or any of them, either alone or jointly with any other person or persons, shall be presented by the same creditor without the special leave of the Court to which the previous petition was addressed.

VII.—That every petition for adjudication of Bankruptcy in London, whether presented by a creditor or by the trader himself, shall forthwith after the filing thereof in the office of the Chief Registrar, be allotted by ballot by the Registrar of the day, in the presence of a Commissioner, and in the presence of the solicitor acting in the matter of such petition to one of the Commissioners of the Court, and such allotment shall be entered in a locked book to be kept for that purpose, to which book each Registrar and Commissioner shall have a key; and every such petition in any district Court where there is more than one Commissioner shall when filed be allotted in like manner by ballot, and entered in a locked book, to be kept as aforesaid.

VIII.—In case of the absence of any Commissioner the Registrar alone, and in case of the absence of any Registrar, the Commissioner alone, may, but in either case, in presence of the solicitor, proceed to ballot any petition, indorsing on such petition the reason for his so proceeding.

IX.—That where a petition for adjudication of bankruptcy filed, either by a creditor or a trader, shall have been dismissed, or shall not have been prosecuted within the time limited, every second or subsequent petition presented to the same Court for adjudication of bankruptcy against the same person or persons, or any of them, and either alone or jointly with any other person or persons, shall be allotted to and prosecuted before the Commissioner who shall have acted in the matter of the first petition, or to whom the same shall have been balloted.

X.—Whenever any doubt shall arise as to the allotment of any petition in London, the same shall be determined by the senior Commissioner, or in his absence by the Commissioner of the day; and in the country by the Commissioner in attendance.

XI.—The petitioning creditor's debt shall be carefully investigated previous to the adjudication, and all securities held by him shall at the same time be exhibited to the Commissioner, together with a debtor and creditor account between the petitioning creditor and the intended bankrupt, which shall be filed with the proceedings, unless otherwise directed by the Court.

XII.—The personal attendance of the petitioning creditor, and of the witness or witnesses to prove the trading and act of bankruptcy, upon the opening of the petition for adjudication, may be dispensed with, on special cause proved to the satisfaction of the Court.

XIII.—Except in case of emergency, all applications for adjudication in London shall be made to the Commissioner of the day in his private room previous to the public sitting of the Court.

Disputing Adjudication of Bankruptcy.—Section 104.

XIV.—That if any person adjudged bankrupt intend to shew cause against the validity of such adjudication, he shall cause notice in writing of such his intention to be served upon the petitioning creditor, or his solicitor, and upon the Registrar, two clear days at least before the day appointed by the Court for shewing cause against such adju-

dication, and in such notice shall state which of the following matters, namely, the petitioning creditor's debt or debts, the trading, or act, or acts of bankruptcy he intends to dispute.

XV.—That after serving such notice of his intention, he shall on application be forthwith furnished with the names of the witness or witnesses deposing to the matter in dispute, and shall, on payment for the same, have a copy of the deposition or depositions, or any of them, as the Court in its discretion may think fit.

XVI.—That on the appearance to shew cause against the validity of the adjudication, the petitioning creditor's debt, trading, and act of bankruptcy, or such of those matters as the person adjudged bankrupt shall have given notice that he intends to dispute, shall again be proved *visd voce*, unless otherwise directed by the Court, and if any new evidence of those matters or any of them shall be given, or any witness or witnesses to such matter shall not be present for cross-examination, and further time shall be desired to shew cause, the Court shall, if it think the application reasonable, grant such further time as it may think fit.

Jurisdiction of the Court of Bankruptcy, under Sec. 12.—Motions and Petitions, and Practice thereon.

XVII.—That (unless the Court shall in any particular case otherwise direct) all applications to the Court in the exercise of its primary jurisdiction by virtue of "The Bankrupt Law Consolidation Act, 1849," shall be by way of motion, supported by affidavit, upon hearing which, the Court shall make such order therein as shall be just; but in cases in which any other party or parties than the applicant are to be affected by such order, no such order shall be made unless upon the consent of such person or persons, duly shewn to the Court; or upon proof that notice of the intended motion and copy of the affidavit in support thereof has been served upon the party or parties to be affected thereby, four clear days at least before the day named in such notice as the day when the motion is to be made: Provided, however, that the Court may, if it shall think fit, in any case where the party or parties to be affected by the order, or any of them, shall not have been duly served with a notice of the motion for such order, make an order calling upon the party or parties to be affected thereby to shew cause, at a day to be named by the Court in such order, why such order should not be made.

XVIII.—That every order to shew cause shall be served upon the party or parties to be affected thereby, four clear days at the least before the day appointed for shewing cause.

XIX.—No warrant for the commitment of any person, pursuant to section 266. of "The Bankrupt Law Consolidation Act, 1849," for disobeying any rule or order of the Court, shall be issued, unless notice of the intended motion for such warrant shall have been served personally upon the person to be committed two clear days at the least before the day of hearing such motion; or unless an order to shew cause why such warrant should not be issued shall have been personally served upon such person, four clear days at the least before the

day named in such order for shewing cause: Provided, however, that in cases in which it shall be made to appear to the Court, that the person intended to be committed is keeping out of the way and cannot be personally served with the notice of motion, or of the order to shew cause, it shall be lawful for the Court to make an order directing substituted service of the notice, or order to shew cause, as may be best suited to the circumstances of the case; and service of such notice, or order to shew cause, according to the directions of such order, shall be deemed to be as effectual as if such service had been made personally.

XX.—In cases in which personal service of any notice of motion, or of any rule or order of the Court, is required, the same shall be effected, in the case of a notice of motion, by delivering to the party or parties to be served, and each of them, a duplicate of the notice of motion; and in the case of a rule or order, by delivering to the party or parties to be served, and each of them, a true copy of the order or rule, at the same time shewing to him or them the original order or rule of the Court.

XXI.—That, except where otherwise provided or required by the statute, or by these Rules, every petition presented to the Court of Bankruptcy in London or in the country, shall be signed by the petitioner or petitioners; provided always, that in the case of partnership or absence of any petitioner or petitioners from the United Kingdom, the signature of one of the partners, or of the party presenting the same on behalf of the person so absent, shall be sufficient, and the signature of each person signing the same shall be attested by the solicitor actually presenting the petition, or by some other solicitor, who shall state himself in his attestation to be the solicitor or agent of the solicitor of the party signing in the matter of the petition.

XXII.—That every such petition presented to the Court shall be entered with the Registrar of the Court to which the same is presented, and the order directing the attendance thereon shall be signed by the Registrar, and under the seal of the Court; and the original petition, when served, shall be returned to the Registrar on or before the hearing, and filed of record. And it shall not be necessary to recite such petition at length, but only the prayer thereof, in any order pronounced by the Court thereon.

XXIII.—That every affidavit to be used in obtaining, supporting, or opposing any petition, or motion, or order for shewing cause for or against any order or rule of Court, shall be filed with the Registrar of the Court having the custody of the proceedings to which the same relates, two clear days at the least before the day appointed for the hearing; and no affidavit in reply or in rejoinder is to be used except by leave of the Court.

XXIV.—That the Registrar, upon any affidavit being left with him to be filed, do indorse the same with the day of the month and year when the same was so left, and do forthwith file the same, with the proceedings to which the same relates.

XXV.—That no affidavit be filed, unless the same is properly intitled in the Court and matter in which the same is to be used, and that after any affidavit is left with a Registrar to be filed, the

same is on no account to be delivered to any person whatever, except by order of the Court.

XXVI.—Except in cases of emergency, all motions shall be made, and all petitions heard, before the Commissioner acting in the particular bankruptcy to which the matter relates, or the Commissioner acting for him in his absence, and in London, on the day on which he sits as Commissioner of the day, and at the sitting of the Court, and in the order set down in the Registrar's Diary, unless the Commissioner shall otherwise direct.

XXVII.—Motions made by the Bar shall be heard according to the right of precedence, and motions made by attorneys in the order in which they have been set down in the Registrar's Diary previous to the public sitting of the Court.

XXVIII.—A short note of every motion shall be delivered to the Registrar previous to the public sitting of the Court, specifying the bankruptcy or other matter to which the same relates, the name of the party on whose behalf the same is made, the name and residence of the attorney of such party (and of the counsel, if the same be made by counsel), the name of any party, and the name and residence of his attorney, on whom any notice of such motion has been served.

Deposit of Costs on Appeal.—Section 12.

XXIX.—That at or before the time of entering an appeal against a decision or order of the Court of Bankruptcy, the party intending to appeal shall (in any case not otherwise specially provided for) deposit with the Chief Registrar, such sum, not being less than 10*l.* and not exceeding 40*l.*, as the Commissioner, whose order or decision is appealed from, or some other Commissioner of the same Court, shall direct, to satisfy, so far as the same may extend, any costs that the appellant may be ordered to pay, and in the absence of any directions of a Commissioner as to the amount of deposit, the sum of 20*l.* shall be so deposited. If it shall appear that there are several respondents in separate interests, the Commissioner, if he shall think fit, may order a separate deposit as to every such respondent.

Allowance of Amendments.

XXX.—That in any proceeding before the Court, the Court, if it think fit so to do, may allow amendment in any particular or particulars, in the judgment of the Court not material to the merits of the case, to be forthwith made on such terms as to re-swearing (in case of affidavits when necessary) and as to payment of costs, or both payment of costs and postponement, or otherwise, as the Court shall think reasonable.

Removal of Commissions and Fiats issued on or before the 11th November 1842.—Section 22.

XXXI.—That every commission and fiat directed to any Commissioners in the country, and opened or purporting by the proceedings to have been opened at any place situated within any one of the several districts appointed for holding courts of bankruptcy in the country, and not heretofore brought into court, shall be, and the same is hereby transferred and removed into the district Court of Bankruptcy within the district in which such

place shall be situate, and every commission and fiat directed to any Commissioners in the country, and opened or purporting by the proceedings to have been opened in the country elsewhere than at any place situated within any one of the said several districts, and not heretofore brought into court, shall be and the same is hereby transferred and removed into the Court of Bankruptcy in London, and all further proceedings in every commission and fiat so transferred and removed as aforesaid, shall be thenceforth prosecuted and carried on in the court to which the same is hereby ordered to be transferred.

XXXII.—That all commissions and fiats directed to any Commissioners in the country, and opened or purporting by the proceedings to have been opened in any of the counties or divisions or parts of the counties named in the Schedule hereunder written, and transferred into the Court of Bankruptcy in London by the preceding Order, be further prosecuted in such court before the Commissioner of the said Court named in such Schedule, in conjunction with such county or counties, or divisions, or parts respectively.

SCHEDULE.

Mr. Commissioner Evans	Norfolk.
	Oxford.
	That part of the county of Dorset not being within the Exeter district.
Mr. Commissioner Fonblanque	South Wilts.
	North Hants.
	Surrey.
Mr. Commissioner Fane	South Hants.
	West Sussex.
Mr. Commissioner Holroyd ...	East Sussex.
	Kent.
	Suffolk.
Mr. Commissioner Goulburn ..	Essex.
	Herts.
	Berks.
	Rutland.
Before the above-named Commissioners, according to such scale of distribution as from time to time shall be directed by any three Commissioners	Huntingdon.
	Cambridge.
	Northampton.
	Bedford.
	Bucks.

With respect to the Chief and other Registrars.

XXXIII.—That the Chief Registrar's office shall be at the Court of Bankruptcy in London, and shall be kept open daily, throughout the year, from ten till four o'clock, (Sunday, Christmas Day, Good Friday, Monday and Tuesday in Easter week, and any day appointed for a public fast or thanksgiving, excepted).

XXXIV.—That all petitions, affidavits, and other documents directed to be filed, except the affidavits mentioned in Rule XXIII., shall be filed in the office of the Chief Registrar at the Court of Bankruptcy in London, if relating to any bankruptcy or other matter under this Act, prosecuted in London, or with the Registrar or Registrars of the district court in which any bankruptcy or other matter under this Act, is prosecuted in the country.

XXXV.—That a roll or book shall be kept by the Chief Registrar, in which shall be enrolled the names of all attorneys and solicitors entitled to practise in the Court of Bankruptcy.

XXXVI.—That the Chief Registrar shall keep a book in alphabetical order, for the purposes after mentioned, and the same shall be publicly kept in the Court of Bankruptcy in London, to be there inspected by any enrolled attorney or solicitor. And that every attorney or solicitor enrolled in the Court of Bankruptcy, shall at the time of his signing the book or roll mentioned in Rule XXXV. enter in such alphabetical book his name and place of abode, or business, where he may be served with notices, summonses, orders, and rules in matters depending in the court; and as often as any attorney or solicitor shall change his place of abode or business, he shall make the like entry thereof in the said book; and all notices, summonses, orders, and rules, which do not require personal service, shall be deemed sufficiently served on such attorney or solicitor if a copy thereof shall be left at the place last entered in such book, with any person resident at or belonging to such place; and if any attorney or solicitor shall neglect to make such entry, then the fixing up of any notice, or the copy of a summons, order or rule, for such attorney or solicitor in the office of the Chief Registrar, shall be deemed as effectual and sufficient as if the same had been served at such place of residence or business as aforesaid.

XXXVII.—That a like alphabetical book of names and residences shall be kept by the Senior Registrar of every district court in the country having two Registrars, and by the Registrar of every district court in the country where there is only one Registrar, in which book every attorney and solicitor resident in, and usually practising in such district respectively, shall in the like manner, and subject to the same regulations, enter his name and place of abode and business.

XXXVIII.—That in case the place of abode or business of any attorney or solicitor be not within a circuit of five miles from the General Post-office in London, or within five miles of the place appointed for the sittings of any district court of bankruptcy in the country districts, such attorney or solicitor shall appoint, and enter in the said alphabetical book, some convenient place within a three mile circuit of the General Post Office, if he be an attorney or solicitor usually practising in the Court of Bankruptcy in London, or within three miles of the place of sitting of the district court, if usually practising in any country district where such notices, summonses, orders and rules as aforesaid may be served on him, subject to the regulations aforesaid.

XXXIX.—All existing commissions and flats, when transferred to the Court of Bankruptcy in London, shall be duly entered in the Chief Registrar's office, in books to be kept for that purpose, and in the country in a book to be kept by the Senior Registrar of every district court having two Registrars and by the Registrar, where there is only one.

XL.—That in addition to the minutes required to be transmitted to the Chief Registrar by section 95. of "The Bankrupt Law Consolidation Act," the Registrars in the country districts (or when there

are two Registrars, one of them) shall transmit to the Chief Registrar, between the 1st and 5th day of each month, a return of the proceedings of such court for the last preceding month, in the form set forth in Schedule 26, to these Orders annexed; and the Chief Registrar shall cause the same to be minuted in a book to be intitled the "Supplemental Docket Book."

Of the Proceedings.

XLI.—All proceedings in the Court shall be written or printed on parchment or paper of one uniform size, that is to say, on sheets of sixteen inches in length and ten inches in breadth, without unnecessary alterations or interlineations; and no erasures shall be permitted; except by leave of the Court, on special cause shewn; in which case any proceedings, though on paper or parchment not of the said size, may be received and filed.

XLII.—All proceedings shall remain of record in the court, and shall not be removed, for any purpose whatever, except by special direction thereof, or of the Lord Chancellor.

XLIII.—A Registrar shall attend in each court, at such times as the Commissioner shall direct, to take and draw up minutes of all proceedings, and such Registrar shall have the charge of all such proceedings, under the superintendence of the Chief Registrar.

XLIV.—Except in cases of emergency, the nature whereof shall be entered on the proceedings, no Registrar shall sit or act for any Commissioner, under section 27, without the express request, in writing, of such or some other Commissioner.

XLV.—In lieu of attaching a copy of the *Gazette* to the proceedings in each bankruptcy or other matter, the Registrar shall make a memorandum of the advertisement in the *Gazette*, and of the date thereof, with proper reference to the file to facilitate search; and one copy of every *Gazette* shall be kept in the office of the Chief Registrar.

Office Copies of Proceedings under Sections 53. and 232.

XLVI.—That all office copies of flats, petitions, or other proceedings, books, papers and writings, or any parts thereof provided for any bankrupt or arranging debtor, or for any creditor of a bankrupt or arranging debtor, or attorney of any such bankrupt, debtor, or creditor, shall be charged and paid for at the rate directed by the 53rd section of "The Bankrupt Law Consolidation Act, 1849," with respect to the office copies therein mentioned.

XLVII.—That all office copies shall be made by the Chief Registrar or Registrar, or by the messenger or usher of the court, as the Court shall appoint, and shall, except as to figures, be fairly written at length, and shall be sealed with the seal of the Court, and delivered out by the person appointed, without any unnecessary delay, and in the order in which they shall have been bespoken.

Duties of the Master.

XLVIII.—That the bills to be taxed by the Master, shall be all bills of costs, charges, fees and disbursements in matters of Bankruptcy, before the Lord Chancellor, the Lords Justices acting in Bankruptcy (as are now taxed by the said Master),

and the Court of Bankruptcy in London, and all other taxable bills in other matters in which the Court of Bankruptcy in London may exercise jurisdiction, and such taxable bills as may be specially referred to him for taxation by any district court of bankruptcy, subject to the revision of the Court.

XLIX.—That the office of the Master shall be at the Court of Bankruptcy in Basinghall Street, and shall be open for the transaction of business daily, from ten o'clock in the forenoon until four o'clock in the afternoon, except on such days and during such periods as the office of the Accountant in Bankruptcy shall be closed by any order of the Lord Chancellor, or by any general rule or order of the Court.

L.—That the business of the Master shall be transacted by him in person.

LI.—That all copies of bills of costs lodged in the Master's office shall be made, examined and delivered out by the clerk who has heretofore made, examined and delivered out the same.

LII.—That in the country districts all bills of costs, charges, fees and disbursements (except such as may be specially referred to the Master) shall be taxed by one of the Registrars.

Proof of Debts.

LIII.—That every sitting held for making a dividend of a bankrupt's estate, shall be a sitting for proof of debts, and the notice of such sitting in the *London Gazette* shall express that debts may be proved at such sitting.

LIV.—That any separate creditor of any bankrupt shall be at liberty to prove his debt under any adjudication of bankruptcy made against such bankrupt jointly with any other person or persons. And under every such adjudication distinct accounts shall be kept of the joint estate and also of the separate estate or estates of each bankrupt, and the separate estate shall be applied in the first place in satisfaction of the debts of the separate creditors. And in case there shall be an overplus of the separate estate, such overplus shall be carried to the account of the joint estate. And in case there shall be an overplus of the joint estate, such overplus shall be carried to the account of the separate estates of each bankrupt in proportion to the right and interest of each bankrupt in the joint estate. And that the cost of taking such accounts be paid out of the joint and separate estates respectively as the Court shall direct.

Taking Accounts of Property mortgaged or pledged, and of the Sale thereof.

LV.—That upon application (which shall be in manner prescribed by Rule XVII.) by any person claiming to be a mortgagee of, or to have security over any part of the bankrupt's estate or effects, real or personal, and whether such mortgage or security shall be by deed or otherwise, and whether the same shall be of a legal or equitable nature, the Court will proceed to inquire whether such person is such mortgagee, or is entitled to such security, and for what consideration and under what circumstances, and if it shall be found that such person is such mortgagee, or is entitled to such security, and no sufficient objection shall appear to the title of such person to the sum claimed by him, under such

mortgage or security, the Court will then proceed to take an account of the principal, interest and costs, due upon such mortgage or security, and of the rents and profits, or dividends, interest or other proceeds received by such person, or by any other person by his order or for his use, in case he shall have been in possession of the property over which the mortgage or security shall extend, or any part thereof, and the Court will then cause notice to be given in the *London Gazette*, and in such other of the public papers as it shall think fit, when and where and by whom, and in what way the said premises or property, or the interest therein so mortgaged, or over which the security shall so extend, are to be sold, and that such sale be made accordingly, and that the assignees (unless it be otherwise ordered) shall have the conduct of such sale; but it shall not be imperative on any such mortgagee to make such application.

LVI.—That all proper parties shall join in the conveyance to the purchaser (where necessary) as the Court shall direct.

LVII.—That the monies to arise from such sale be applied in the first place in payment of the costs, charges and expenses of the assignees, of and occasioned by the application to the Court, and of and attending such sale, and then in payment and satisfaction of what shall be found due to such mortgagee, or person so having security, for principal, interest and costs, and that the surplus of the said monies (if any) be paid to the assignees. But in case the monies to arise from such sale shall be insufficient to pay and satisfy what shall be so found due to such mortgagee or person so having security, then he shall be admitted a creditor for such deficiency, and receive dividends thereon rateably with the other creditors, but so as not to disturb any dividend or dividends then already made.

LVIII.—That for the better making such inquiry and taking such account, and making a title to the purchaser, all parties be examined by the Court upon interrogatories or otherwise as it shall think fit, and produce before the Court upon oath all deeds, papers and writings in their respective custody or power relating to the estate or effects of the bankrupt as the Court shall direct.

Bankrupt's Balance Sheet.

LIX.—The bankrupt's balance sheet must be filed in duplicate with the Registrar of the Court ten days at least before the day appointed for the last examination of the bankrupt, or the adjournment day thereof for that purpose (one copy for the official assignee, and the other for the proceedings); and the last examination of the bankrupt shall in no case be passed by the Court unless his balance sheet shall have been duly filed as aforesaid; office copies of the balance sheet, or such part thereof as shall be required, shall be provided by the proper officer.

Advertisement of Certificate and Transmission to Chief Registrar, and Appeal against Allowance thereof.

LX.—That the notice of the allowance of a certificate of conformity shall be advertised by the messenger of the court in the *London Gazette* ten days or more before the expiration of the time

allowed by the statute for entering an appeal against the allowance, and such notice shall specify the class of the certificate and the time of suspension (if any) and the conditions (if any) annexed to the allowance: and no certificate of conformity shall be delivered to the bankrupt, except on production of the *Gazette* containing such advertisement.

LXI.—That after the expiration of the time allowed for entering an appeal against the allowance of a certificate, and on being satisfied that no appeal has been entered, the Registrar of the Court shall deliver such certificate to the bankrupt, and shall certify the allowance to the Chief Registrar.

LXII.—That before any application for a recall of a certificate, and before or at the time of entering any appeal against the judgment of the Court of Bankruptcy for the allowance of a certificate, or for the refusal, the withholding, or the class of a certificate, or otherwise with respect to a certificate, the creditor or assignee or bankrupt intending to appeal shall deposit with the Chief Registrar such sum, not being less than 10*l.* and not exceeding 40*l.*, as the Commissioner whose judgment is appealed from, or some other Commissioner of the same court acting for him, shall direct, in order to satisfy (so far as the same may extend) any costs that the appellant may be ordered to pay, and in the absence of any direction of a Commissioner as to the amount of deposit, the sum of 20*l.* shall be so deposited.

LXIII.—That at the time of entering an appeal against the judgment of the Court for the allowance of a certificate, or for the refusal, the withholding, or the class of a certificate, notice thereof shall be given to the Court by leaving the same in writing with the Chief Registrar who shall forthwith enter in the Certificate Book the time and nature of every such appeal, and shall afterwards enter in the said book the date and substance of any order made in the said appeal that may be produced before him.

LXIV.—That all affidavits to be made in support of petitions of appeal against the allowance, refusal, or withholding of any bankrupt's certificate or the class thereof shall be filed at the time of the filing of such petition of appeal.

Audits.

LXV.—Every bill of fees and disbursements, and charges of any solicitor or attorney, or messenger, under any commission, fiat, or petition for adjudication of bankruptcy, incurred prior to any sitting for an audit, shall be delivered to the Registrar for taxation, five days, at least, before the day appointed for such sitting; and, in default thereof, if such sitting shall be adjourned by reason of such default, such solicitor, or attorney, or messenger, shall pay the costs occasioned by the adjournment, and the amount thereof shall be deducted from the amount of such bill; and no money shall be paid to any solicitor, or attorney, or messenger, on account of any fees or disbursements or charges of any bill, until such bill shall have been taxed.

LXVI.—The audit account of the official assignee, or of any creditors' assignee or assignees, shall be made out in the ordinary form of a debtor and creditor account, each item thereof being entered according to its date, and a name, date, and proper

explanation given to such item; and a duplicate of such account shall be sent by the official assignee to the solicitor two days at least prior to the day appointed for the auditing of such account, subject to the power of the Commissioner to require an account, digested under proper heads, to be annexed to the audit account, if he shall think proper.

LXVII.—At every audit the Debtor and Property Book exhibited to the Court by the official assignee, shall be carefully examined and compared with the debts and property collected, as stated in the audit paper, and the cause of any monies remaining uncollected shall be ascertained, and a minute thereof made, and filed with the proceedings; and all persons appearing to be indebted to the bankrupt's estate shall be forthwith summoned and examined in that behalf upon oath, and the examination so taken shall be filed with the proceedings; and such directions shall be given by the Court as to any further proceedings thereupon as to the Court shall seem fit.

Summoning of Trader.—Sections 78. to 86.

LXVIII.—That the particulars of demand and notice under "The Bankrupt Law Consolidation Act, 1849," and specified in Schedule G, to the said Act annexed, shall, where the debt is claimed to be due to a person or persons not in partnership, be signed by or in the christian name and surname of every such person, adding after his signature, his description, residence or place of business, and shall, where the debt is claimed to be due to a partnership firm, be signed by or in the name of one of the partners on behalf of himself and partner or partners, adding after such signature the style or firm of partnership and place of business as follows; (that is to say) John Thompson for self and partners, trading under the style or firm of
at _____ in the county of _____

LXIX.—Such particulars of demand and notice shall be directed to the party or parties intended to be summoned by the christian and surname of each of them, (or where the christian name is not known, by the surname only, or when the christian name is indicated only by any initial or contraction, then by such initial letter or letters, or contraction of the supposed christian name and by the surname), and also by the place of residence or business, and shall also contain in the body thereof a statement of the name or names with such initial or initials or contraction as above mentioned, if the name is not known, of all the persons from whom the debt is claimed to be due, whether the whole of them shall be summoned or not, or (in case of partners) the style or firm of partnership and place of business, in the same form as above mentioned.

LXX.—The account in such particulars of demand shall be expressed with reasonable and convenient certainty as to dates and all other matters, and where credit is given in such account to the debtor, the notice shall require payment of the difference or balance only which appears to be due in such account.

LXXI.—If the affidavit of debt under the said Act shall not be filed within one calendar month after service of the particulars of demand and notice, the plaintiff (or creditor) shall not afterwards be at

liberty to proceed without serving new particulars of demand and notice.

LXXII.—Every affidavit for summoning a debtor under the said Act shall state the nature of the debt with the same degree of certainty and precision as is now or shall hereafter be required in an affidavit to hold to bail by order of a Judge in the superior courts at Westminster.

LXXIII.—Every summons of a debtor under the said Act shall describe the parties in the same manner as they were described in the particulars of demand and notice.

LXXIV.—Every such summons shall be indorsed with a notice as follows:—

“Notice to the party summoned.

This summons is served upon you pursuant to the provisions of “The Bankrupt Law Consolidation Act, 1849,” and is founded on an affidavit of debt which was filed in the Court of Bankruptcy in London, or the Court of Bankruptcy for the district, at on the day of 18

If you shall fail to appear to this summons at the time and place within specified, having no lawful impediment made known to and proved to the satisfaction of the said Court and allowed, and if you also fail within seven days after personal service of this summons, or within such enlarged time as the said Court may grant, to pay, secure or compound for the demand within mentioned to the satisfaction of the summoning creditor, or enter into a bond, in such sum, and with two sufficient sureties as the Court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought, or shall thereafter be brought for recovery of the same, together with such costs as shall be given in such action, you will be deemed to have committed an act of bankruptcy on the eighth day after the service of this summons, provided a petition for adjudication of bankruptcy shall be filed against you within two calendar months from the filing of the above-mentioned affidavit.

If you shall appear, and on appearance, or at any enlargement or adjournment of the summons shall refuse to sign an admission of the said demand in the form required by the said Act, and shall not make a deposition on your oath in the form required by the said Act, that you believe you have a good defence upon the merits to such demand or some part thereof, and shall not (if required by the Court so to do) enter into a bond according to the form contained in Schedule K. to the said Act annexed, in such sum and with such two sufficient sureties as the Court shall approve of, to pay such sum or sums as shall be recovered, together with such costs as shall be given in any action which shall have been or shall be brought for the recovery of such demand or of any part thereof in respect of which such deposition shall be made, and shall also fail within seven days after personal service of this summons, or within such enlarged time as aforesaid, to pay, secure or compound as above mentioned, or to enter into such bond as first above mentioned, the same consequence will follow as in the case first supposed, subject to the same proviso as regards the filing a petition for adjudication of bankruptcy.

If you shall appear, and on appearance shall

sign and file an admission of the said demand, and shall not within seven days next after the filing of such admission pay or tender and offer to pay to the said creditor the amount of such demand, or secure or compound for the same to the satisfaction of such creditor, you will be deemed to have committed an act of bankruptcy on the eighth day after the filing of such admission, subject to the same proviso as before mentioned with regard to the filing a petition for adjudication of bankruptcy.

If you shall appear, and on appearance shall sign an admission for part of the said demand, and shall not make a deposition upon oath in the form required by the said Act, that you believe you have a good defence upon the merits to the residue, and shall not (if required by the Court so to do) enter into such bond as aforesaid, to pay such sum or sums as shall be recovered in any action which shall have been brought or shall thereafter be brought for the recovery of such residue, together with such costs as shall be given in such action, then if, as to the sum so admitted you shall not within seven days next after the filing of such admission, pay, or tender and offer to pay to the said creditor the sum so admitted, or secure or compound for the same to the satisfaction of such creditor, and as to the residue of such demand, shall not within seven days from the service of the summons, or such enlarged time as may be granted by the said Court in that behalf, pay, secure or compound for the same to the satisfaction of such creditor, or enter into a bond in such sum, and with such two sufficient sureties as the Court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought, or shall thereafter be brought for recovery of the same, together with such costs as shall be given in such action, you will be deemed to have committed an act of bankruptcy on the eighth day after the service of this summons, subject to the same proviso as before mentioned with regard to the filing a petition for adjudication of bankruptcy.

If you shall appear, and on appearance shall, as to the whole of the said demand or part of it, make a deposition on your oath (in the form required by the said Act) that you believe you have a good defence upon the merits to the same, and (if required by the Court so to do) enter into such bond according to the form contained in Schedule K. in such sum and with such sureties as aforesaid, you will be entitled to a discharge from the summons.

You are moreover to observe, that an admission made by you after the service of this summons, though signed elsewhere than before the Court, may afterwards be filed in court, and will be as effectual as if you had appeared and signed it in court, provided such admission be made in the form contained in Schedule L. to the said Act annexed, and there be present at the time of the signature an attorney of one of Her Majesty's superior courts of law on your behalf, expressly named by you and attending at your request, to inform you of the effect of such admission before it is signed by you, and provided also that such attorney do subscribe his name to the admission as

a witness to the due execution thereof, and in such attestation declare himself to be attorney for you, and state therein that he subscribes as such attorney."

LXXV.—Every summons of a debtor under the said Act shall be indorsed with the name and place of business of the attorney actually suing out the same, but *in case no attorney shall be employed for the purpose, then with a memorandum expressing that the same has been sued out by the summoning creditor "in person."*

LXXVI.—Every such summons shall be served four days at least before the time for appearance therein mentioned.

LXXVII.—Every such summons shall be served between the hours of nine o'clock in the forenoon and nine o'clock in the afternoon.

LXXVIII.—If the plaintiff (or summoning creditor) shall make default in appearance by himself or his attorney at the time appointed in that behalf, the defendant (debtor) shall be entitled to his discharge from the summons, and a memorandum of such discharge shall be indorsed on the summons.

LXXIX.—If the defendant or party summoned shall appear at the time appointed in that behalf, or at any enlargement or adjournment thereof, and shall refuse to admit such demand, but shall, as to the whole of the said demand, or part of it, make a deposition as required by the said Act, that he believes he has a good defence on the merits to the same or some part thereof, and if ordered by the Court so to do, but not otherwise, enter into such bond according to the form contained in Schedule K. in such sum and with such two sufficient sureties, and within such time as the Court shall approve of and direct, the defendant shall be entitled to his discharge from the summons, and a memorandum of such discharge shall be indorsed on the summons.

LXXX.—Any want of compliance on the part of the plaintiff with these Rules and Orders in the particulars of demand and notice, and in the affidavit for summoning the defendant, and in the summons and service thereof, or in any or either of such matters, may be waived by the defendant, or allowed to be rectified by the Court, when it shall not in the opinion of the Court be matter of substance, or shall have arisen from a mere slip; but unless waived by the defendant, or rectified with the consent of the Court, if the same shall be made known to and proved to the satisfaction of the Court, at the time required by the summons for the appearance of the defendant, it shall be deemed and taken to be a good objection to requiring the defendant to state whether or not he admits the demand sworn to by the plaintiff or any part thereof; and in such case the defendant shall be entitled to his discharge from the summons with costs, and a memorandum of such discharge shall be indorsed on the summons.

LXXXI.—Every application to enlarge the time for calling on the defendant to state whether or not he admits the demand or any part thereof, or for entering into a bond with sureties, shall be supported by affidavit.

LXXXII.—Before any defendant shall be allowed to enter into a bond with sureties, according

to the provisions of the said Act, he shall give to the plaintiff or his attorney two clear days' notice in writing, signed by the defendant or his attorney, of the defendant's intention so to proceed.

LXXXIII.—Such notice of sureties shall be accompanied with a true copy of their affidavit of sufficiency, which affidavit shall be in the following form, viz.:

In the Court of Bankruptcy, London, or in the Court of Bankruptcy for the district.

Between and

A. B., of in the &c. and C. D., of &c., (*adding their place of residence and description respectively*) severally make oath and say, and first the said A. B. for himself saith that he is one of the proposed sureties for the above-named defendant, and that he the said A. B. resides at aforesaid, and that he is worth property to the amount of £ over and above what will pay and satisfy all his just debts and incumbrances, *that he is not surety in any manner for the above-named defendant or any other person, except on the present occasion, (or if he is surety on any other occasion substitute for the words in italics the following,) "and every other sum for which he is now surety;"* that his the said A. B.'s property to the amount aforesaid consists of (*here specify the nature and value of the property, according to the circumstances of the case as follows:*) stock in trade in his business of a carried on by him at of the value of , of good book debts owing to him to the amount of , furniture in his house at of the value of , of a freehold or leasehold farm of the value of situate at occupied by [*or of other property, particularizing each description of property with the value thereof*]. And the said A. B. further saith that for the last six months he has resided at aforesaid (*or if he has resided at several places, then say at the following places, particularizing them*). And the above named deponent, C. D., for himself saith that (*here pursue the same form as with respect to the former surety*).

LXXXIV.—The amount of property so sworn to shall be at least equal to the sum demanded, or the portion thereof for which the bond is ordered to be given (*fractional parts of a pound excepted*) and one-fourth more.

LXXXV.—The plaintiff shall be at liberty, within four days after service of notice of sureties, to except to the proposed sureties, or either of them, by delivering a written notice to the defendant or his attorney, to the effect generally that he excepts to such surety or sureties (*as the case may be*), and a copy of such notice shall be served on the Registrar of the court in which such exception is to be heard, two days at least before the day of hearing.

LXXXVI.—Two days after service of such notice of exception, the defendant or his attorney shall attend before the Commissioner of the day in London at three o'clock in the afternoon, or if in the country, at such time as the Court shall appoint, with the bond duly stamped, and with an affidavit by the subscribing witness of the execution of such bond, and the plaintiff or his attorney shall be at liberty to oppose the sureties or either of them, upon affidavit or on the ground of any defect appearing on the face of the proceedings.

LXXXVII.—The bond shall in all cases be taken in a penal sum to the amount of double the sum demanded or the part thereof in respect of which the bond is to be given, up to the sum of 1,000*l.*; and beyond 1,000*l.* in the sum of 1,000*l.* beyond the sum demanded.

The condition of the bond is to be according to the form contained in Schedule K. to the said Act.

LXXXVIII.—Where no notice of exception is served, the defendant or his attorney shall attend before the Commissioner of the day on the sixth day after service of notice of sureties, at eleven o'clock in the forenoon in London, or if in the country, at the hour appointed by the Court, with the bond and affidavit of execution aforesaid, and also with an affidavit of service of notice of sureties, and an office copy of the affidavit of sufficiency.

Arrangements between Debtors and their Creditors, under the Superintendence and controul of the Court.

LXXXIX.—That every petition shall be delivered fairly written or printed on parchment, properly stamped, between the hours of eleven and two, to the Registrar of the day in London, or to the Registrar or one of the Registrars in the country (*as the case may be in town or in country*), who shall file and number such petition, and allot the same by ballot, in the presence of a Commissioner, to one of the Commissioners of the Court of Bankruptcy in London (or to a Commissioner in the country where there are two Commissioners), and forthwith certify to such Commissioner the filing of the petition and the allotment to him, and the petition shall be prosecuted before such Commissioner (or before the sole Commissioner where there is only one). Provided always, that any one Commissioner of the same court may, in the absence of any other Commissioner, act for him. Provided also, that where a petition shall have been previously filed by the same petitioner, whether the same shall have been dismissed or not, or when the petitioner has previously been bankrupt in London, or within the same district in the country, the new petition shall be allotted to the same Commissioner to whom the former petition, commission, fiat, or petition for adjudication was allotted.

XC.—That two fair copies on paper of the petition shall be delivered to the Registrar, together with the original petition; one for the use of the Commissioner, the other for the use of the official assignee and for the inspection of creditors.

XCI.—That the sum of 10*l.*, or such other sum not exceeding 30*l.*, as the Commissioner shall direct, shall, before the appointment of any sitting of the Court under such petition, be deposited with such official assignee of the Commissioner to whom the petition shall be allotted, as he shall direct, for the costs of the sitting or sittings, for the payment of such remuneration to the official assignee as the Commissioner shall award for the examination of the accounts, and for other necessary expenses, and the residue, if any, shall be repaid to the petitioner.

XCII.—That in all cases where a petitioner shall be in custody, there shall be filed with his petition a certificate from the gaoler or officer of

the cause or causes of the detention of the petitioner.

XCIII.—That all notices required by or given in pursuance of the provisions of the Act with respect to the said arrangements, except where otherwise directed by the Act, or by the Court, shall be sent or served (*as the case may require*) by a messenger of the Court.

XCIV.—That the account to be filed by the petitioning trader shall be signed in the presence of and attested by a solicitor of the Court of Bankruptcy, and that the copy to be furnished to the official assignee, shall be so furnished ten days or more before the day appointed for the private sitting of the court.

XCV.—That no person not being or not claiming to be a creditor, or the solicitor or duly authorized attorney of a creditor, except the official assignee and one clerk, and the petitioner accompanied by two persons, shall be present at any sitting, or be permitted to inspect the petition or other proceedings, unless authorized in writing by the Commissioner.

XCVI.—That the minutes or notes of the proceedings at every sitting shall be kept by the Registrar.

XCVII.—That every affidavit in the matter of an arrangement under the superintendence and controul of the Court, made after the allotment of a petition, shall be intitled "The Court of Bankruptcy in London" or "The Court of Bankruptcy for the district" (*as the case may be*) "in the matter of a petition for arrangement between A. B. and his creditors."

XCVIII.—That the several forms in the following Schedule marked A., shall be used, with the necessary variations.

SCHEDULE A.

FORM OF ORDER FOR PROTECTION TO PETITIONING TRADER, under Section 211.

"The Bankrupt Law Consolidation Act, 1849."

Court of Bankruptcy, Basinghall Street, London, (or at in the County of)
the day of in the year of our
Lord one thousand eight hundred and

WHEREAS, of a trader unable to meet his engagements with his creditors, did on the day of present his petition to this honourable Court, under the provisions of "The Bankrupt Law Consolidation Act, 1849," praying that his person and property might be protected from all process, and that such proposal as he might be able to make, or such modification thereof, as by three-fifths in number and value of his creditors might be determined, might be carried into effect under the superintendence and controul of this honourable Court; and there was filed with the said petition such affidavit in support thereof as is required by the said Act: Now, I, one of the Commissioners of the said Court, acting in the matter of the said petition, do hereby in pursuance of the said statute, order that the person and property of the said shall be protected

from all process from the date hereof, until the day of next at noon, or until further order.

Given under my hand and the seal of the Court this day of 18 . Commissioner.

FORM OF RENEWAL OF PROTECTION, to be indorsed on the original ORDER FOR PROTECTION.

Court of Bankruptcy, Basinghall Street, London, (or at in the County of) the day of in the year of our Lord one thousand eight hundred and

I, one of the Commissioners of the Court of Bankruptcy in London, (or for the district) authorized to act in the matter of the within petition, do hereby renew the protection within granted, and order that the person and property of the said shall be protected from all process from the date hereof until the day of next at noon, or until further order.

Given under my hand and the seal of the Court the day of 18 . Commissioner.

ORDER OF RELEASE OF PETITIONING TRADER FROM CUSTODY, under Section 211.

"The Bankrupt Law Consolidation Act, 1849."

Court of Bankruptcy, Basinghall Street, London, (or at in the County of) the day of in the year of our Lord one thousand eight hundred and

WHEREAS, of a trader unable to meet his engagements with his creditors, did on the day of present his petition to this honourable Court, under the provisions of "The Bankrupt Law Consolidation Act, 1849," praying that his person and property might be protected from all process, and that such proposal as he might be able to make (or such modification thereof as by three-fifths in number and value of his creditors might be determined) might be carried into effect under the superintendence and controul of this honourable Court acting in the matter of the said petition; and whereas I have made an order, bearing date this day (or the day of) that the person and property of the said shall be protected from all process from the date thereof until the day of next at noon, or until further order; and whereas it appears that the said is in prison for debt, namely, in the prison of under an execution upon a judgment obtained on the day of in the Court of against the said at the suit of for the sum of l. and interest thereon, (*the statement of the cause of the petitioner's imprisonment or custody to be varied according to the facts,*) and it does not appear by any judgment, order, commitment or sentence, under which the said petitioner is in prison or in custody, or by the record or entry of any such judgment, order, commitment, or sentence, that he is in prison or in custody for any debt con-

tracted by fraud or breach of trust, or by reason of any prosecution against him whereby he had been convicted of any offence, or for any debt contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication of bankruptcy: Now I do hereby order the sheriff of (*the person having the petitioner in prison or custody*) and every person who shall have the said in custody by virtue of the said execution, to release the said from custody as to such execution, pursuant to the said statute.

Given under my hand and the seal of the Court this day of in the year of our Lord 18 . Commissioner.

CERTIFICATE OF APPROVAL OF RESOLUTION ACCEPTING PETITIONING TRADER'S PROPOSAL, Section 216.

"The Bankrupt Law Consolidation Act, 1849."

Court of Bankruptcy, Basinghall Street, London, or at in the County of the day of 18

WHEREAS, of a trader unable to meet his engagements with his creditors, did, on the day of present his petition to this honourable Court under the provisions of "The Bankrupt Law Consolidation Act, 1849," praying that such proposal as he might be able to make, (or such modification thereof as by three-fifths in number and value of his creditors might be determined) might be carried into effect, under the superintendence and controul of the said Court; and whereas one of the Commissioners of the said Court acting in the matter of the said petition, caused such sittings of the Court to be held as are directed by the said Act; and whereas a certain resolution or agreement now exhibited and marked with the letter was duly assented to at such sittings, which I, a Commissioner acting in the matter of the said petition, and after hearing

do think reasonable and proper to be executed under the direction of this Court, and have approved and confirmed the same, and caused it to be filed and entered of record in the said Court; I do hereby certify the several matters aforesaid under my hand and the seal of the Court this day of in the year of our Lord 18 . Commissioner.

PROTECTION FROM ARREST, to be indorsed on the foregoing CERTIFICATE.

The within-named is hereby protected from arrest at the suit of any person being a creditor at the date of his petition, and having had such notice or notices as by the within-mentioned Act is required until the day of 18 , at noon,

RULES AND ORDERS IN BANKRUPTCY.

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or until further order, provided that this protection shall not be valid in favour of the said if he shall be proved to have been about to abscond beyond the jurisdiction of this Court, or if he has concealed or is concealing any part of his estate or effects, nor against any creditor whose debt is not truly specified in the account filed by the said nor against any creditor whose debt has been contracted by the said by any manner of fraud or breach of trust. Dated this day of 18 .

Commissioner.

FORM OF ACCOUNT TO BE FILED BY PETITIONING TRADER, under the 12 & 13 Vict. c. 106. s. 214.

"The Bankrupt Law Consolidation Act, 1849."

Court of Bankruptcy, Basinghall Street, London, (or at in the County of)

the day of in the year of our Lord 18 I, of being a petitioning trader under the provisions of "The Bankrupt Law Consolidation Act, 1849," do declare, that the following schedules do contain a full and true account of my debts and the consideration thereof, and the names, residences, and occupations of my creditors, and also a full and true account of my estate and effects, whether in possession, reversion, or expectancy, and of all debts and rights due to or claimed by me, and of all property of what kind soever held in trust for me, and that I have therein set forth such proposal as I am able to make under the provisions of the said Act.

Witness my hand the day of one thousand eight hundred and

Signed by the said

in the presence of Solicitor.

CREDITORS.

No.	Names, Residences, and Occupations of Creditors.	Amount.			When Contracted.	Nature and Consideration of the Debt and Securities if any, and estimated value of such Securities.
		£.	s.	d.		

Note.—When the Name and Residence (or either of them) of any Indorser or Holder of any negotiable Security are unknown, that fact must be stated.

DEBTORS.

N.B. Where there are Cross Demands, the party must be entered both as Creditor and Debtor, and "Set Off" must be written under the Amount.

No.	Names, Descriptions, and Places of Abode of Persons from whom Debts and Rights are due to the Petitioner, or claimed by him.	Amount.			When Contracted.	Good, Bad, or Doubtful.	Nature and Consideration of the Debt, also Securities, if any, for the same, and the estimated value of such Securities.	Witnesses, with their Residences, and other Evidence by which the Debt may be proved.
		£.	s.	d.				

PROPERTY IN POSSESSION.

Real and Personal Estates and Effects, which were at or since the time of filing my Petition, or are now in my possession, enjoyment, or controul, or which were, or are held by any other person or persons in trust for my use, or to the possession or enjoyment of which I was entitled at the time of subscribing my Petition, or am now entitled.

		£.	s.	d.
1. Interest in Lands.	Freehold, Copyhold, and Leasehold Property, with local Description, Names of Tenants, and Annual Rent of the same, and statement of Incumbrances (if any) thereupon, with the Dates thereof			
2. Personal Property.	Household Goods and Furniture, at Wearing Apparel Jewels, Trinkets, and Ornaments of the Person Plate, Linen, and China Wines and other Liquors..... Books, Prints, and Pictures..... Horses, Cows, and other Animals Carriages Farming Stock and Implements of Husbandry..... Stock in Trade in my business of Machinery and Utensils in my business of Ships and Shares of Ships: viz.			
3. Property in the Funds, Annuities, Shares, &c.	Annuities, Money in the Public or other Funds, Shares in Canal or other Companies; shewing in whose names the same are standing, also when and by whom the last Dividend or other Payment was received in respect of the same			
4. Unpaid Legacies.	Legacies due, but unpaid; with all particulars concerning the same			
		£.		
Books, Deeds, Papers.	The following is a true List of all Books, Papers, Deeds, and Writings relating to my Estate and Effects, or any part thereof, which at the time of presenting my Petition were, or at any time since have been in my possession, or under my custody or controul, or in the possession or custody of any person in trust for me, or for my use, benefit, or advantage.			

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PROPERTY IN REVERSION, REMAINDER, OR EXPECTANCY, PLACES, PENSIONS, RIGHTS, AND POWERS.

N.B.—Contingent as well as Vested Interests must be entered.

Real and Personal Estates and Effects in which I had or have any Interest in Reversion, Remainder, or Expectancy.

		Supposed value of my Interest if now to be Sold.		
		£.	s.	d.
1. Interest in land.	Freehold, Copyhold, and Leasehold Property, with Names and Descriptions of Persons now enjoying the same, and the Annual Value thereof; also the nature of my Interest therein, and from whom, and in what manner it is derived			
2. Personal Property.	Personal Property, with Names and Descriptions of Persons now enjoying the same; also the nature of my Interest therein, and from whom, and in what manner it is derived			
3. Property in the Funds, Annuities, Shares, &c.	Annuities, Money in Public or other Funds, Shares in Canal and other Companies; shewing in whose Names the same are standing, with Names and Descriptions of Persons now enjoying the same; also the nature of my Interest therein, and from whom, and in what manner it is derived			
Places and Pensions in Possession or Reversion.	Places of Benefit or Advantage held by me, with the Salaries, Fees and Emoluments thereof; also all Pensions and Allowances in Possession or Reversion held by me, or by any other Person or Persons for me, or on my behalf, or of and from which I derive or may derive any benefit or advantage			
Rights and Powers.	Rights and Powers which I or any other Person or Persons in Trust for me or for my Use, Benefit or Advantage, or am or were, or are in any manner seized or possessed of, or interested in or entitled to or which I or any other Person or Persons in trust for me, or for my Benefit had or have any power to dispose of, charge, or exercise for my benefit or advantage			

Witness my Hand, the
Signed by the said

day of

One Thousand Eight Hundred and
in the presence of
Solicitor.

NEW SERIES, XXI.—BANKR.

c

Arrangement by Deed.—Sections 224. to 229.

XCIX.—That a certificate of the trustee or inspector, or of two creditors, of the execution of the deed or memorandum of arrangement by the requisite number of creditors, and the account to be appended thereto, and affidavit verifying the same, and the certificate to be granted by the Court, shall be in the following forms, with the necessary variation.

FORM OF CERTIFICATE BY TRUSTEE OR INSPECTOR.

"The Bankrupt Law Consolidation Act, 1849."

To the Court of Bankruptcy in London, (or to the Court of Bankruptcy for the district.)

I, the undersigned being the trustee (or inspector,) (or we the undersigned and being the trustees) (or inspectors) under a deed (or memorandum) of arrangement now produced, and bearing date the day of and made between (state the parties to the deed or memorandum) being a deed (or memorandum) of arrangement between the said and his creditors, within the meaning of the provisions of "The Bankrupt Law Consolidation Act, 1849," with respect to arrangements by deed, do hereby certify to the Court of Bankruptcy in London (or to the Court of Bankruptcy for the district), that the said deed (or memorandum) has been signed by or on behalf of six-sevenths in number and value of the creditors of the said whose debts amount to 10*l.* and upwards, accounting every creditor a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgage property, and other such available securities or liens from the said, appeared to be the balance due to such creditor; and that a full account of the debts of the said together

with the names, residences, and occupations of his creditors, is appended hereto.

Dated this day of 18 A. B.

FORM OF CERTIFICATE BY TWO CREDITORS OF THE TRADER.

"The Bankrupt Law Consolidation Act, 1849."

To the Court of Bankruptcy in London, (or to the Court of Bankruptcy for the district.)

We, the undersigned A. B. of and C. D. of being two of the creditors of the trader hereinafter mentioned, and there being no trustees or inspector under the deed (or memorandum) of arrangement hereinafter mentioned, do hereby certify to the Court of Bankruptcy in London (or to the Court of Bankruptcy for the district) that a deed (or memorandum) bearing date the day of and made between (state the parties to the deed or memorandum), being a deed (or memorandum) of arrangement between the said and his creditors within the meaning of the provisions of "The Bankrupt Law Consolidation Act, 1849," has been signed by or on behalf of six-sevenths in number and value of the creditors of the said whose debts amount to ten pounds and upwards, accounting every creditor a creditor in value in respect of such amount only as, upon an account fairly stated after allowing the value of mortgaged property, and other such available securities, or liens from the said appeared to be the balance due to such creditor; and that a full account of the debts of the said together with the names, residences, and occupations of his creditors is appended hereto.

Dated this day of 18 E. F.
G. H.

FORM OF THE ACCOUNT TO BE APPENDED TO THE CERTIFICATE OF TRUSTEE, OR INSPECTOR, OR TWO CREDITORS.

N.B.—This is to be an Account of all the Debts of the Trader including those under 10*l.*, and including Debts secured, and shewing the estimated value of any security.

"The Bankrupt Law Consolidation Act, 1849."

A FULL ACCOUNT OF THE DEBTS OF together with the Names, Residences, and Occupations of his Creditors.

Amount of Debts.	CREDITORS.			Debts wholly or partially secured by mortgage or other such available securities or liens, shewing the amount secured, and the value or estimated value of the security.
	Names.	Residences.	Occupations.	
500 <i>l.</i>	John Smith ...	10, Fore Street, London.	Merchant	...250 <i>l.</i> , part of the debt secured by mortgage of freehold premises in Street, London, dated the 1st day of January, 1840. The estimated value of the premises is 300 <i>l.</i>
4 <i>l.</i> 10 <i>s.</i> 6 <i>d.</i>	William Roberts	50, Cheapside, London.	Tailor.	

Form of Affidavit of the Trader to accompany the Certificate.

"The Bankrupt Law Consolidation Act, 1849."
In the Court of Bankruptcy in London, (or Court
of Bankruptcy for the district.)
In the matter of an arrangement by deed between
I. K. and his creditors.

The above-named I. K. of , maketh
oath, and saith that he hath perused the accom-
panying certificate purporting to be signed by
bearing date the day of
and the account appended thereto, and purporting
to be a full account of the debts of this deponent,
together with the names, residences, and occupations
of this deponent's creditors. And this deponent
saith that the said account and the matters therein
stated are true, and that the said account is a full
and true account of the debts of this deponent,
together with the names, residences, and occupations
of this deponent's creditors. And this deponent
saith that he is acquainted with the handwriting of
the said and the signature to the said certi-
ficate is in the handwriting of the said
and that the contents of the said certificate are true.

*Form of Certificate by the Court of Execution by
requisite proportion of Creditors.*

"The Bankrupt Law Consolidation Act, 1849."
Court of Bankruptcy, Basinghall Street, London,
(or at in the county of the
day of in the year of our Lord 185 .)
In the matter of an arrangement by deed between
I. K. and his creditors.

Upon reading the petition of the above-named
I. K. to this Court, and the affidavit (or affidavits)
in support thereof, and of the due service of the
notices required by this Act, and upon hearing
and being satisfied that the said I. K.
being a trader liable to become a bankrupt, has sus-
pended payment, and that he did for six months
next immediately preceding his suspension of pay-
ment reside (or carry on business) within the district
of this Court, and that a deed (or memorandum) now
exhibited, and marked with the letter and bear-
ing date the day of and made between
(state the parties to the deed or memorandum)
being a deed (or memorandum) of arrangement be-
tween the said and his creditors, within the
meaning of the provisions of "The Bankrupt Law
Consolidation Act, 1849," with respect to arrange-
ments by deed, has been signed by or on behalf of
six-sevenths in number and value of the creditors
of the said I. K., whose debts amounted to 10*l* and
upwards, accounting every creditor a creditor in
value in respect of such amount only as upon an
account fairly stated, after allowing the value of
mortgaged property and other such available secu-
rities or liens from the said I. K., appeared to be
the balance due to such creditor; I hereby certify
the same under my hand and the seal of the Court.
Dated this day of 185

A. B., Commissioner.

*Orders for Payment of Money and Costs, and Execution
thereon.—Sections 123, 132, 151, and 249.*

C.—That every order for payment of money and
costs, or either of them, shall be signed by the
Commissioner making such order, and be sealed
with the seal of the Court, and be countersigned
by the Registrar, or one of the Registrars, and
shall be forthwith filed with the proceedings.

CI.—That every order for payment of costs
shall contain a direction that the party in whose
favour the order is made may enforce the same by
issuing execution.

CII.—That the costs directed by any such order
to be paid shall be taxed on production of an office
copy of such order, and the allocatur being duly
stamped shall be signed and dated by the Master or
Registrar taxing the costs.

CIII.—That in all cases where writs of execution
may be issued out of the Court of Bankruptcy to
enforce an order for payment of money and costs,
or either of them, the same shall be sealed with the
seal of the Court, and be issued by the chief Re-
gistrar on production of an office copy of the order
for payment and (where the order comprises costs) on
production of the allocatur.

CIV.—That at the time of issuing any writ of
execution the solicitor causing the same to be issued
shall file a *præcipe* thereof with the Chief Registrar,
in the form given in the Schedule to these Orders.

CV.—That the Chief Registrar shall file and
keep every such *præcipe*, and shall keep a book in
which he shall enter the same, with an index re-
ferring alphabetically to the names of the persons
against whom writs are issued.

CVI.—That writs of execution shall be in the
forms given in the following Schedule, or as near
thereto as the circumstances of the case may re-
quire, and such writs when sealed shall be delivered
to the sheriff or other officer to whom the execution
of the like writs issuing out of the superior courts
of common law belongs, and shall be executed by
such sheriff or other officer as nearly as may be in
the same manner in which he doth or ought to
execute such like writs, and for the execution of
such writs such sheriff or other officer shall not
take or be allowed any fees other than such as are
or shall be from time to time allowed by lawful
authority for the execution of the like writs issuing
out of the superior courts of common law.

CVII.—That writs of execution shall be tested
in the name of the senior Commissioner and of the
day when actually issued, and be made returnable
immediately after the execution thereof, before the
Court of Bankruptcy in London.

CVIII.—That the amount actually intended to
be levied or extended, or for which the person is to
be taken, and the name, occupation, and address of
the person against whom the writ is issued, and the
name and residence, or place of business of the so-
licitor issuing the same, shall be indorsed on every
writ of execution.

CIX.—That on the filing of a return to a former
writ that goods have been seized but not sold, a writ
of *venditioni exponas* may be issued.

CX.—That on execution of the writ, or before
execution, if so ordered by the Court of Bankruptcy
in London, every writ shall be forthwith returned

to the said Court of Bankruptcy, by filing the same (with the proper return indorsed) with the Chief Registrar, by whom such writ and return shall be filed of record, and the fact and date, and substance of the return, shall be forthwith entered in the *præcipe* book.

CXI.—That on satisfaction, by levy or otherwise, in whole or in part, the party on whom the order is made, on delivery of a search stamp, shall cause such satisfaction to be entered on the order for payment.

CXII.—That unless such satisfaction shall appear by the return of the writ, or shall be admitted by the party in whose favour the order shall be made, or his solicitor, application must be made to the Court of Bankruptcy wherein the proceedings and order shall be filed to order such entry of satisfaction.

CXIII.—That the Court of Bankruptcy shall, on proper application, exercise such and the same powers of amendment of writs of execution, and the indorsement thereon, and the *præcipes* thereof, in cases where such powers may be reasonably exercised, and on the same terms as to payment of costs or otherwise as the superior courts of Westminster are in the habit of exercising.

Form of Præcipe on issuing Execution.

SURREY. *Pl. fa., ca. sa., elegit, or venditioni exponas, (as the case may be) against C. D., for payment of* £ and £ costs (as the case may be) to A. B., official assignee of (omit this if not applicable) on order of the Court of Bankruptcy in London (or for the district) dated the day of in the year of our Lord, 18

E. F. (solicitor issuing the writ.)
Address
Date

Forms of Writs (to be varied where necessary).

No. 1.

Writ of *fi. facias* on an order for payment of debt admitted in Court to be due to the estate of a bankrupt.

VICTORIA.—By the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the Sheriff of greeting: Whereas by an order of the Court of Bankruptcy in London [or for the district] dated the day of in the year of our Lord, 18 and made in the matter of [insert the title of the order] reciting that C. D., of in his examination taken the day of and signed and subscribed by him, had admitted that he was indebted to the said bankrupt in the sum of £ upon the balance of accounts between the said C. D. and the said bankrupt, it was ordered that the said C. D. should pay to A. B. the official assignee of the estate and effects of the said bankrupt in full discharge of the sum so admitted the sum of £ forthwith [make this conformable to the order]. And whereas we are given to understand that the said sum of £ [or that the sum of £, part of the said sum of £] is still unpaid. Now

we command you that of the goods and chattels of the said C. D. in your bailiwick you cause to be made the said sum of £ [insert the sum to be levied] and that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made interest upon the said sum of £ at the rate of 4l. per centum per annum from the said date of the said order. And that you have that money and interest before our Court of Bankruptcy at Basinghall Street, in the city of London, immediately after the execution hereof, to be paid to the said A. B., official assignee as aforesaid, in pursuance of the said order. And that you do all such things as by the statute passed in the year of our Lord 1838 you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to our said Court of Bankruptcy at Basinghall Street aforesaid immediately after the execution thereof, and have there then this writ. Witness [name of senior Commissioner] at Basinghall Street, in the city of London, the day of in the year of our Lord 185

No. 2.

Writ of *fi. facias* on an order for payment by instalments of debt admitted in Court to be due to the estate of a bankrupt.

VICTORIA.—By the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the Sheriff of greeting: Whereas by an order made in the Court of Bankruptcy in London [or for the district] bearing date the day of in the year of our Lord 18 entitled, In the matter of [insert the title of the order] and reciting that C. D. of in his examination taken the day of and signed and subscribed by the said C. D., had admitted that he was indebted to the said bankrupt in the sum of £ upon the balance of accounts between the said C. D. and the said bankrupt, It was ordered that the said C. D. should pay to A. B., the official assignee of the estate and effects of the said bankrupt, in full discharge of the said sum of £ the sum of £ in manner following, that is to say, by instalments of £ each, the first whereof was to be made on the day of . And it was ordered that in default of payment of any of the said instalments the whole sum then remaining unpaid should immediately become payable and be paid. And whereas we are given to understand that default was made in payment of one of the said instalments, and thereupon the said sum of £ which then remained unpaid [or the sum of £, being the portion of the sum so ordered to be paid, which then remained unpaid, according to the facts] immediately became payable, but the same has not been paid. Therefore we command you that of the goods and chattels of the said C. D. in your bailiwick you cause to be made the said sum of £ [insert here the sum to be levied] and that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made interest [proceeding as in the former form].

No. 8.

Writ of *fieri facias* on an order for payment of debt admitted in Court to be due to the estate of a bankrupt, and of costs assessed by the Court.

VICTORIA.—By the grace of God [as in the forms given above, reciting the order, including the portion of it relating to costs]. And whereas we are given to understand that the said sums of £ and £ are still unpaid [make this agree with the facts]. Now we command you that of the goods and chattels of the said C. D. in your bailiwick you cause to be made the said sums of £ and £ [proceed as in the above forms, with the necessary variations.]

No. 4.

Writ of *fieri facias* on an order for payment of costs to be taxed.

VICTORIA.—By the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the Sheriff of greeting: We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ for certain costs which lately before our Court of Bankruptcy in London [or for the district] by an order made in a certain matter there, entitled, "In the matter of [insert the title of the order] bearing date the day of were ordered to be paid by the said C. D. to A. B., official assignee of the estate and effects of [omit this if not applicable, and alter the form to suit the facts of the case], which costs have been since taxed at the said sum of £ as appears by an allocatur dated the day of and that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made interest at the rate of 4l. per centum per annum on the said sum, from the said date of the said allocatur. And that you have that money and interest before our Court of Bankruptcy at Basinghall Street, in the city of London, immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said order. And that you do all such things as by the statute passed in the year of our Lord 1838 you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to our said Court in London immediately after the execution thereof. Witness [name of the senior Commissioner] at Basinghall Street, in the city of London, on the day of in the year of our Lord 185

No. 5.

Writ of *capias ad satisfaciendum* on an order for payment of debt admitted in Court to be due to the estate of a bankrupt.

VICTORIA.—By the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the Sheriff of greeting: [recite the order for payment, and that the money continues unpaid, as in the form of fieri facias above given, and proceed.] Now we command you that you take the said C. D. if he shall be found in your bailiwick, and him safely keep, so that you

may have his body immediately after the execution hereof before our Court of Bankruptcy in London, to satisfy the said A. B., official assignee as aforesaid, the said sum of £, and further to satisfy the said A. B., official assignee as aforesaid, interest upon the said sum of £ at the rate of 4l. per centum per annum from the said date of the said order, and have there then this writ. Witness [name of senior Commissioner] at Basinghall Street, in the city of London, the day of in the year of our Lord 18

No. 6.

Writ of *venditioni exponas*.

VICTORIA.—By the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the Sheriff of greeting: Whereas by our writ we lately commanded you that of the goods and chattels of C. D. [here recite the mandatory part of the fieri facias to the end] and on the day of you returned to our said Court of Bankruptcy in London, that by virtue of the said writ to you directed you had taken goods and chattels of the said C. D. to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers [to be varied according to the actual return]. Therefore we being desirous that the said A. B. should be satisfied the money and interest aforesaid, command you that you expose to sale, and sell or cause to be sold the goods and chattels of the said C. D. by you in form aforesaid taken and every part thereof for the best price that can be gotten for the same, and have the money arising from such sale before our said Court of Bankruptcy at Basinghall Street, in the city of London, immediately after the execution hereof, to be paid to the said A. B., and have there then this writ. Witness at Basinghall Street, in the city of London, the day of in the year of our Lord 18

No. 7.

Writ of *elegit* on an order for payment of debt admitted in Court to be due to the estate of a bankrupt.

VICTORIA, &c.—To the Sheriff of greeting: Whereas [recite the order for payment, and that the money continues unpaid, as in the form of fieri facias above given, and proceed]. And afterwards the said A. B. came into our said Court of Bankruptcy, and according to the form of the statute in such case made and provided, chose to be delivered to him, her, or them [as the case may be] all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D., or any one in trust for him, was seized or possessed of on the day of in the year of our Lord (a), or at any time afterwards, or over which the said C. D. on the

(a) The day on which the order was made.

said day of (a), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said sum of £ shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B. by a reasonable price and extent all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold and customary tenure in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of (a) or at any time afterwards, or over which the said C. D. on the said day of (a) or at any time afterwards had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ shall have been levied.

And in what manner you shall have executed this our writ make appear to us in our Court of Bankruptcy aforesaid immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness

No. 8.

Writ of *elegit* on an order of the Court of Bankruptcy for payment of debt admitted in Court to be due to the estate of a bankrupt, and of costs assessed by the Court.

VICTORIA, &c.—To the Sheriff of greeting.

Whereas [*recite the order for payment, including the portion of it relating to Costs, and that the moneys are unpaid, as before, and proceed*]. And afterwards the said A. B. came into our said Court of Bankruptcy, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick as the said C. D., or any one in trust for him, was seised or possessed of on the day of in the year of our Lord (a), or at any time afterwards, or over which the said C. D., on the said day of (a), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said

goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said two several sums of £ and £, together with interest upon the said sum of £ at the rate of 4*l.* per centum per annum from the day of (a), and on the said sum of £ at the rate aforesaid, from the day of (b) shall have been levied: Therefore we command you that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person or persons in trust for him, was or were seised or possessed of on the said day of (a), or at any time afterwards, or over which the said C. D., on the said day of (a), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £, together with interest aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us in our Court of Bankruptcy aforesaid immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness

No. 9.

Writ of *elegit* on an order for payment of costs to be taxed.

VICTORIA, &c.—To the Sheriff of greeting:

Whereas lately in our Court of Bankruptcy in a certain matter there depending, intituled "*In the matter of E. F.*" by an order of our said Court made in the said matter, and bearing date the day of it was ordered that C. D. should pay unto A. B. certain costs as in the said order mentioned, and which costs have been taxed and allowed by G. H., Esq., the Master of our said Court, at the sum of £, as appears by the certificate of the said Master, dated the day of . And afterwards the said A. B. came into our said Court of Bankruptcy, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or

(a) The day on which the order was made.

(a) The day on which the order was made.
(b) The date of the allocatur.

customary tenure, in your bailiwick as the said C. D. or any one in trust for him, was seised or possessed of, on the day of , in the year of our Lord, , (b) or at any time afterwards, or over which the said C. D. on the said day of , (c) or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels, as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £, together with interest thereon at the rate of 4l. per centum per annum, from the said day of (b) shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any person or persons in trust for him was or were seised or possessed of on the said day of , (b) or at any time afterwards, or over which the said C. D. on the said day of (b) or at any time afterwards, had any disposing power, which he might, without the assent of any other person or persons, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us in our Court of Bankruptcy aforesaid, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness

Course of Priority of Payment out of the Estate of the Bankrupt, of the Costs of the Petitioning Creditor, Section 114, and of payment of Costs out of joint or separate Estates.

CXIV.—That after payment or retainer out of the estate of the bankrupt of all monies duly paid by the official assignee, the per centage on the gross produce of the estate, from time to time, payable to the credit of "the Chief Registrar's Account," and afterwards the per centage payable to the official assignee in respect of realizing the property, the costs of the petitioner of filing and prosecuting his petition, until the choice of assignees by the creditors, shall be paid as follows: first, the costs and charges of the messenger and broker acting under

the petition to the time of the choice of assignees, and then the costs and charges of the solicitor acting in the matter of the petition until the said time.

CXV.—That in case any joint estate of any bankrupts shall be insufficient to pay any costs or charges necessarily incurred in respect of the same, the Court may order such costs to be paid out of the separate estates of such bankrupts, or one or any of them; and *vice versa* may order costs necessarily incurred for any separate estate, if the same were incurred with reasonable probability of benefit to the joint estate, to be paid out of such joint estate.

Composition after adjudication of Bankruptcy, under Sections 230, 231.

CXVI.—That at the first of the meetings of creditors directed by the statute to be held, a minute shall be taken by the solicitor to the assignees, of the names of the several creditors present, and the amount of their several debts standing in proof upon the proceedings, distinguishing such of them as shall assent to such composition.

CXVII.—That the second of the said meetings shall be held before the Commissioner, and that at such meeting the said Commissioner shall, by deposition of witnesses and documentary evidence, as to him shall appear to be proper, inquire and ascertain whether the several particulars directed by the statute to be performed previous to the holding of such second meeting have been duly performed, and certify the same, together with the proceedings which shall have taken place at such second meeting.

CXVIII.—That for the better information of all parties interested, the certificate of the Commissioner shall state what proportion in number and value the creditors assenting to the composition bear to the creditors who shall have proved debts to the amount of 20l. and upwards under the fiat, or petition, and also whether any sale has been made of the bankrupt's estate, in order that provision may, if expedient, be made for confirming the same.

With respect to Official Assignees and their Duties.

CXIX.—That each Commissioner shall appoint his official assignees where more than one is attached to his Court, to act in rotation under the several bankruptcies prosecuted before him; unless in any case the Commissioner shall see cause to the contrary.

CXX.—That the same rule for the appointment of official assignees shall be followed as to existing commissions and fiats issued before the 11th October 1849, under which no official assignee has been appointed.

CXXI.—That the appointment of any official assignee to any bankrupt's estate shall be under the hand of the Commissioner, and shall remain of record in the said Court of Bankruptcy; and certificates of such appointment, under the seal of the Court, shall be delivered to such assignee by the Registrar upon application for the same.

CXXII.—No official assignee shall either directly or indirectly carry on any trade or business, or hold or be engaged in any office or employment other than his office of official assignee.

(b) The date of the allocatur.

(c) The date of the Master's certificate of taxation.

CXXIII.—Each official assignee shall find sureties to the extent of 6,000*l.*, and shall together with such sureties (except where otherwise especially directed by any three Commissioners, of whom the senior Commissioner shall be one) execute a joint and several bond to the Chief Registrar for the time being in the penal sum of 6,000*l.*

CXXIV.—Each official assignee to be made liable to the whole amount, and the sureties to be liable together to the like amount, in such proportions as shall be approved of by such three Commissioners, provided that no one surety shall be liable for more than 3,000*l.*, nor less than 1,000*l.*

CXXV.—That each official assignee shall, on the 1st day of January in every year, or within one week then next following, make a declaration in writing, to be filed with the Chief Registrar, that to the best of his knowledge and belief his sureties are alive and solvent; and in such declaration state, to the best of his knowledge and belief, any change of residence of any or either of such sureties.

CXXVI.—Each official assignee shall, on pain of dismissal, give immediate notice in writing, to the Chief Registrar, of the death, bankruptcy, or insolvency of any or either of his sureties; and shall, if required, cause a new bond to be executed to the like amount by another surety or sureties, to be approved of as above.

CXXVII.—Each official assignee shall follow the instructions of the Commissioner under whom he acts.

CXXVIII.—That no official assignee shall keep under his controul upon any one estate more than 100*l.*; or, in the aggregate of moneys of bankrupts' and petitioning debtors' estates, more than 1,000*l.*; and any excess beyond such sum shall be paid by him forthwith into the Bank of England.

CXXIX.—That the official assignees, at the time of paying moneys into the Bank of England, shall state in writing, delivered therewith to the cashier of the Bank, in the form specified in the Schedule hereunto annexed (No. 4), the date and amount of the payment, the name of the official assignee making it, the name and description of the bankrupt, or bankrupts, to whose estate the money belongs, and that it is to be placed to the credit of the Accountant in Bankruptcy; and the official assignee shall take a receipt for the same from the cashier of the Bank, and on the same day carry or transmit it to the office of the Accountant in Bankruptcy, who will give a proper voucher for such receipt, and that the money is placed to the credit of the estate of the said bankrupt, or bankrupts, in the books kept in the office of the Accountant in Bankruptcy, such voucher to be produced when called for by the Court.

CXXX.—That the allowance to be made to the official assignee shall be upon the following Scale: subject to variation in any particular case, and for special cause to be assigned by the Commissioner in writing, and filed with the proceedings,

SCALE.

That there be paid to each official assignee for the examination of the bankrupt's accounts, such sum as the Commissioner shall think fit, not ex-

ceeding 20*l.* for the accounts of one bankrupt, nor exceeding 20*l.* for the joint estate of two or more bankrupts; and not exceeding 10*l.* for each separate estate, administered under the same adjudication.

For every debt collected 5 per cent. on the first amount of 100*l.* or any less sum; 2½ per cent. on the next amount of 400*l.* or any less sum; 1 per cent. on the next amount of 500*l.* or any less sum; and ¼ per cent. on all further sums.

For property realized 2½ per cent. on the first amount of 500*l.* or any less sum; 1 per cent. on the next amount of 500*l.* or any less sum; and ¼ per cent. on all further sums.

On dividend 2 per cent. on the first amount of 1,000*l.* or any less sum, actually divided; and 1 per cent. on all further sums.

The per centage on mortgaged property to be calculated only on the residue payable to the bankrupt's estate.

For drawing every dividend warrant, or renewed dividend warrant, sixpence.

Note.—At the expiration of twelve months after these Orders come into operation, this Scale will be revised by the Commissioners (subject to the approval of the Lord Chancellor,) regard being had to the amount of remuneration received by the official assignees in the preceding twelve months.

CXXXI.—That the official assignee shall enter in a book, to be called the Register Estate Book, the names of the bankrupts in the commissions, fias, and petitions to which he shall have been or shall be appointed.

CXXXII.—That the official assignee shall keep the following set of books, in size and form heretofore used; that is to say, register estate book (No. 1); register book of bankrupts' books delivered to official assignee under each estate (No. 2); debtor and property book; rough cash book; fair cash book; rough journal, fair journal (for bills of exchange, securities, &c.); ledger; letter book; petty cash and postage book; audit book.

CXXXIII.—That the official assignee, forthwith after his appointment under any bankrupt's estate, shall sort and number the books, papers, and writings of the bankrupt, with the number of the estate, in the Register Estate Book, and the number of each book, thus:—

[54. (The number of the estate in the Register Estate Book.)

75. (The number of the book, paper, or writing received by the official assignee).]

and the official assignee shall file a list thereof, with the proceedings, and shall also forthwith after his appointment deliver to the bankrupt a written notice or letter in the form specified in the Schedule hereunto annexed (No. 1).

CXXXIV.—That the official assignee shall direct, in the form specified in the Schedule hereunto annexed (No. 2), the payment of all monies due to any bankrupt's estate from any one person, or from two or more persons being partners, and carrying on business or residing in England, and exceeding in amount the sum of 500*l.*, and of all moneys being in the hands or under the controul of any assignee or assignees chosen by the creditors of any bankrupt's estate to which such official assignee shall have been appointed, into the Bank of England, to the credit of the Accountant in

Bankruptcy, and for the particular estate to which such money shall belong.

CXXXV.—That when any money shall be paid into the Bank of England, pursuant to the directions aforesaid, the person so paying such money shall receive a certificate in the form specified in the Schedule hereunto annexed (No. 3), from one of the cashiers of such bank, of his paying the same, and of its being placed to the account of the Accountant in Bankruptcy for the proper estate, and a voucher for such payment shall be sent by the Bank on the same day to the said Accountant.

CXXXVI.—That as soon as conveniently may be after every such payment, the Accountant in Bankruptcy shall certify in writing to the proper official assignee that such payment has been made, and the name of the bankrupt or bankrupts to the credit of whose estate the money has been placed in the books kept in the office of the Accountant in Bankruptcy.

CXXXVII.—That all moneys without exception received by the official assignee, and not paid by him forthwith into the Bank of England to the credit of the Accountant in Bankruptcy, shall be paid by the official assignee, as soon as they shall amount to 100*l.*, into the hands of a banker, with whom such official assignee shall keep an account as such official assignee, such account to be entitled as official assignee, and in which account, no moneys shall be entered, except such as are received by the official assignee in his official capacity.

CXXXVIII.—That all moneys paid into the Bank of England to the credit of the Accountant in Bankruptcy, for the estate of any person adjudged bankrupt, or in matters of bankruptcy, shall be subject to the order of a Commissioner of the Court of Bankruptcy, in writing under his hand, and testified by a Registrar, as to the application thereof; provided that every such order shall specify the amount of any payment to be made by such order, the purpose to which it is to be applied, and the name of the official assignee or other person to whom the same is to be made for such purpose; and in cases where the sum to be paid exceeds 500*l.*, the name of the person beneficially entitled (to whom only in such case the payment shall be made), and the Accountant in Bankruptcy shall and may, pursuant to such order pay the sum of money specified therein, out of such bankrupt's estate by a draught, subscribed to, and on the same paper with the said order; such order and draught to be in the form specified in the Schedule hereunto annexed (No. 5).

CXXXIX.—That all orders by the Commissioner for payment of money, or for the transfer and sale (as hereinafter provided) of any stock or securities, being part of a bankrupt's estate, be signed in triplicate, and that one copy of any such order be filed with the proceedings in bankruptcy, and that one copy be left with the Bank of England, and that one copy be left with the Accountant in Bankruptcy.

CXL.—That the official assignee shall, before any audit, enter in a book the names of all the debtors to the bankrupt's estate, as returned in his balance sheet, and shall state the reasons why debts are not paid on the opposite page; such book shall be produced to the Court at every audit.

NEW SERIES, XXI.—BANKR.

CXLI.—That each official assignee shall deposit in the Bank of England, to the credit of the Accountant in Bankruptcy, all bills, notes and other negotiable instruments, except unaccepted bills of exchange, as soon as he shall receive the same; and shall deposit in like manner all unaccepted bills of exchange as soon as the same shall have been accepted or refused acceptance; and shall at the time of such deposit leave a statement in writing with the cashier of the Bank of England specifying the date and contents of the instruments so deposited, the name of the official assignee making such deposit, the name and description of the bankrupt or bankrupts, and the particular estate to which the same respectively belong, and that such instruments respectively are to be deposited to the credit of the said Accountant in Bankruptcy; and shall also take a receipt for the same from the cashier of the Bank, and carry or transmit it to the office of the said Accountant in Bankruptcy, who will give a proper voucher, to be produced when called for by the Court.

CXLII.—That when and as soon as any bill, note, or other negotiable instrument, deposited as aforesaid in the Bank of England in the name of the said accountant shall become due, the Governor and Company of the Bank of England shall, without any direction from the said accountant, deliver such bill, note, or other negotiable instrument to one of the cashiers of the Bank, who is to present the same for payment, and receive the sum of money due thereon, and forthwith to pay the sum so received, if any, into the Bank of England, to be there placed to the credit of the said accountant.

CXLIII.—That in case any such bill, note, or other negotiable instrument, shall not be paid, the said Governor and Company of the Bank of England shall cause such bill, note, or other negotiable instrument as is by law required to be noted and protested to be delivered to a notary for that purpose, and to be noted and protested accordingly, and shall, after the same shall have been so noted and protested, as the case may be, again deposit the same in the Bank of England, to the credit of the said accountant.

CXLIV.—And that the said Governor and Company of the Bank of England forthwith, after every such receipt of money or deposit of any note, bill, or other negotiable instrument, shall certify to the said accountant the sum of money received, if any, on each such bill, note, or negotiable instrument, and placed to the credit of the said accountant, or that such bill, note, or negotiable instrument, has been dishonoured; and such dishonoured bill, note, or other negotiable instrument shall be forthwith delivered by the Bank to the proper official assignee.

CXLV.—And that as often as any bill, note, or other negotiable instrument that shall have come to the hands of any official assignee shall have been or shall be dishonoured, such official assignee shall forthwith give such notice thereof as is by law required from the holder of such bill, note, or other negotiable instrument respectively.

CXLVI.—That any one of the Commissioners of the Court of Bankruptcy acting in the prosecution of any bankruptcy may from time to time make order relative to the delivery out to any official

assignee of any bill of exchange or promissory note which may stand in the Bank of England to the credit of the Accountant in Bankruptcy for the estate under such bankruptcy; provided that the purpose of such delivery be stated in the order, and such order be attested by a Registrar.

CXLVII.—That any one of the Commissioners of the Court of Bankruptcy acting in the prosecution of any commission, fiat, or petition for adjudication of bankruptcy may, as often as it shall appear to him expedient, by order under his hand in the forms specified in the Schedule hereunto annexed (Nos. 6, 7, and 8), direct any money, which may have been paid into the Bank of England on account of the estate of the bankrupt named in such commission, fiat, or petition, to be invested in the purchase of Exchequer bills, to be lodged in the Bank of England, and may in like manner direct the sale or exchange of such Exchequer bills, and also the exchange, sale, or transfer of any stock in the public funds, or in any public company, or of any Exchequer bills, India bonds, or other public securities which shall have been transferred, delivered, or paid into the Bank of England on account of such bankrupt's estate, and may direct the proceeds thereof to be laid out in the purchase of Exchequer bills, and that such Exchequer bills, when so purchased, be deposited in the Bank of England, to the credit of the said accountant for such particular estate; and the said accountant shall and may, pursuant to such order, make such sale, purchase, or transfer, without any further order or direction; and the expenses thereof may be charged to the account of the estate for the benefit of which the same shall have been respectively made.

Provided always, that the signature of the Commissioner be attested by a Registrar, and that the order of the Accountant in Bankruptcy be subscribed to the order of the Commissioner, and on the same paper with the said order.

Provided further, that no stock or public fund be transferred upon any sale, and that no Exchequer bill, India bond, or public security be delivered for the purpose of sale, except to a cashier of the Bank of England, until the price or value thereof be paid into the Bank of England to the credit of the Accountant in Bankruptcy for the particular estate to which it belongs, and that no sum be paid for the purchase of any Exchequer bill, India bond, or other public security, until such Exchequer bill, India bond, or public security be deposited in the Bank of England to the credit of the said Accountant in Bankruptcy, and for such particular estate.

CXLVIII.—That the official assignee shall forthwith after the declaration of a dividend, give notice by advertisement in the *London Gazette*, and to each creditor by a printed circular letter in the form specified in the Schedule hereunto annexed (No. 9), to be sent through the Post Office at the cost of the bankrupt's estate, to be settled by the Commissioner, of the time and place of the delivery of the dividend warrants, as hereinafter provided; and that at such time the official assignee will require the production of such securities, if any, as the creditor exhibited at the time of his proof; and that no dividend warrant will be delivered to the creditor holding any security for his debt until such

security shall be produced, without the special directions of a Commissioner in that behalf.

CXLIX.—That when a dividend has been or may be declared, the solicitor to the estate shall forthwith make out three lists of the creditors in alphabetical order, and shall state, in separate columns, after the name of each creditor, the amount of his debt and the dividend to which he is entitled, and in two of such lists the securities exhibited at the time of proof, and shall to each name prefix a number in regular series, together with the date of the order of dividend, according to the form in the Schedule hereunto annexed (Nos. 10 and 11), and shall sign such several lists, and deliver the same within four days after the declaration of such dividend to the official assignee, who shall cause one of the lists which specifies such securities to be filed with the proceedings, and shall examine and sign the several lists, if correct, and shall prepare books at the expense of the estate, containing as many blank warrants as may be necessary, according to the form in the Schedule hereunto annexed (No. 12) for London, and (No. 13) for the country, and shall number and fill up a warrant for each dividend, and insert in each warrant the name of the creditor to which the number of such warrant is prefixed in the list, and the dividend payable to him, and shall keep one of the lists specifying the securities in his custody, and shall take or send the books containing such warrants, together with the list not specifying the securities to the Accountant in Bankruptcy, who shall ascertain that the amount of such warrants does not exceed the sum standing in his name to the credit of the bankrupt's estate, and shall compare the warrants with the lists, and if correct shall certify the same, by affixing the seal of his office, to be provided for that purpose, in the margin of the warrants; and he shall keep in his custody the list of creditors, and return the warrants to the official assignee, for delivery to the creditors as hereinafter mentioned.

CL.—That when a creditor, or any person duly authorized under his hand to receive his dividend warrant, shall apply for the same, the official assignee shall require the production of such securities (if any) as the creditor exhibited at the time of his proof, and if satisfied that the amount of the said dividend still remains due, shall fill up the date in the warrant and receipt, and upon the creditor or such other person authorized as aforesaid signing the receipt, the official assignee shall mark the securities (if any) with the amount of that dividend, and shall sign and deliver the warrant for the same; provided that no dividend warrant shall be delivered to any creditor holding any security for his debt until such security shall be produced; provided that upon the statement of a creditor that he is unable to produce his security, and that the same has not been parted with for any valuable consideration, nor assigned to any person, he shall be examined on oath before a Commissioner as to the cause of such inability, and his examination shall be filed with the proceedings, and the Commissioner shall adjudge whether in his opinion the creditor is or is not able to produce the security; and if the Commissioner is of opinion that the security cannot for a sufficient cause be produced,

the creditor shall give a sufficient indemnity to the official assignee, to be approved by the Commissioner, and upon such indemnity being given the official assignee shall deliver the dividend warrant to the creditor.

CLII.—That the payment of the dividend warrant may be obtained by the creditor, or any person duly authorized by him under his hand to receive his dividend, or by the executor or administrator of any such creditor, upon production of the dividend warrant at the office of the Accountant in Bankruptcy, or in a country bankruptcy, at any branch of the Bank of England, or such other bank as shall be named by the Bank of England in that behalf.

CLIII.—That if any other person than the creditor or person duly authorized by him, or the executor or administrator of any such creditor, claim to receive the dividend, the person so claiming the same must obtain an order for payment thereof indorsed upon the warrant by a Commissioner under his hand; and if any dividend warrant be above twelve months' date, a like order for payment thereof by a Commissioner shall be required; provided always, that in no case shall any dividend warrant be paid to an official assignee unless such official assignee be the payee, or the executor or administrator of the payee, or the assignee of any bankrupt payee.

CLIII.—That when a dividend has been or may be declared under any commission, fiat, or petition for adjudication, the Commissioner acting in the prosecution of such bankruptcy may, by order under his hand, attested by a Registrar, in the form specified in the Schedule hereunto annexed (No. 14), direct the sum ordered to be divided, or such part thereof as may be required, to be carried from the general account of such estate to an account to be kept in the books of the Accountant in Bankruptcy, entitled "The Dividend Account," and to the particular estate; provided that when it shall appear that any part of the money directed to be applied in payment of any dividend is not called for to make such payment, the Commissioner may, by order under his hand, testified as aforesaid, and in the forms specified in the Schedule hereunto annexed (Nos. 15, 16, 17, 18, and 19, as the case may be), direct such sum to be carried back to the original account of the estate to which it belonged.

CLIV.—That all dividend warrants under any bankrupt's estate, which shall have been delivered to any official assignee by the Accountant in Bankruptcy for more than twelve calendar months, the same having been previously stamped by such accountant, but which shall not have been delivered to any creditor of such estate, shall forthwith, after the expiration of such twelve months, be brought or sent by such official assignee, together with two lists thereof, under each bankrupt's estate, to the said accountant, who shall thereupon compare the warrants with such lists, and cancel such warrants; and one of such lists shall be certified by the said accountant, and returned to the official assignee, who shall file such list with the proceedings of the respective bankruptcies; and the other of such lists to be retained by the said accountant.

CLV.—That the official assignee shall once in every quarter of a year deliver to the Court to

which he shall be attached, an account made up to the last day of the preceding month, together with his cash-book and banker's pass-book duly balanced, and any other books that the Commissioner may require; and such account shall shew the balances placed to the credit of the Accountant in Bankruptcy, and of every estate under the charge of such official assignee in the books kept in the office of the Accountant in Bankruptcy, such balances to be certified by the said accountant; and such account shall also shew the balances of every bankrupt's estate then in the hands or under the power or controul of the official assignee.

CLVI.—That such quarterly account shall be kept by the Registrar of the Court to which such official assignee shall be attached, and shall be open to the inspection of creditors; and that notice shall be given in each court of such account having been delivered, and that any creditor applying to the Court may inspect the same without fee, at such convenient time as may be appointed by the Court.

CLVII.—That all monies, bills of exchange, notes, and other negotiable instruments hereinbefore directed to be paid or delivered to or by the Bank of England, may be paid or delivered to or by the Bank of England by or through any of the branch banks thereof, or any other bank that may be named by the Governor and Company of the Bank of England for that purpose; and all business arising in the country with the Bank of England may, where necessary or convenient, be transacted with the Bank of England by or through any of such branch banks, or other bank so named.

CLVIII.—That the several forms specified in the Schedule hereunto annexed for the several purposes therein stated, and not hereinbefore referred to, be followed in all cases where the same may be applicable.

CLIX.—That if the official assignee shall without good and sufficient cause, to be allowed by the Court, keep under his controul more than 100*l.* of money belonging to any one estate or more than 1,000*l.* in the aggregate of monies belonging to bankrupts' estates, for more than one week, he shall be charged in his accounts by the Commissioner with such sum as shall be equal to interest at the rate of 20*l.* per cent. per annum, on the excess of the said sum of 100*l.* or 1,000*l.*, as the case may be, for such time as such money shall be under his controul beyond the said week; and, unless the money has been kept for good and sufficient cause, allowed by the Court, the official assignee shall be dismissed from his office, upon the report of the Commissioner, or upon petition to the Lord Chancellor by the creditors' assignee or assignees, or by any creditor, and be liable to the costs and expenses, and have no claim to remuneration.

CLX.—That all forms relating to the payment or delivery into or out of the Bank of England of any money, bills, notes, or other securities under bankruptcies, prosecuted in the country, be printed in red ink.

CLXI.—That the orders hereby made as to official assignees of the estate of bankrupts, and their duties and conduct, shall so far as the same are applicable, apply to, and be observed by official assignees, appointed under petitions presented by

debtors desirous of effecting arrangements with their creditors, under the superintendence and controul of the Court.

CLXII.—That printed copies of these Rules and Orders shall be supplied by the Chief Registrar, to the several Courts of Bankruptcy in London, and in the country districts; and also to the Accountant in Bankruptcy, the Governor and Company of the Bank of England, the Master in Bankruptcy, and each official assignee; and that one such copy be posted up in some conspicuous place in every such court; and in the respective offices of the Chief Registrar, the Accountant in Bankruptcy, the Master in Bankruptcy, and official assignees.

CLXIII.—That these Rules and Orders shall take effect from and after the 11th day of January 1853, from which time all Rules and Orders made previous to the passing of "The Bankrupt Law

Consolidation Act, 1849," and the Order made on the 12th of October, 1849, shall be and are hereby rescinded.

JOSHUA EVANS, *Senior Commissioner.*

JOHN S. M. FONBLANQUE, EDWARD HOLROYD, EDWARD GOULBURN, WM. THOS. JEMMETT, M. B. BERE, RICHD. STEVENSON, WILLIAM SCROPE AYETON, H. I. PERRY,	}	<i>Commissioners.</i>
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Approved,

ST. LEONARDS, C.

19th Oct. 1852.

REPORTS

OF

Cases in Bankruptcy,

BEFORE THE LORDS JUSTICES AND BEFORE THE FULL COURT OF APPEAL.

BY

SAMUEL VALLIS BONE, Esq.
BARRISTER-AT-LAW.

FROM MICHAELMAS TERM 1851, TO TRINITY TERM 1852,
BOTH INCLUSIVE.

CASES IN BANKRUPTCY

COMMENCING WITH

MICHAELMAS TERM, 15 VICTORIÆ.

LORDS JUSTICES. }
1851. } *In re* HOLTHOUSE.*
Nov. 5, 10, 12. }

Bankrupt Law Consolidation Act, 1849
—Certificate—Appeal—Notice of Opposition.

A bankrupt was refused his certificate by the Commissioner for an offence not enumerated in the 256th section of the statute 12 & 13 Vict. c. 106, namely, for systematically buying goods at a small price and short credit and immediately selling the same at still lower prices. He was also refused any protection, except pending an appeal. On an appeal, the Court refused to grant any certificate, but made an order, by consent of the assignees, giving protection for the person of the bankrupt, but leaving his property liable.

A creditor who had not given three days' notice of opposition under the 198th section, and who was, therefore, refused a hearing, was not allowed to appear before the appeal Court to discharge the above order of the Commissioner.

The petition in this case was presented by the bankrupt, praying the grant of his certificate. The facts were not disputed, and were these:—The debts amounted to

10,000*l.*, the property sold by auction realized 1,357*l.* On the application, by the bankrupt, for his certificate, he was opposed by the assignees, on the ground that he had systematically bought goods at low prices and on short credit, and immediately sold them at still lower prices. The fact of such a course of proceeding the bankrupt did not deny, and it was stated in his own petition. Mr. Commissioner Fane refused to grant any certificate or protection whatever, excepting during the appeal, and from this decision the bankrupt appealed.

Mr. Cooke appeared in support of the petition, and stated that the bankrupt had been in business fifty years and was seventy years of age; that Mr. Commissioner Fane, when deciding on the application, expressly stated that his judgment was not founded on the 256th section of the Bankrupt Law Consolidation Act, for that the conduct pursued by the bankrupt did not bring it within any one of the offences there enumerated. On that occasion the assignees had argued that the offence was within the third there enumerated for a fraudulent contracting of debt; but Mr. Fane refused to accede to such an argument, saying that the fraud there meant related to a fraud as against the party who sold the goods or gave the credit. The assignees then contended that the

* See the important case *Re Stanton*, before a full Court, *post*, p. 7.

second case in the 256th section met the offence, for that with intent to conceal the state of his affairs he had falsified his books; but that was equally unsuccessful, for Mr. Fane said that the grossness of the bankrupt was made manifest by his having actually kept a full account of his improper dealings, and had he committed the second offence enumerated in the section, the assignees would not have, by such means as they had, discovered his transactions. The words of that section were imperative, for it said, if it shall appear that the bankrupt has committed any of the offences "the Court shall refuse to grant such certificate." This Court would hardly import into the section any offence which did not come within its words (and the Commissioner himself had said that the bankrupt had not committed any one of them), and say that he should be punished in the same way as if he had committed one of such offences. The Commissioner had acted as if he was bound to refuse the certificate, in which he had acted erroneously. The 198th section gave the Commissioner power either to suspend or refuse the certificate if the conduct of the bankrupt as a trader (1) were unsatisfactory, but that conduct must be considered with reference to the offences enumerated in the act. The legislature never contemplated this offence, grievous as that offence was, and therefore did not provide against it; and the term "conduct as a trader" was not governed by any rule of law, nor by any principle legal, equitable, social, or commercial.

Mr. Malins and *Mr. Cracknall*, who appeared for the assignees, stated, in answer to a question from the Court, that there was no wish to interfere with the personal liberty of the bankrupt, all that was required being to prevent him ever again pursuing such a course as he had followed, a result which could only be arrived at by leaving his property always liable for his present debts.

LORD JUSTICE KNIGHT BRUCE.—I see

(1) See the remarks of Knight Bruce, V.C. on the construction of this section in the case of *Ex parte Dornford*, 20 Law J. Rep. (n.s.) Bankr. 7.

no reason for any further interference. An order may be arranged by which, with the consent of the assignees, the personal liberty of the bankrupt may not be interfered with.

Mr. Cooke.—The bankrupt has had protection pending this appeal, and no protection can be given him if his certificate is refused. The words of the 256th section are equally plain and peremptory as to that, for it says, "and shall in like manner refuse to grant the bankrupt any further protection."

LORD JUSTICE KNIGHT BRUCE.—Oh yes! The Court may grant protection for a short time, and why not for a long time?

LORD JUSTICE LORD CRANWORTH.—The offence of the bankrupt comes as near obtaining money or goods under false pretences as can well be imagined. I do not say whether or not he could be indicted for that offence, nor whether, if indicted, he could be convicted. Of that I give no opinion; but systematically buying at one price and selling at a lower would lead to the inference of such an intention. A more gross case against a bankrupt I cannot well conceive than is here proved, and indeed admitted by him, and I see no reason whatever for saying that he ought to have his certificate.

An order was then arranged as suggested by the Court; the assignees giving their consent.

Nov. 10.—*Mr. Roll*, on behalf of a creditor to a large amount, obtained leave to give notice of motion to discharge the order, and on the 12th, with *Mr. Bagley*, made the same; but it appearing that this creditor was not permitted to be heard before the Commissioner, on the ground that he had not given three days' notice of opposition pursuant to the 198th section, the Court decided that he could not be heard on the appeal.

LORD JUSTICE LORD CRANWORTH.—It appears to me to be perfectly plain that, as the act of parliament requires three days' notice of opposition to be given, and as it is admitted that no such notice was

given, we have no authority to hear this particular creditor. The legislature having said that no creditor shall be heard before the Commissioner to oppose without giving three days' notice, *à multo fortiori* a creditor who has not given such notice cannot be heard here.

The motion was, after a discussion on the question of costs, refused, with costs.

LORDS JUSTICES.

1851.

Nov. 12.

In re CHEETHAM.

Bankrupt Law Consolidation Act, 1849
—Jurisdiction—Payment of Money out of Court.

The primary jurisdiction in Bankruptcy being, by the 12th section of the statute 12 & 13 Vict. c. 106, transferred to the Commissioners, and the jurisdiction of the Vice Chancellor under that act having been exclusively appellate and transferred to the Court of Appeal by the statute 14 & 15 Vict. c. 83, the Court of Appeal cannot order the payment of money out of the Bankruptcy Court, unless the application be made by way of appeal from a Commissioner.

Mr. Elmsley appeared in support of a petition for the payment of a sum of 66*l*. and a few shillings out of the Court of Bankruptcy. The original fund belonged to four persons, infants, of whom the petitioner was one, and two of them having attained the age of twenty-one, they presented their petitions for payment out of court of their respective shares, and the same was ordered accordingly by the Chief Judge in Bankruptcy. The petitioner now having attained his age of twenty-one, asked for his share.

LORD JUSTICE KNIGHT BRUCE.—I made those orders as Chief Judge in Bankruptcy, before the new Bankrupt Law Consolidation Act came into operation. By that statute all the primary jurisdiction of the Court of Bankruptcy is transferred to the Commissioners; while by the statute constituting this Court the jurisdiction of the Vice Chancellor sitting in Bankruptcy, that jurisdiction being appellate only, is trans-

ferred to the Lords Justices. I consider, therefore, that on this petition we have no jurisdiction to make the order; but if the Commissioner shall on application find any difficulty and decline to make it, then I think we can exercise our authority by way of appeal.

LORD JUSTICE LORD CRANWORTH concurred.

LORDS JUSTICES.

1851.

Nov. 19.

In re CASTELLI.

Bankrupt Law Consolidation Act, 1849
—Advertisement of Adjudication.

Four partners were adjudicated bankrupts. Two resided abroad. The adjudication was made on the 8th of November. On the 13th notice was given of an application, on behalf of the partners abroad, to suspend the advertisement. On the 17th the meeting was held to shew cause against the issue of the advertisement, and the application was then made. The Commissioner refused to suspend the issue of the advertisement on the ground that, as the application was not made within seven days from the adjudication, he had no authority, under the 104th section of the 12 & 13 Vict. c. 106, to do so:—Held, upon appeal, that "such extended time" mentioned in the section meant "further or longer time" not exceeding fourteen days; and that the notice having been given within the seven days everything was in fieri, and the Commissioner had authority to grant the application. The matter was, therefore, sent back to the Commissioner.

This was an application, by way of appeal from a decision of Mr. Commissioner Holroyd refusing to stay the issue of the advertisement of adjudication. Four persons, namely, Frank Castelli, Giovanni Baptista Giustiniani, Severio Castelli, and Francisco Franciscowitch Braggiotti, carried on business in partnership in London, and were on the 8th of November 1851 adjudicated bankrupts. Two of the partners resided in Leghorn, the business being carried on in London by the others, the style of the firm being "Castelli, Giustiniani & Company." On the 13th of November a notice was given, on behalf of

the two residing at Leghorn, that an application would be made to the Commissioner, at the meeting to be held on the 17th, for the purpose of shewing cause against the issue of the advertisement of adjudication, to postpone the issue of the advertisement, on the ground of the absence of those parties who could, if present, give very material explanations of the accounts, and shew that as against them the adjudication ought not to stand. The meeting was held on the 17th, when application was made to the Commissioner pursuant to the notice, but the application being made two days later than the seven days after the adjudication, he held that he had no authority under the 104th section of the Bankrupt Law Consolidation Act, 1849, (1) to sus-

pend the issue of the advertisement, and extend the time to the fourteen days specified in that section.

Mr. Cairns, in support of the appeal, submitted that as the notice was given within the first seven days of the adjudication, the requirements of the statute were sufficiently complied with, and if the meeting had been held on the 15th instead of the 17th, they would have been so literally. It was not the fault of the parties on whose behalf the application was made, that the meeting was not appointed earlier: that was a matter not resting with them. The view taken by the Commissioner was erroneous, for he had the authority he decided he had not, and could have extended the time to the period authorized by the act, although the application was not made within the first seven days. The Court would also consider the hardship of the case of the appellants, who, residing at Leghorn, had not been served with the notice or duplicate of the adjudication.

LORD JUSTICE KNIGHT BRUCE. — I do not see why the learned Commissioner did not extend the time to the period which he is authorized to do by the act.

LORD JUSTICE LORD CRANWORTH. — It must be shewn to us that it is a rational construction of the act, to refuse what is now asked.

Mr. Chandless contended that the terms of the 104th section were plain and positive as to the time within which the adjudication might be questioned. The expression "such extended time" manifestly was meant to commence from the end of the first seven days, and, therefore, could not be granted unless the application were made within those first seven days. He submitted that the Commissioner had taken a correct view of his authority, under the strict words of this positive enactment. That an act of parliament which lays down rules must be interpreted most strictly was adjudged by Lord Cottenham, in the case of *In re The North of England Joint-Stock Banking Company (Hall's case)* (2), where he re-

(1) The 104th section is as follows:—"That before notice of any adjudication of bankruptcy shall be given in the *London Gazette*, and at or before the time of putting in execution any warrant of seizure which shall have been granted upon such adjudication, a duplicate of such adjudication shall be served on the person adjudged a bankrupt, personally, or by leaving the same at the usual or last known place of abode or place of business of such person; and such person shall be allowed seven days, or such extended time, not exceeding fourteen days in the whole, as the Court shall think fit, from the service of such duplicate, to shew cause to the Court against the validity of such adjudication; and if such person shall within such time shew to the satisfaction of the Court that the petitioning creditor's debt, trading, and act of bankruptcy upon which such adjudication has been grounded, or any or either of such matters, are insufficient to support such adjudication, and upon such shewing no other creditor's debt, trading, and act of bankruptcy sufficient to support such adjudication, or such of the said last-mentioned matters as shall be requisite to support such adjudication, in lieu of the petitioning creditor's debt, trading, and act of bankruptcy or any or either of such matters, which shall be deemed insufficient in that behalf, as the case may be, shall be proved to the satisfaction of the Court, the Court shall thereupon order such adjudication to be annulled, and the same shall by such order be annulled accordingly; but if at the expiration of the said time no cause shall have been shewn to the satisfaction of the Court for the annulling of such adjudication, the Court shall, forthwith after the expiration of such time, cause notice of such adjudication to be given in the *London Gazette*," &c.

(2) 1 Hall & Twells, 580; 1 Mac. & Gor. 307; s. c. 19 Law J. Rep. (n.s.) Chanc. 69.

fused to include any one as a contributory who did not come clearly within the definitions or one of them set forth in the Winding-up Acts. It had been urged that it was a hardship on these parties that they were absent, but the absence of parties in their position was contemplated by the legislature, and their case especially provided for. The words at the early part of section 104. were "shall be served on the person adjudged bankrupt, personally, or by leaving the same at the usual or last known place of abode or place of business of such person." The application ought, therefore, to be refused, with costs.

Mr. Cairns was not called on to reply.

LORD JUSTICE KNIGHT BRUCE.—I am of opinion that the words "or such extended time" mean no more nor less than "further or longer" time, not exceeding fourteen days. I am of opinion that the applicants' notice of the 18th of November, for the motion to be made on the 17th, having been given within the first seven days, was sufficient. The consequence is, that, in my view, the true construction of the act of parliament requires the matter to be proceeded with and gone into by the Commissioner, to see whether the other seven days should be allowed. I think the matter should go back to the Commissioner; and if Lord Cranworth concurs in that opinion, then the case must be brought before the Commissioner within two days from this time, and being commenced within fourteen days, can be heard by adjournment as may be most convenient.

LORD JUSTICE LORD CRANWORTH.—I am entirely of the same opinion. I think the construction contended for in opposition to this application would be most harsh and unreasonable. The utmost latitude of construction should be put on this act of parliament. Everything before the Commissioner was *in fieri* when the notice was given, and to hold that he had no jurisdiction to grant the further seven days, because the application to do so was not actually made during the first seven days, would be, one would almost be induced to say, absurd.

<p>LORDS JUSTICES. 1851. Dec. 3, 13, 17; AND FULL COURT OF APPEAL. Dec. 20.</p>	}	<p><i>Ex parte STANTON, in re STANTON.</i></p>
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Bankrupt Law Consolidation Act, 1849
— *Certificate — Certificate of Penalty —*
Appeal — Discharge of Prisoner.

The full Court of Appeal (Lord Justice Knight Bruce dubitante), held first, that, under the statute 12 & 13 Vict. c. 106, the Commissioner may refuse protection to a bankrupt for other causes than for the commission of any of the offences enumerated in the 256th section; secondly, that the issue of the certificate of penalty, under the 257th section, depends upon the refusal of protection generally, and is not limited to such refusal for either of the offences enumerated in the preceding section; and thirdly, that the discretion vested with the Commissioner by this statute in granting or withholding protection is very large, excepting in the cases enumerated in the 256th section, in which cases his functions are merely ministerial, and he is bound to refuse protection.

This was an appeal from the decision of Mr. Commissioner Evans. The facts were as follows:—William Stanton was declared a bankrupt, on his own petition, in the month of December 1850; having previous to that time carried on the business of a watchmaker, jeweller and stationer, in a small way, at Buckingham. He duly filed his balance sheet, and on his attending to pass his examination on such balance sheet, on the 14th of January 1851, before Mr. Commissioner Evans, his last examination was adjourned until the 20th of February, in consequence of his not having furnished a stock account and cash account to accompany his balance sheet. Stanton stated his inability to comply with the requisition of the Commissioner, as he did not keep either a stock-book or a cash-book; and the Commissioner, on a statement made by the assignees, that they were not satisfied with his explanation, adjourned the bankrupt's last examination *sine die*, with protection until the 27th of March 1851. Nothing further was done in the matter until the month of October, when the

bankrupt was served with a summons or warrant, under the hand of the Commissioner, to appear before him on the 13th of that month, to shew cause why he had not filed a stock and cash account, as required. Upon such hearing, the Commissioner signed a memorandum, to the effect that the bankrupt had not filed a stock and cash account, and that he, therefore, refused further protection; and on the same day the Commissioner signed a certificate, whereby he certified that the bankrupt's assignees were creditors of the bankrupt for the sum of 1,207*l.* 12*s.* 5*d.*, in trust for the other creditors, and that he was not protected from process against his person. On the 21st of October 1851 the bankrupt was arrested and committed to Aylesbury gaol, by virtue of a writ of execution issued upon the certificate of the Commissioner, and remained in custody ever since. On the 24th of November a further application was made to Mr. Commissioner Evans, the purport of which was to withdraw or set aside the certificate. His Honour, however, refused further to interfere.

A motion was now made, by leave previously given, on behalf of the bankrupt, that the decision pronounced on the 24th of November by the Commissioner, in which he refused to set aside the certificate signed by him on the 13th of October, under the 256th section of the act, whereby he certified that the assignees of the bankrupt were creditors, as such assignees, for the sum of 1,207*l.* 12*s.* 5*d.*, in trust for the creditors, and that the bankrupt was not protected by the Court from process against his person, and also refusing to discharge the said bankrupt out of the custody of the keeper of the gaol at Aylesbury, might be reversed; and that the said certificate and the execution issued thereon might be set aside and the bankrupt discharged out of custody, on the ground that the said certificate and execution were irregular, invalid, and not warranted by the proceedings in the case or otherwise; and that the assignees might be ordered to pay the costs of the application made to the Commissioner and of the present application.

Mr. Cooper and *Mr. Simpson* having stated the facts of the case as before detailed,

and having addressed the Court in support of the motion,

LORD JUSTICE KNIGHT BRUCE (after conferring with Lord Cranworth) said, that their Lordships were of opinion that a *visd voce* examination of the bankrupt, if taken down, might throw some further light on his proceedings, and therefore they should direct the motion to stand over until after such an examination should have been made.

Dec. 13.—*Mr. Cooper* and *Mr. Simpson* again brought on the motion. They said, the bankrupt had been examined before the Commissioners, as directed by the Court, on the 11th of December, when, having made and signed the declaration required by the Bankrupt Act, he declared he was unable to furnish any other account than he had already done in his balance sheet and accounts filed, and that he never kept any stock-book. Counsel then proceeded to argue that the refusal of protection was wrong, as was the signing of the certificate of penalty, the offence of the bankrupt not falling under any of those enumerated in the statute. The argument was, in substance, the same as that presented before the full Court, as stated below. *Ex parte Cowgill* (1) was cited.

Mr. Russell and *Mr. Sturgeon*, for the assignees, opposed the motion, principally on the ground that there was evidence before the Commissioner, and which was repeated at the time of the *visd voce* examination of the bankrupt, that he had been seen by a witness to make an entry of a loan of money, and that therefore the assertion as to a cash-book was untrue.

LORD JUSTICE KNIGHT BRUCE, during the argument, observed, that by the words of this statute the Crown did not seem to have reserved to it the right to remit the punishment awarded. The acts enumerated by the statute were constituted offences.

Mr. Sturgeon informed the Court that the point had been considered at the Home Office in cases under the Insolvent Debtors

(1) 20 Law J. Rep. (N.S.) Q.B. 300.

Acts, and it was considered that the Crown had no authority to interfere.

LORD JUSTICE LORD CRANWORTH.—It is clear that the bankrupt has not committed, nor does the Commissioner say he has committed, any of the offences enumerated in the act. The protection was not refused on any of these grounds. The question is, whether the Commissioner has a general discretion.

LORD JUSTICE KNIGHT BRUCE (after again conferring with Lord Cranworth) said, I am sorry to say that although this is a case of the discharge of a prisoner from custody, we are not able to dispose of it at once. Both my learned Brother and myself have all along been disposed and even anxious to come to a conclusion at once upon it, but we have not been able to do so. We will do so, if possible, in a few days; and in the mean time it may be convenient for counsel to know that we may require the whole case to be re-argued. The point, as regarding the liberty of the subject, is one of great importance. At present, we cannot agree as to what order should be made on the motion. It must stand over.

Dec. 17.—Their Lordships this day directed that the motion should be brought before the full Court of Appeal.

Dec. 20.—The motion was this day renewed before the Lord Chancellor and the Lords Justices, in the Lord Chancellor's Court, Lincoln's Inn (Old) Hall (2).

(2) The sections of the act upon which the case depends are the 256th, 257th, and 259th, and their material parts are as follows. The 256th enacts, "That if at the sitting appointed for the last examination of any bankrupt, or at any adjournment thereof, it shall appear to the Court that the bankrupt has committed any of the offences hereinafter enumerated, the Court shall refuse to grant the bankrupt any further protection from arrest; and if at any sitting or adjourned sitting for the allowance of the certificate of any bankrupt it shall appear that he has committed any of such offences, the Court shall refuse to grant such certificate, or shall suspend the same for such time as it shall think fit, and shall in like manner refuse to grant the bankrupt any further protection." The nine offences may be shortly stated thus:—1. Destruction of books and papers within two months of his bankruptcy, with intent to conceal the state of his affairs; 2. Keeping false

Mr. Cooper and Mr. Simpson.—The clauses of the statute which deal with the subject of arrest and imprisonment, and with protection from arrest, are the 112th, 113th, 162nd, 211th, 256th, 257th, and 259th. It is plain, as was intimated by Lord Cranworth in the argument on the 13th inst., that no offence was committed by the bankrupt coming within the enume-

books or wilfully falsifying them; 3. Contracting debts by fraud or false pretences; 4. Making away with his property, or fraudulently, in contemplation of bankruptcy, paying any creditor within two months of his bankruptcy to the exclusion of the other creditors; 5. Concealing any debt due to or from him after the bankruptcy, or concealing or making away with any part of his property; 6. Attempting to account for any of his property by fictitious losses or expenses; 7. Vexatiously bringing or defending any action or suit within six months preceding the adjudication of bankruptcy; 8. Wilfully preventing or withholding the production of any book, paper, &c. relating to his trade; 9. Wilfully omitting to keep proper books of account, or keeping his books imperfectly with intent to conceal the true state of his affairs. The 257th section enacts, "That the assignees for the time being of the estate and effects of any bankrupt, when the accounts relating to his estate shall have become records of the court, shall be deemed judgment creditors of such bankrupt for the total amount of the debts which shall by such accounts appear to be due from him to his creditors; and every creditor of any bankrupt, immediately after the proof of his debt shall have been admitted, shall be deemed a judgment creditor of such bankrupt to the extent of such proof; and the Court, when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall, on the application of such assignees or of any such creditor, grant a certificate under the seal of the Court, in the form contained in Schedule B a. to this act annexed, and every such certificate shall have the effect of a judgment entered up in one of Her Majesty's superior courts of common law at Westminster until the allowance of the certificate of conformity of such bankrupt; and the assignees or the creditor to whom, according to such certificate, the bankrupt shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a writ of execution against the body of such bankrupt," &c. The 259th section enacts, "That if any bankrupt shall betaken in execution after the refusal of protection, or after the refusal or suspension of his certificate, he shall not be discharged from such execution until he shall have been in prison for the full period of one year, except by order of the Court: Provided always, that this enactment shall not take effect until after the expiration of six months from the commencement of this act, and then only against such persons as shall have been adjudged bankrupt under this act, and for offences committed after the commencement of this act."

ration of offences in the act. If then no offence was committed, the conduct of the bankrupt can be no foundation for the penal certificate, for the Commissioner has no jurisdiction to grant it until he has adjudicated that one of the specified offences has been committed. With regard to the construction of the act, it is most important to observe that the 259th section provides, that the enactment shall not take effect for six months after the passing of the act, and then only for offences committed after the commencement of the act, and therefore it could only be intended by the legislature by the word "enactment" to refer to the whole group of clauses numbered 39, and beginning with section 251, preceded by the words "be it enacted," and was not intended to be confined to the 259th section where it appears. No ambiguity could have arisen if the words "as aforesaid" had been inserted after the words "shall have refused to grant the bankrupt any further protection" in the 257th section; and it may even be argued that the words "as aforesaid" are needless, since there the enactment in dealing with offences, and enumerating them, uses this precise language, shall refuse to grant the bankrupt any "further protection," which words occur nowhere else in conjunction throughout the whole act of parliament. It is to be observed also, that the 257th section must have been intended as the mode of punishing a bankrupt for previous offences, enumerated, and only those; for otherwise a bankrupt who has committed no offence is placed in no better condition than he who has been guilty of any of those before enumerated. The effect of holding that the Commissioner was right would be that a man might be taken in execution twice for the same debt, considering the extensive words of the 257th section. In the first instance he is made liable to arrest at the suit of the assignees, as trustees for the whole body of creditors, and then he may be taken by each creditor individually, and no delivery can take place until after a year's imprisonment. The words "refuse further protection" do not appear in any part of the act until the 256th section, which enumerates the offences for which protection is to be refused, and these words

are repeated in the 257th section under which this penal judgment certificate is issued. In order to arrive at the construction contended for below, and which will, no doubt, be repeated here on behalf of the assignees, violence must be done to the express words of the 259th section, which is to take effect only for offences committed six months after the commencement of the act, while, on the other hand, if the bankrupt's contention be correct, it is necessary only to import the words "as aforesaid" into the 257th section, and so set the matter free from doubt; and there is no violence to the statute, for they ought to be implied, for the language relating to refusal of protection only occurs in the 256th section, and in the enactment of that section relating to the several specified and enumerated offences. At any rate the words "this enactment" in section 259, apply to the whole of the new law introduced by this act, and which has proved so difficult of construction. In such a state of doubt the Court will have reference to the rule that penal statutes are to be strictly construed, and that the liberty of the subject shall not be interfered with but on plain and unambiguous enactments.

LORD JUSTICE KNIGHT BRUCE.—May not the words "this enactment" in the 259th section refer to the whole group of clauses? If they do, it may be that the certificate of penalty may be limited to the enumerated offences.

Mr. Russell and *Mr. Sturgeon* contended that the Commissioner had a general authority and discretion to issue the certificate of penalty in any case where he had refused protection, and such authority and discretion was not limited to the cases of refusal of the Commissioner of any one of the nine enumerated offences. The case of the committal must depend on the 257th section alone, irrespective of any other. By that section, the grant of that certificate was made to depend upon the refusal of protection generally; and not confined, as had been argued, to those offences before specifically enumerated.—They then proceeded to argue upon the conduct of the bankrupt in not keeping proper accounts;

but as the case is only important on the question of the construction of the statute, these arguments are omitted.

Mr. Simpson was heard in reply.

Their Lordships then conferred for a considerable time, after which,—

The LORD CHANCELLOR said, This case is one which fully deserves the consideration of the full Court, as the question raised is one that must be constantly recurring, and upon which the Commissioners may have different opinions. With a view, therefore, of rendering the granting of a certificate of penalty a matter of general application, it was thought desirable that the Court should be constituted as it now is. Here, the bankrupt has been taken in execution on such a certificate, and that certificate has been granted after refusal of protection for offences not enumerated in the act. The real point to be decided is, whether the certificate mentioned in the 257th clause, and upon which the bankrupt has been arrested, can be issued upon the refusal of protection by the Commissioner in every case, or only in cases where such protection has been refused for one of the nine offences specified in the 256th section. Having given the case all the attention it demands, and taking into consideration the liberty of the subject involved in the determination of the question, I must say that I have arrived at the conclusion, that the Commissioner was right in granting the certificate. It is quite manifest that the Commissioner has authority to refuse protection for other causes than those mentioned in the 256th section, and it appears to me that the proper construction of the 257th section makes the certificate of penalty to depend upon the refusal of protection generally, and is not limited to the refusal of protection for either of the nine offences set forth in the 256th section. The discretion vested in the Commissioner by the act, in granting or withholding protection, is very large, except in the particular instances mentioned in the 256th section, when his discretion ceases, and he only acts in a ministerial character, which renders it incumbent upon him to refuse protection.

The 257th section, after the assignees shall have in the events there specified become judgment creditors, says, that every creditor shall be deemed a judgment creditor for the whole amount of his proof, and then goes on, "and the Court, when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall, on the application of such assignees or of any such creditor, grant a certificate under the seal of the Court, in the form contained in the schedule;" and then it goes on to say, that such certificate shall have the effect of a judgment entered up; and concludes by saying, "and the assignees or the creditor to whom, according to such certificate, the bankrupt shall be indebted, shall be thereupon entitled to issue and enforce a writ of execution against the body of such bankrupt." This appears to me to be free from any ambiguity or doubt, and does not confine the granting of a certificate of penalty to the particular offences mentioned in the 256th clause, for otherwise a bankrupt might, perhaps, take care to steer clear of them; and although he might have protection refused him for other causes, yet the Commissioner could not visit him with due punishment by issuing a certificate authorizing his arrest. Such an interpretation of the act would virtually deprive the creditors of power to compel a bankrupt to furnish proper accounts, and would take away the penalty attached to the refusal of protection in cases that might be quite as important as any of the nine mentioned in the 256th clause. With respect to the words "this enactment," in the 259th section, it appears to me to be confined to that particular section, and means only "this section," or "this provision," and is not to be referred to the antecedent clauses relating to the issuing of the certificate. The argument that the words "this enactment," are to be taken in conjunction with the 256th and 257th sections, and that they limit the issuing of the certificate of penalty to cases where protection has been refused for offences named in the 256th clause, is of no avail. Being, therefore, of opinion that the Commissioners have full authority to refuse protection for

other misconduct than the nine offences set forth in the 256th section, and that the certificate of penalty follows in every case where such protection has been refused, and is not confined to those nine cases, I must hold that the bankrupt is legally in custody under the act, and the application for his discharge must be refused.

LORD JUSTICE LORD CRANWORTH.—I entirely concur with the judgment of the Lord Chancellor, and should not feel it necessary to make any remarks were it not for the importance of the question. The argument that the clauses are to be taken as a group, and so construed, is very plausible, but not in my judgment conclusive. The language of the 257th section is plain and intelligible if allowed to be taken by itself, and only becomes ambiguous when joined with the other sections for the purpose of interpretation,—a mode of attempting to find out the intention of the legislature not to be permitted where the literal meaning of a clause or section is patent. There is nothing in the 257th section to cut down the granting of the certificate to the cases of refusal of protection mentioned in the 256th section. The words amount to a general enactment, that the Commissioner shall issue such certificate in all cases where protection has been refused, and are intended merely to increase the consequence of a refusal of protection. I was much struck by the observation of my learned Brother Lord Justice Knight Bruce, that the words in the 259th section, "this enactment," may be referable to the whole group of clauses, and would, therefore, limit the granting of a certificate of penalty to the offences mentioned in the 256th section; but to adopt that construction will, in my opinion, be to hold that the legislature intended that a bankrupt might act with impunity for six months after the commencement of the act, inasmuch as the old acts are actually repealed. This view of the matter seems to me unanswerably to prove that the words "this enactment" are confined to the 259th clause, and mean that the particular enactment therein specified shall not take effect for six months. It has also been argued that at any rate "this

enactment" is intended to apply to all the new law there introduced, but with this argument I cannot agree, as in one sense the whole of the act must be considered new law, the old acts being repealed. Taking, therefore, the 257th section as a complete enactment of itself, and finding that it does not confine the issuing of the certificate to any particular case where protection has been refused, I entirely concur with the Lord Chancellor in thinking that the application must be refused.

LORD JUSTICE KNIGHT BRUCE.—As a majority of the Court are agreed upon a particular construction of this act, there is no necessity for my judgment to be given. It would not be a matter of wonder, if, considering the inaccuracy and ambiguity of the act, I had dissented from my learned colleagues; but I do not say that I dissent, I only doubt. I doubt, and never shall cease to doubt, nor is it a matter of surprise that any person should doubt, as to what is the correct view of this act of parliament. The main grounds of my doubts are, whether the 256th, 257th, 258th, and 259th clauses do not stand together as wholly new law, preceded and followed by what, with a slight variation, was before law; and, therefore, whether they must not be considered as one single entire proposition, each part being dependent upon the rest, and so construed. The 256th section specifies with particular exactness the various offences that are to be followed by the consequences mentioned in the 257th clause, when the Commissioner "shall grant" the certificate there mentioned. My doubt, therefore, is, whether the compulsory clauses are not to be taken and read together, and if so, the granting of the certificate must be limited to the refusal of protection for offences set forth in the 256th section. Upon this point I always shall have my doubt. I have made these remarks as affording a reason why I entertain such doubts, which to call dissent would be representing them far too high.

The motion was refused.

LORDS JUSTICES. }
 1852. } *Ex parte BOWERS, in re*
 Jan. 14. } BOWERS.

Bankrupt Law Consolidation Act, 1849
—Protection—Arrangement—Summons—
Adjudication.

An order obtained by a debtor under the 211th and following sections (of arrangements under the controul of the Court) of the statute 12 & 13 Vict. c. 106, granting protection until a day certain, exceeding two months from its date, is irregular.

A debtor obtained such an order, and before the two months had expired a creditor proceeded against the debtor under the 78th section, and procured a summons returnable within the original two months, and the debt not being discharged within the time limited the debtor was adjudged a bankrupt. The debtor petitioned for the discharge of the order of adjudication, which was dismissed; and on an appeal from that order of dismissal, the petition of appeal was dismissed, with costs.

The Court declined to give any judicial opinion whether, after an order granting protection under the 211th section, a creditor could proceed under the 78th section.

This was an appeal petition presented by the bankrupt from the decision of Mr. Commissioner Balguy, under the following circumstances.—On the 26th of November 1851, Mr. Bowers, the bankrupt, a grocer and wine-merchant at Worcester, filed a petition under the debtor and creditor arrangement sections (sections 211 to 233) of the Bankrupt Law Consolidation Act, 1849, to the Birmingham District Court of Bankruptcy, and obtained from Mr. Commissioner Daniell (the then Commissioner of the district) an order of that date, granting him protection until the 2nd of February 1852. On the 5th of December 1851, a creditor proceeded under the 78th section of the act, and obtained a summons against the bankrupt returnable on the 19th of December. The bankrupt did not personally attend the summons, but a solicitor attended on his behalf, and stated the fact of the grant of the order for protection. The creditor then proceeded, by his petition, to obtain an adjudication in bank-

ruptcy grounded on this non-attendance and non-payment, as an act of bankruptcy.

On the 18th of December the bankrupt presented a counter-petition, praying that the adjudication might not take place, and to have the petition presented for that purpose by the creditor taken off the file. On the 23rd of December, Mr. Commissioner Balguy, the successor of Mr. Daniell, made an order dismissing the bankrupt's petition, and the present petition was one of appeal praying the discharge of the order of dismissal, and that the prayer of that petition might be granted.

Mr. Swanston and Mr. Mottram, for the bankrupt.—It is not competent for a creditor to take proceedings against a debtor to whom protection has been granted under the 211th section. That such was the intention of the legislature is plain from the words of that section, than which nothing can be more positive. If the debtor performs his part of the condition, that is, submits himself and all his property to the jurisdiction of the Court, the Court may grant protection, and may renew such protection from time to time. The renewal can only be supposed to be intended to be made as from a given day, and such renewal would be by an order and would satisfy the words of the section; the protection would be, in fact, until the further order or renewal of protection. The proceeding to compel an act of bankruptcy by means of a debtor trader summons while the trader was protected in person and property was wholly irregular, and cannot stand, and the adjudication, therefore, cannot be sustained.

[LORD JUSTICE KNIGHT BRUCE.—It would be a strange thing, when a man's person and property have been protected from all process, to hold that, nevertheless, he may be made a bankrupt.]

In an *Anonymous case* (1) before Mr. Commissioner Fane, a summons had issued against a party who was a debtor; after the summons had been duly served upon him, he filed a petition under the 211th and subsequent sections, and obtained protection to a day certain, that day being the day appointed for the first meeting. Mr. Commissioner Fane held that the debtor was

(1) 1 Fonbl. N.R. Bankr. 46.

protected against all process, and directed that the summons of the creditor, although it had been served before the order was obtained on the petition for protection, should not be proceeded with.

The Solicitor General (Sir W. P. Wood), and *Mr. Baggallay*, for the creditor.—The whole proceeding of the bankrupt is to prevent a second bankruptcy. In September 1849 he was declared a bankrupt, and in February 1851 he received a certificate of the third class. Since that time he contracted the debt on which the creditor obtained the summons in question. The effect of an order to a stated time, being more than two months from its date, can only operate, if it be permitted to stand, to prejudice the rights of creditors, and prevent them from making the debtor a bankrupt. That the legislature never intended the clauses (211. and subsequent) to displace the rights under the 78th section is clear, because the authority to grant protection under section 211. is not an absolute power as to time, but is expressly confined by the previous words relating to the petition. The debtor may petition that "his person and property may be protected from all process until further order," and then the Commissioner has authority to grant "such protection." It is true the prayer of the petition given in the form Schedule A a. is, "that the person and property may be protected from all process," but that can only mean such protection as is mentioned in the act, namely, protection "until further order." The form adopted may save the petition itself from being irregular, but it does not make the order correct; and in making the order *Mr. Commissioner Daniell* exceeded his authority. The creditors were not intended to be defeated by such a contrivance as was here resorted to, or else the 218th section would not have provided that the estate of the petitioning trader should not vest in the official assignee until after the approval of the resolution therein referred to.

Their Lordships having conferred,

LORD JUSTICE LORD CRANWORTH said—If we should be of opinion that the view taken by the Solicitor General of this order is right, there will, of course, be nothing to

prevent the proceedings which have been taken by the creditor. We think that until we are satisfied whether or not the order is rightly made, it will be a useless consumption of time to enter into any other question. We shall, therefore, be glad to hear what *Mr. Swanston* has to say on this point.

Mr. Swanston.—There is nothing in the act limiting the form in which the order for protection is to be made. The Commissioner himself would, on a proper application, have been able to discharge his own order, which would thus have no other effect than if made in terms "until further order." The 211th section of the act does not, it is submitted, make it imperative upon the Commissioner in granting an order for protection to adopt the words "until further order;" that section of the statute provides that a debtor unable to meet his engagements "may present a petition to the Court, setting forth the true cause of such inability, and praying that his person and property may be protected from all process until further order; and the Court, on such petition, shall have power to grant such protection, and may renew the same from time to time as it shall think fit." And the 212th section enacts, that every such petition shall be in the form contained in Schedule (A a) to the statute annexed. The form of prayer given to the petition by this schedule is simply for protection "from all process," without any specification as to time. It is submitted that the words "such protection" occurring in the 211th section, have reference to protection of the person and property, rather than to the period to which the protection is to extend, and that the succeeding provision enabling the Commissioner to renew the protection from time to time, is more adapted to the case of a previous order for protection having been made for a definite time, than to that of an order terminable at the will of the Commissioner. It is submitted, that the phraseology of the 211th section and the form of prayer given to the petition in the schedule give a discretion to the Commissioner as to the form of the order to be made, and that they do not so limit him to make an order for protection in terms "until further

order" that if he departs from that form the order made will be a nullity. The Commissioner is not limited to an order, the particular terms of which are specified in the act only, but not in the schedule, which gives the model of the petition; but a discretion is given to him to adapt the order to the circumstances of the case, having regard to the state of business in his court. If he has such a discretion, the Court, in the absence of proof to the contrary, will presume that it has been rightly exercised. The order which has been made by the Commissioner is, moreover, practically, to all intents, an order till further order. It is an order which may extend to a certain time, but not beyond, without further order. In the mean time it is always in the power of the Commissioner to discharge his own order. No order of the Commissioner is in its nature irrevocable. Even if it were not competent to the Commissioner to discharge the order, still it is open to him in the case of danger to direct the official assignees to collect and secure the assets. On these various grounds, it is submitted, that the order is not irregular. In the *Anonymous case* already cited the order for protection was made to a day certain, and no objection was taken to it on the ground of irregularity.

LORD JUSTICE KNIGHT BRUCE.—How this case would have stood if the order of November had granted protection until further order, or until a certain day or further order, it is not necessary to say. In point of fact, the order obtained is an order absolutely and unconditionally granting protection until a certain fixed day, more than two months after the date of the order. Such an order may or may not be a nullity. On that I give no opinion, except saying that if it is a nullity there is an end of all question. Assuming it not to be a nullity, I apprehend it still to be irregular, and I conceive when a person obtains an order *ex parte* for his own benefit, and behind the back of his creditors, and in a certain sense to the prejudice of his creditors, he is bound to obtain an order strictly correct, and strictly regular, or to abide the consequences. The proceedings which have been taken to make this gentleman a bankrupt may be valid or not—may

be regular or not; with them I do not interfere. Lord Eldon, even in cases where a commission of bankruptcy was confessedly invalid, has refused to interfere with it, leaving the parties who thought fit to issue it to make the best they could of it. I am of opinion that the order obtained by this gentleman was irregular, and ought not to be allowed to afford him protection. I adhere to what Mr. Balguy has done.

LORD JUSTICE LORD CRANWORTH.—I entirely concur in that view. If it had not been for the schedule to the act, there could have been no question but that the petition itself would have been irregular; as, however, the petition is in form prescribed by the schedule, it cannot be so treated. The order has been made for protection until a given day, thus tying up the hands of every one in the mean time; it is an order which cannot be supported, and is one from which the debtor can derive no assistance. The application is, therefore, dismissed, with costs.

LORD JUSTICE KNIGHT BRUCE.—Upon the point first argued by Mr. Swanston, it is not our intention to give any opinion, and we give none.

LORDS JUSTICES. } *Ex parte* MAC BIRNIE'S
 1852. } TRUSTEES, *in re* MAC
 Jan. 28. } BIRNIE.

Marriage Settlement—Trader—Right of Proof—Case stated under the 14th section. of the Bankrupt Law Consolidation Act 1849.

A trader about to be married and being, in fact, insolvent, of which insolvency the intended wife was ignorant, entered into a covenant with trustees to pay them a moderate sum of money, the interest to be paid to the wife's appointment, and, in default, to the intended wife for life for her separate use, then to the husband for life, and the capital to be in trust for the survivor absolutely. Property of the wife was also agreed to be settled upon the same trusts. The husband became bankrupt, and the trustees applied to prove for the amount, which had never been paid, but the Commissioner rejected the proof:—Held, on appeal, that the settlement was good as against the assign-

nees, and that the trustees were entitled to prove.

This was a special case, stated by the authority of the Commissioner, for the opinion of the Court, he having rejected a proof for 500*l.* on the bankrupt's estate. From the case (which was stated at the instance of the trustees of a settlement, and granted under the authority of the 14th section of the Bankrupt Law Consolidation Act, 1849), it appeared that the bankrupt, John Mac Birnie, carried on trade in Devonshire, having a shop in Exeter, receiving payment for his goods by weekly instalments. He commenced business as a draper and tea-dealer in May 1850, without any capital, but obtaining credit from the wholesale houses on the guarantie of his former master. Twelve months afterwards he made an offer for a composition, but by an arrangement he was able to go on. In June 1851, being then still in insolvent circumstances, and being about to be married to Maria Harris, he executed a settlement, by which the one-third of the intended wife, in a certain trust sum of 700*l.*, to which she was entitled in possession, was assigned to trustees upon certain trusts after stated, and the said bankrupt, in consideration of the intended marriage, and in pursuance of an intended agreement entered into in contemplation thereof, covenanted with the trustees to pay them on demand the sum of 500*l.*, with interest from the day of the marriage at the rate of 4*l.* per cent. per annum. And it was declared that the trustees should stand possessed as well of the one-third part of the 700*l.* as of the 500*l.* settled by the bankrupt, upon trust, for such persons as Maria Harris should by deed or will appoint, and in default of appointment, upon trust, during the joint lives of the bankrupt and Maria Harris, to pay the income of the trust funds to her for her separate use; and upon the decease of either the bankrupt or Maria Harris, upon trust, subject to the said power of appointment, to pay the trust funds to the survivor, with power to the trustees to allow the trust funds to remain outstanding until Maria Harris should otherwise direct. By an agreement executed at the same time, the contingent

interest of Maria Harris in one-half of another one-third of the said sum of 700*l.* in the event of her brother dying under twenty-one years of age, and also all other property (if any) which might thereafter devolve on her, was agreed to be settled upon the same trusts as the 500*l.* The bankrupt continued in his trade until October 1851, when he stopped payment, indebted, exclusively of the 500*l.* to the trustees of the settlement, in the sum of 1,302*l.* 19*s.* 10*d.*, of which above 800*l.* was contracted before the settlement. His assets consisted of stock and furniture, valued at 147*l.* 13*s.* 3*d.*; good debts, 630*l.* 6*s.* 4*d.*; doubtful, 372*l.* 18*s.* 10*d.*; bad, 189*l.* 5*s.* 10*d.*; total property and debts, 1,340*l.* 4*s.* 3*d.* The case stated that "the probable amount of the assets that will be realized is 365*l.*, in consequence of the peculiar nature of the debts contracted with traders of this class."

Mrs. Mac Birnie was examined, and the following portion of her examination was stated in the case. "I was engaged to my husband about nine months before we were married. About ten days previous to our marriage something was said about my property. I was entitled to one-third of a sum of 700*l.* due on mortgage, which I was to receive on my brother's coming of age. My property was to be settled on myself. I did not know Mac Birnie's circumstances. I wished the settlement to be made to secure my money to myself. I employed Mr. Every to prepare the settlement. He acted for both of us. Mr. Mac Birnie and I went together to Mr. Every's, and instructed him to prepare the settlement. We went to him two or three times about it. No one went with me on my behalf. Mr. Mac Birnie made no statement to me about his affairs or his property. I did not know he was in debt at all. He owed my mother some money. I do not know if it was repaid before we were married. It was my own thought about having my property settled on me. I told Mr. Every to settle it in the usual way. I gave no directions as to the 500*l.* of Mr. Mac Birnie's. He said he would settle it on me. I did not know how it was to be paid." The Commissioner added, "The Court has no reason to doubt the truth of this statement."

The proof by the trustees for the 500*l.* was resisted by the assignees, and finally rejected by the Commissioner, and his reasons were, that at the date of the settlement the bankrupt was embarrassed and had no reasonable expectation of avoiding bankruptcy, and that he entered into the covenant with a view of enabling the trustees to prove against his estate, in fraud of his creditors, and by way of indirectly making a provision out of his own property for himself in case of bankruptcy. The learned Commissioner, in support of his view, cited—

Ex parte Cooke, 8 Ves. 353.

Ex parte Hodgson, 19 Ibid. 206.

Ex parte Hill, Cooke's Bankr. Law, 7th edit. 238.

Higginson v. Kelly, 1 Ball & B. 252.

Mr. Shapter, for the appellants, the trustees.—There is no evidence in the present case of any fraudulent design by the bankrupt, as is attributed to him in the judgment of the Commissioner. It is true a presumption would arise of such a fraudulent intention if the settlement, instead of being so small, had been extravagantly large. The cases on which the Commissioner relied are rather in favour of the bankrupt, and are sufficient to support the appeal. No case goes so far as to hold that, a settlement made before and in contemplation of bankruptcy, but in consideration of a settlement of property belonging to the wife, and where the intended wife has no notice of the design, if any existed, of a fraud on the creditors, can be set aside. It has long been settled that marriage is a valuable consideration, and the only section of the Bankrupt Act which relates to the setting aside of instruments on the ground of insolvency is the 126th section, and in that, contracts for valuable consideration are expressly accepted.

Mr. Bacon contended, on behalf of the assignees, that the mere fact of a deed being executed for value was not enough to save it from the consequences of fraud if fraud existed in the transaction, and so it was laid down in *Cadogan v. Kennett* (1). The doctrine was also recognized in *Ex*

parte Meaghan (2); and *Campion v. Cotton* (3), strong as that case was, was clearly distinguishable from the present.

No reply was called for.

LORD JUSTICE KNIGHT BRUCE.—What we have to decide is, as to the effect we are to give to a marriage settlement which contains no reference to bankruptcy, but which does contain a simple and immediate covenant on the part of the intended husband to pay this sum of money. How this case would have stood if the intended wife had been implicated in any design to defraud the creditors of the intended husband, either by means of contracting for an extravagant settlement or otherwise, it is unnecessary for me to say. Nor is it necessary for me to say what would have been the result of the *bona fides* of the wife being impeached in some manner other than by the mere appearance and nature of the settlement, that is, if its terms might have made the wife suspect that its provisions were otherwise than usual or proper, by reason of its being out of proportion to the station and circumstances of the intended husband. The conduct of the wife, however, is not impeached. There appears to be nothing suspicious in this settlement, and it is such an one only as an honest woman well advised might reasonably and properly require. This disposes of the whole case. No fraud is imputed to her; I think sufficient does not appear to exclude a proof, and in that Lord Cranworth seems to concur.

LORD JUSTICE LORD CRANWORTH.—I not only concur in the conclusion to which my learned Brother has come, but I do so substantially also for the reasons he has given. It has been said that this settlement was a fraud on the Bankrupt Law. In this I cannot agree. It has not been shewn, or attempted to be shewn, that the wife was party or privy to any fraud,—was *particeps criminis* if fraud there were. The transaction does not appear to be otherwise than fair, or not to have been entered into *bona fide*. I agree that the settlement of all the property to the separate use of the wife might have awakened

(1) 2 Cowp. 432.

(2) 1 Sch. & Lef. 179.

(3) 17 Ves. 263.

suspicion; but it did not do so, and so the Commissioner has, in effect, found. The wife being cognizant of no fraud, the present case is distinguishable from those which were cited during the argument. I, however, guard myself against giving any opinion as to what would be the effect of a settlement shewing in itself something so extraordinary as to make it evident that fraud was intended, as if the settlement had been of 50,000*l.* and not of 500*l.* That would have been too gross not to be seen. There is nothing of that sort here; there was no fraud and nothing to awaken suspicion. The settlement, therefore, is valid, and the proof for the 500*l.* must be allowed. The costs of the petition may come out of the estate.

LORDS JUSTICES. }
 1852. } *Ex parte* MATHESON, in re
 Feb. 11. } MATHESON.

*Bankrupt Law Consolidation Act 1849—
 Railway Stock—"Government or other
 Stock."*

*The 201st section of the act enacts, that no bankrupt shall be entitled to his certificate if he shall within one year before his bankruptcy have lost 200*l.*, by any contract for the sale or purchase of "any Government or other stock:"—Held, on appeal, affirming the decision of the Commissioner, that railway stock is within the meaning of this section.*

In this case the certificate was opposed by the assignees before the Commissioner upon several grounds, and Mr. Commissioner Perry refused it on account of reckless trading, of incurring debts without means of payment, of excessive speculations in shares, and also for the following reason stated in a memorandum at the foot of the decision, "And I declare that the bankrupt appears to me also not entitled to his certificate, he having brought himself within the penal provisions of the 201st section of the Bankrupt Law Consolidation Act, 1849, by a loss of 200*l.*, within one year next preceding the filing of the petition for adjudication in this matter, upon a contract for the purchase of railway

stock, called 'Leeds stock;' and by a loss of 200*l.* within the like period, upon another contract for the purchase of 'Edinburgh and Glasgow stock,' being also railway stock; which two several contracts were respectively entered into by the said bankrupt, and were not to be performed within one week after the date of each respective contract" (1). From this decision the bankrupt appealed.

After the case had been stated—

LORD JUSTICE KNIGHT BRUCE said, that his learned Brother and himself thought that the arguments had better be confined in the first instance to the question whether railway stock was included in the act, as a decision on that point might render any discussion on the other parts of the Commissioner's judgment unnecessary.

Mr. Bramwell and Mr. W. M. James, for the petition.—The question here is, whether "other stock" can be said to include railway stock, or must not be construed to mean other stock *ejusdem generis* as the stock before mentioned in the act, namely "Government stock." It is very material, in the outset, to observe that when this term was originally used in the Bankrupt law of this country, no such thing as railway stock existed, for railways were unknown; yet successive acts of parliament have been passed and still the words remain the same. Such an omission to alter the words is a manifest intention on the part of the legislature to exclude such stock,—the existence at the time of passing later acts, and especially the last act, of such stock being most notorious. Where the legislature did intend to guard against gambling in any

(1) The 201st section of the act is, so far as relates to this question, this:—"That no bankrupt shall be entitled to a certificate of conformity under this act, and any such certificate, if allowed, shall be void, if such bankrupt shall have lost, by any sort of gaming or wagering in one day 20*l.*, or within one year next preceding the issuing of the fiat or filing of the petition for adjudication of bankruptcy 200*l.*, or if he shall within one year next preceding the issuing of the fiat or the filing of such petition have lost 200*l.* by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract."

stock it took care to use full and extensive words, as in the case of the Bubble Act, 6 Geo. 1. c. 18. The case upon railway stock, however, is not without authority, for in the case of *Hewitt v. Price* (2), which arose under the 5th section of the Stock Jobbing Act, 7 Geo. 2. c. 8, railway stock was held not to be included in the description of "other public securities," the words before used being "any public or joint stock." The reason given by one of the learned Judges was, that railway stock was not "public stock," nor did it form any part of "public annuities." In that case the observation of Mr. Justice Bosanquet in *Wells v. Porter* (3) was cited, who said "When we find the expression 'public stocks,' we must intend the public stocks of this country;" and Lord Chief Justice Tindal assented to that proposition. If the view taken by the Commissioner be right, then it is at variance with all the rules laid down by this Court, for certainly no trustee who has power of investing in government or other stock would be permitted to invest the property of his *cestui que trust* in railway stock, and if he did, this Court would make him responsible for any loss, on the ground that such an investment was a breach of trust.

The proper construction of the words "or other stock" is, that they are *ejusdem generis* with the former word "Government;" the *genus* is stock, and stock guaranteed by this or any other government. The income of stock, thus meant, is not variable; but in shares it is: one is not, the other is subject to fluctuation like any other mercantile commodity. At the time of the passing of the Consolidation Act in 1849, it was perfectly well known to the legislature what money was invested in railways, canals, and other public works; and had it been intended to include such monies, the statute would have been clear and explicit in so enacting. Between the time when these words were used in acts of parliament and the passing of the last Bankrupt Act, it was well known that railway stock had been held by the Courts not to be within the words of the Stock Jobbing Acts; and it is quite impossible to

suppose that if railway stock were meant, it would not have been either specifically named or that some clear general word to include it would not have been made use of.

[LORD JUSTICE LORD CRANWORTH.—Do you contend that, in the case of a will, Bank stock would pass by such words?]

Mr. W. M. James.—Yes.

[LORD JUSTICE KNIGHT BRUCE.—And yet Bank stock is fluctuating; it depends upon the profits of the Bank as bankers.]

Mr. Rolt and Mr. Kinglake appeared for the assignees, but were not called on.

LORD JUSTICE KNIGHT BRUCE.—I am of opinion that the Commissioner's decision is correct. The Bankrupt Act of 1849, singularly enough, considering the general import and object of it, does not continue or contain the provisions found in other and preceding acts of parliament as to construing it favourably to creditors. If the clause to which I allude had been found there, I am inclined to think no question could have arisen; but still it is a rule, and has been a rule from the earliest times, applicable to the construction of all statutes, that you must suppress the mischief, and advance the remedy to which they relate. If this be so, there can be no reasonable doubt that stock of the description referred to is as much within the mischief intended to be prevented,—is as much within the meaning of the 201st section of the act—as ordinary Government stock, and certainly ought to be within the remedy. The words are "Government or other stock," and railway stock is so described by the legislature, in other statutes, in a way to warrant the application of the term "stock" to it. It has, however, been said that the 201st section is a penal section. To this I must not be understood as assenting; but whether it is so or not, I quite agree with the Commissioner in thinking that the stock in question is "other stock" within the meaning of the clause. This, I apprehend, is the construction the words must bear.

LORD JUSTICE LORD CRANWORTH.—I am entirely of the same opinion. I think "other stock" means stock transferable in the books of a company, in the same manner as Government stock is transferable in

(2) 4 Man. & G. 355.

(3) 2 Bing. N.C. 722.

the books of the Bank of England. An argument was attempted to be adduced from earlier statutes, where more words were used. But so also, in other older acts, the different descriptions of wagering are specified, as by tennis, dice, &c. All such enumeration is left out here, because in modern acts the legislature is in the habit of omitting all this enumeration of particulars. Here it was said, that stock of this kind cannot be within the meaning of these words, because they became part of the bankrupt law when shares of this description could not have been in existence. I think it would be unsafe to argue that stock was not intended to be included merely on this ground. With regard to the ingenious argument adduced in this case, that a trustee for investment in Government or other stock would not be justified in investing in this stock, I think that argument is excluded, because a trustee is not justified in investing in foreign stock. My view of the case is even stronger than that of my learned Brother. The petition must be dismissed, and with costs.

LORDS JUSTICES. }
 1852. } *Ex parte BATES, in re*
 Feb. 17. } WILLIAMS.

Bankrupt Law Consolidation Act, 1849
—Removal of Solicitor to the Assignees—
Discretion of Commissioner.

Assignees appointed solicitors, who were related by marriage to the bankrupts. The Commissioner, deeming the appointment objectionable, gave the assignees time to decide whether they would discharge the solicitors, or whether they, the assignees, would themselves retire from their office; at the time appointed the assignees refused to do either, whereupon the Commissioner removed the assignees:—Held, upon appeal, that the removal of assignees is in the entire discretion of the Commissioner, and the Court, refusing to interfere, dismissed the appeal, with costs.

The bankrupts in this case were William Williams, William Williams the younger, and Thomas Robert Williams, carrying on

business at Newport, in Monmouthshire, as "The Newport Old Bank." The petitioner, Mr. Bates, and another gentleman, were appointed assignees, and at a meeting for the examination of the bankrupts, on the 21st of January 1852, gentlemen from two firms of solicitors, namely, Messrs. Prothero & Fox, and Messrs. Savery, Clark & Co. attended, as representing these firms, as solicitors for the assignees. Mr. Prothero was first cousin of the wife of Mr. W. Williams the elder, and Mr. Savery was uncle to the wife of Mr. T. R. Williams. Mr. Commissioner Stephen objected to the appointment, and it was agreed that the last examination should be adjourned to the 9th of February, in order that the assignees might consider whether they would discharge the solicitors, or whether they would themselves retire from the office of assignees. On the 9th of February the assignees declined to take either course, whereupon the Commissioner delivered the following judgment:—

"The appointment of solicitors made by the assignees in this cause being, in my opinion, objectionable for reasons already stated, and which it is unnecessary to repeat, I think it is also clear that it falls within my province, as the Commissioner before whom the petition is prosecuted, to take the objection. I apprehend this to be incident to the general powers and duty, unquestionably residing in this Court, to superintend the whole course of proceedings in every bankruptcy placed upon its file; and to see that those proceedings are conducted (so far as the Court has the opportunity of becoming officially acquainted with what is done) in the manner best adapted to promote the objects of the bankrupt law. Upon the present specific question, viz., whether the Court has power to interfere with the choice made by the assignees of their solicitors, the only argument against its possessing the power that occurs to my mind, as carrying with it sufficient colour to require notice, is that the right, which the Court does unquestionably possess of rejecting an assignee whom it may deem unfit to be appointed, is given by the express provision of the Bankrupt Law Consolidation Act, 1849, section 139; and it may be said, perhaps, that the express insertion of such a power

tends to the inference that it would not otherwise have existed, and therefore to the inference that the power now in question does not exist. Neither of these inferences, however, seems to be legitimate. The 139th section containing as it does an express enactment that the appointment of assignees may be made by the major part in value of creditors, it became necessary to add the express proviso (1), in order to obviate the implication that might otherwise have seemed to arise, that this choice was, even in the case of an unfit person, to be absolute and conclusive. But even without the proviso, I conceive that this Court must have possessed (as incident to the general jurisdiction with which this act so largely clothes it, and to an extent so much greater than any preceding act) the power to reject or remove an unfit assignee. And, even supposing the contrary, yet the case of the solicitor is very different from that of the assignee, for the assignee being once appointed, his nomination of a solicitor, unfit for whatever reason to be employed, is a breach of his duty as trustee for the creditors; and on that ground, independently of any other, the interference of the Court, in such a case, seems to be clearly authorized. Besides which, it is to be considered that the Court has a more direct and peculiar interest in the fitness of a solicitor appointed, because that solicitor, when appointed, becomes, as it were, the minister and assistant in effect of the Court itself. For it is laid down on the high authority of Lord Eldon, 6 *Ves.* 1. (at a time when bankruptcies were under the immediate cognizance of the Court of Chancery) that the solicitor was to be deemed 'a minister of that court'; and if so, it seems to follow,

(1) The 139th section is as follows:—That at the first public sitting, &c. "assignees of the bankrupt's estate and effects shall and may be chosen and appointed, and all creditors who have proved debts to the amount of 10*l.* and upwards shall be entitled to vote in such choice, and also any person authorized" in manner herein mentioned, "and the choice and appointment shall be made by the major part in value of the creditors so entitled to vote; provided that the Court shall have power to reject any person so chosen who shall appear to such Court unfit to be an assignee, or to remove any assignee, and upon such rejection or removal a new choice and appointment of another assignee shall be made in like manner."

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on the same principle, that he is now a minister of the court in which the petition is presented. It may be added to these considerations, that if I am right in holding this appointment by the assignees in the present case to be of a nature tending to compromise the interest of the creditors and the claims of public justice, and if it be indeed true (as contended for) that the Court has no power of interference, then it follows that the creditors and the public remain in this respect without protection; for I am aware of no other quarter in which an original jurisdiction on this subject can be supposed to reside. There would be, therefore, a great defect in the law, and, although we know that such defects are occasionally discovered, I need scarcely say that they are never to be presumed, and that in any case of doubt it is to be taken as more probable that the law has intended its existing institutions to comprise some remedy for a given abuse, than that it has left that abuse wholly unprovided for. Under the circumstances, I should have thought it right to make a formal order on the assignees, directing them to change their solicitors; but as they declared to the Court at the last sitting that, in the event of such an order being made, it was their intention not to obey the same, it would seem futile to take that course; and I, therefore, now proceed to order, and do hereby order that the assignees be removed from their office, on the ground of their persisting in the choice of solicitors they have made, and refusing to obey any order that the Court should make for changing their solicitors; and that a sitting be held on the 23rd day of the present month, at 11 o'clock in the forenoon, for the choice of the new assignee or assignees; and that the time of the sale of the bankrupts' property, now advertised for the 2nd of March next, be enlarged until the 16th of March by advertisement, and I do adjourn the last examination of the said bankrupts until the said 23rd day of February."

The assignees presented a petition of appeal against this decision.

Mr. Bacon and *Mr. Giffard*, for the appellants.—The authority of the assignees to appoint their solicitor is, as it has always

been, and recognized to be, an absolute right, with which the Commissioners have no authority to interfere ; and although the 139th section gives full power to remove the assignees in cases where the Commissioner shall think they are improper persons, nothing is said about the solicitor, and there is no pretence for saying that the assignees are improper persons to be intrusted with the management of this estate. Having no direct authority over the appointment of the solicitor, the Court will not sanction the indirect attempt to controul it.

[LORD JUSTICE KNIGHT-BRUCE.—Do not the words after those to which you allude, "or to remove any assignee," sufficiently shew that the removal is wholly in the discretion of the Commissioner?]

They are so ; but still that discretion is one which this Court will feel itself bound to controul where the motive for its exercise is plainly improper. The Commissioner has very clearly shewn that the reason which has actuated him was not any personal incompetency, or other disqualification for the office, but solely as a sort of punishment for not submitting, in the exercise of that authority which the legislature has intrusted to them, to his dictation. If any principle such as this had ever existed in the bankrupt law, some trace of it must be to be found in the books, but no such trace is discoverable.

[LORD JUSTICE LORD CRANWORTH.—Suppose this case: the son a bankrupt, his father a solicitor, and the assignees employing the father to be the solicitor to the estate : surely that circumstance would render him unfit. The assignees making such a choice might well be a very material ingredient in determining in the mind of the Commissioner the fitness of the assignees themselves to continue in the office.]

It does not follow that because there is relationship a solicitor will be induced to act improperly. In truth, the gentleman who acts in the matter of this bankruptcy is the partner who is in nowise connected with the bankrupts. If the solicitor does act improperly, this Court has full power to controul him ; and if the assignees should persist in employing him, it would be a breach of duty on their part, and ample

ground for their removal. The regulations in bankruptcy in 6 *Ves.* 1. shew no authority to interfere with the assignees in such a matter.

Mr. Swanston and *Mr. Roxburgh* appeared for the petitioning creditors, in support of the judgment of the Commissioner, but were not called on.

LORD JUSTICE LORD CRANWORTH.—I have had some doubt, and still doubt, whether, had I been in the place of the Commissioner, and had to exercise a discretion, I should have so exercised that discretion as the learned Commissioner has. The matter is, however, one of discretion merely. That the Commissioner has a discretion as to the removal of assignees is, I think, clear, and this Court will not interfere with it, unless it is satisfied that such discretion has been improperly exercised. During the argument, I asked what would be the effect of the case where the relationship between the parties was that of a father or very near relation. The reason why I put that case of a father acting as solicitor under his son's bankruptcy was, to shew that relationship might, in an extreme case, be a ground of unfitness for the office. I think the Court cannot weigh, in such a question, the degrees of relationship. Here the Commissioner may have reasons strong, even conclusive, to bring him to the determination, even of the unfitness of these gentlemen ; and as he has a discretion, it is not necessary for this Court, without the knowledge of those reasons, to interfere merely because of a doubt crossing the mind of one member of it, whether he would have exercised the discretion otherwise than as the Commissioner has exercised it in regard to the removal of the assignees if the case had originally come before him. The Commissioner in this instance has adopted no general principle : but he merely decides that the appointment of the solicitors is inexpedient. I am of opinion that the petition must be dismissed.

LORD JUSTICE KNIGHT-BRUCE.—If this had been an order by the Commissioner on the assignees to discharge their solicitor, it is totally unnecessary to say what would have been my opinion, and I therefore

abstain from expressing it. What he has done in effect is, I understand, this: he has said to the assignees, "you are respectable men, and have employed respectable solicitors; but, however respectable they are, there are reasons which appear to me, for the due application of the estate, and for the proper administration of justice, to be sufficient to induce me to say that, in my judicial opinion, it is necessary that you should discharge those solicitors and employ others; will you employ other solicitors, or will you yourselves retire from the assigneeship?" To this the assignees in effect say, "We will do neither one nor the other." In such a state of things I can only say I agree entirely with the view taken by my learned Brother; and add that, in my opinion, the petition must be dismissed, with costs, to be paid by the petitioners, and not out of the estate.

Mr. Swanston asked that the costs of the petitioning creditors might be paid by the appellants.

Mr. Bacon.—They were not served with the petition of appeal, and ought not to have appeared. The official assignee was served, and he very properly did not appear.

The petitioning creditors' costs were directed to be paid out of the estate, their solicitor stating that, in fact, the petition of appeal had been served on the Commissioner, who had sent him, the solicitor, a note authorizing him to appear.

L.C. } *In re* CARTER, *ex parte*
Dec. 5, 11. } CARTER.

Adjudication of Bankruptcy—Petition to annul after Advertisement—Jurisdiction of the Commissioner—Statute 12 & 13 Vict. c. 106. ss. 12, 233.

A petition to annul an adjudication after advertisement in the Gazette, must be presented to the Vice Chancellor sitting in Bankruptcy. After the advertisement, the Commissioner has no jurisdiction to entertain a petition to review his adjudication—stat. 12 & 13 Vict. c. 106. ss. 12, 104, 233.

This was an appeal from an order of the Vice Chancellor Knight Bruce, annulling the adjudication of bankruptcy against the petitioner, with costs.

The principal question raised both upon the hearing before the Vice Chancellor and on the present appeal was whether the Commissioner had jurisdiction to entertain a petition by the bankrupt to annul the adjudication of bankruptcy after the advertisement of the adjudication, under the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106.

The facts of the case appear in the report of the hearing, before the Vice Chancellor, 20 Law J. Rep. (N.S.) Bankr. 19.

Mr. Swanston and *Mr. W. W. Cooper*, for the petitioning creditors, appellants.—The petition of the bankrupt to the Commissioner to annul the adjudication was irregular, for the Commissioner had then no jurisdiction to review his own judgment. The bankrupt, having taken advantage of the bankruptcy by obtaining his discharge from arrest thereunder, will not be allowed afterwards to dispute it.

Mr. Daniel, for the bankrupt.—The 104th section of the Bankrupt Law Consolidation Act has a distinct and limited object, namely, to enable the bankrupt to avoid the advertisement of the adjudication; but, after the advertisement, the bankrupt has a further time to dispute the adjudication. The only question is, whether the petition to the Commissioner was a proceeding within the act to dispute the adjudication. The authority of the Commissioner to entertain the question depends on the 12th section of the act, which gives the Court, in the exercise of its primary jurisdiction, superintendence and controul in all matters in Bankruptcy, and gives an appeal only to the Vice Chancellor, and no original jurisdiction. If the Commissioner, therefore, has not jurisdiction, no Court exists which can give effect to the provisions of the 233rd section. The petition to annul was not an appeal, but an original proceeding within the meaning of the 233rd section—*Ex parte Thorold* (1).

Mr. Swanston, in reply, contended that a petition to annul was in the nature of an

(1) 3 Mont. D. & D. 285.

appeal from the decision of the Commissioner, and therefore ought to have come before the Vice Chancellor; that the petition to the Commissioner was a nullity, and the proceedings before the Vice Chancellor were not had within the time limited by the act.

The LORD CHANCELLOR.—The sole question is, whether the petition to the Commissioner on the 19th of March was or was not a proceeding within the meaning of the act, taken before a proper tribunal, with a view of proceeding to annul the adjudication. The act is not quite consistent in terms; for, though it is clear that after the passing of this act fiats were at an end, and the only foundation of the prosecution of the bankruptcy was the adjudication, yet mention is made of fiats. Formerly there was a previous proceeding called a docket, upon which a fiat issued under the Great Seal; but now, in analogy to that, a petition is presented to the Commissioner praying the trader may be adjudged a bankrupt. Yet, nevertheless, the language of the act in some parts supposes the fiat to continue. It must be remembered, however, that the adjudication is the commencement of the proceedings in bankruptcy, and that it is not, as of old, a mere ministerial proceeding, but a judicial act, a conclusion of law from facts which the Commissioner is charged with the duty of inquiring into. The proceeding is *ex parte*, and it being found that an *ex parte* proceeding often works injustice if immediately acted upon, therefore a remedy is given by the 104th section, which provides that the trader shall have notice of the adjudication previously pronounced, and shall have a certain time allowed him to dispute its validity, and authority is given to the Commissioner, if he shall be satisfied that the evidence formerly produced before him did not warrant his conclusion, to annul the adjudication, and that would have put an end to the proceedings in Bankruptcy, subject however to appeal, as it was not intended that the decision of the Commissioner should be final. By the 12th section very extensive powers are conferred on the Commissioner, subject in all cases to an appeal to the Vice Chancellor.

Now, there is no doubt that a petition for an adjudication is a matter over which the Commissioner has jurisdiction; and this section, therefore, in defining his jurisdiction in general terms, expresses that which comprises a petition for adjudication, among other matters, but "subject in all cases to appeal." The adjudication, then, is a matter within the jurisdiction of the Commissioner, and an appeal is given in all cases where jurisdiction is given to the Commissioner. That would shew that there is no such evil necessarily arising in the present case as an appeal brought to the Commissioner against his own adjudication, or, if he has no jurisdiction, that there is therefore no remedy; for there is a remedy distinctly pointed out. It has always been a great object with the legislature to limit the time within which the bankrupt may contest his bankruptcy, to the earliest moment; because, by such litigation the efforts of the assignees to realize the estate are impeded, and the ruin of the estate occurs during the contest; or, if the bankruptcy is invalid, the trader himself is ruined. The present statute follows in the same course. The 104th section gives the bankrupt the opportunity of resisting the proceedings before the advertisement. Suppose he does not take advantage of that, what is the next step which the act has provided by which to limit the period within which the bankruptcy shall be doubtful? The 233rd section provides that, unless the bankrupt shall, within twenty-one days after the advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat, or the petition for adjudication, and shall have prosecuted the same with due diligence, &c., the *Gazette* shall be conclusive evidence of the bankruptcy.

Such being the general provisions of the act directed to the object I have before adverted to, let me now consider what the bankrupt has done. He did not contest the adjudication within the time limited by the 104th section, but at a subsequent period he presented a petition to the Commissioner, in which he prayed that the petition for adjudication, and the adjudication, might be annulled. Now, it has been said that the Commissioner possesses original jurisdiction to adjudicate upon the

bankruptcy; and having so adjudicated, his original jurisdiction is exercised, and he has done all that he has power to do; and that the only mode of impeaching the adjudication is by appeal to the Vice Chancellor; and that wherever an appeal is given, you must resort to the act itself, to see to what Court it is given; that there is nothing in this act to point to a second hearing by the Commissioner, but that the Commissioner's decision in adjudication, as in other matters, is open to appeal. The question in this part of the case is, what is the true character of the petition presented on the 19th of March? Was it an original proceeding on the part of the bankrupt? It was said, on the other side, that it could not have that character, because, if it was a proceeding finding fault with a judgment previously pronounced, it was in the nature of an appeal, and was an attempt to extend the period beyond the seven days allowed by the 104th section, and even much further; and that it is an evasion of the act which limits the time. That the bankrupt was intended to have the power of obtaining the judgment of the Commissioner after adjudication is quite clear; but is it not equally clear that where the bankrupt wishes to avoid an appeal by calling on the Commissioner for a review of his decision, that proceeding must be had within the time limited by the 104th section? I think the legislature has clearly expressed, that if the bankrupt proposes to do that, he must do it within the time there limited. I think this was, to all intents, a petition of appeal, and that it was not presented before the proper tribunal; and that it was not competent to the Commissioner to enter into the question a second time after the time limited. Instead of presenting his petition to the Vice Chancellor in the first instance, as he ought to have done, after the expiration of the twenty-one days from the advertisement, he presents a petition against the order of the Commissioner refusing to review his own judgment. If the Commissioner was right in holding that the party was not then entitled to call upon him to review his judgment, the petition complaining of that decision cannot be sustained. Looking at it with much anxiety, it appears to me that the provisions of the

act of parliament would be evaded by the extension of the power beyond what the legislature intended, supposing the present order to stand. I think the Commissioner was correct in the view which he took, that he had no power at that time to review his decision, and that, therefore, the appeal against that judgment cannot be sustained, and that the order of the Vice Chancellor now appealed from must be reversed. The appellants to have their costs of this appeal out of the bankrupt's estate.

LORDS JUSTICES. } *Ex parte WHITAKER, in re*
 1852. } *WHITAKER AND ANOTHER.*
 March 2.

Bankrupt Law Consolidation Act, 1849
—Refusal of Certificate—Reference back
to the Commissioner.

Whether the Court of appeal has jurisdiction to refer back the question of certificate after the Commissioner has refused it—quære.

Whether the grant of the certificate by the Commissioner after he has once refused it would be valid—quære.

James Whitaker and Joseph Crowther were adjudicated bankrupts. The certificate of Crowther was suspended for three years, that of Whitaker was refused. Both had protection after three months' imprisonment. The bankrupt Whitaker appealed.

Mr. Bacon and Mr. Steere.—Since the hearing before the Commissioner facts have been discovered which lead to a supposition that the Commissioner would not have refused the certificate had the case been so presented to his attention. Instead, therefore, of pressing the appeal, the Court is now asked to refer the matter back to the Commissioner to review his decision.

LORD JUSTICE KNIGHT BRUCE.—I doubt whether the 207th section of the act gives the Court jurisdiction to refer back the certificate to the Commissioner to review his decision.

LORD JUSTICE LORD CRANWORTH.—Even if the Court did so, and the Commissioner re-heard the case, and then granted

the certificate, the grant would probably be invalid.

The Court then heard the case upon the additional evidence and examined the bankrupt, the appellant, and ultimately varied the order by giving him his certificate after a suspension of three years.

LORD JUSTICE KNIGHT BRUCE.—It must be distinctly understood that in varying this decision we do so only on the additional evidence before us, and not as in the slightest degree intimating that, upon the materials which were before the learned Commissioner, we should not have come to the same conclusion as he did.

LORDS JUSTICES. } *Ex parte* BEAN, *in re* WILKINSON.
1852.
March 11.

Bankrupt Law Consolidation Act, 1849
—*Annuling Adjudication—Time for Appeal.*

Where a creditor petitions against an adjudication within the proper time, and the petition is not heard within the twenty-one days from the adjudication, and when heard it is dismissed, and the creditor appeals within twenty-one days after the Commissioner's decision on his petition, his appeal is in time under the 12th section of the statute. A petition to the Commissioner to annul the adjudication is not an appeal within the meaning of that section.

John Wilkinson was adjudicated bankrupt on the 12th of May 1851. Mr. Samuel Bean, a creditor, presented a petition on the 30th of June to annul, on the ground of there being no act of bankruptcy, and there being no sufficient petitioning creditor's debt. The 11th of July was appointed for the hearing, when Mr. Bean attended the district court; and, after the petitioning creditor's debt had been admitted to proof, the Commissioner ordered Mr. Bean's petition to stand over until the 15th of August. Before that day the assignees petitioned against the admission of proof of the petitioning creditor's debt, and on the 18th of August Mr. Bean's

petition was again adjourned till after the hearing of the last-mentioned petition. On the 11th of December 1851 the proof was expunged by the Lords Justices, and Mr. Bean's petition to annul was heard by the Commissioner on the 20th of February 1852, when it was dismissed, with costs, and from that decision Mr. Bean appealed.

Mr. Swanston and Mr. Daniel, for the appeal.

Mr. Glasse and Mr. Hardy, for the petitioning creditor.—As this is an appeal from an adjudication it should have been presented within twenty-one days from the date of the adjudication—*Ex parte Carter* (1).

Mr. Bacon and Mr. Terrell appeared for the assignees.

LORD JUSTICE KNIGHT BRUCE.—This petition from adjudication appears, so far as the evidence before us goes, to be unsupported by the legal requisites. The case, therefore, fails at law. That, however, is not decisive; but still, when a bankruptcy is insufficient at law, it lies upon those who attempt to support it to shew equitable grounds for sustaining it. There appear in this case to be no such grounds shewn. With respect to the time of the application, it was made to the Commissioner at the end of seventeen days; and if there was any delay, it arose by reason of the pendency of an application by the bankrupt for the same purpose. It is said that the Commissioner had no jurisdiction to annul the adjudication upon the application of Mr. Bean, because the adjudication took place on the 12th of May, and his petition of appeal to this Court was not presented until the 20th of June, that is, after an interval beyond twenty-one days. We are of opinion that it is not a case of appeal, within the 12th section of the act, from the order of adjudication, but that the appellant's original application to have the adjudication annulled was properly made to the Commissioner under the general jurisdiction conferred on him by the act of parliament, and that it was not until he had adjudicated upon that application of Mr. Bean that a

(1) 20 Law J. Rep. (N.S.) Bankr. 19.

case for appeal arose. So far as Mr. Bean is concerned, from the moment when his application to the Commissioner was rejected, and not before, it became a case for an appeal as regarded him. He has appealed within twenty-one days after the decision: that is the way in which we view the case.

LORD JUSTICE LORD CRANWORTH was of the same opinion.

The case was gone into on the other points, and ultimately the adjudication was annulled.

LORDS JUSTICES. }
1852. } *Ex parte RIMELL, in re*
March 20. } BREWER.

Bankrupt Law Consolidation Act, Section 232—Inspection of Documents, &c.—“Reasonable Request.”

A creditor, who had proved his debt, applied by his attorney, under the 232nd section of the statute 12 & 13 Vict. c. 106, for leave to inspect the affidavit of debt, the proof of the act of bankruptcy, and other proofs filed in court, on which the adjudication was founded, with a view to impeach the adjudication. The officer of the district court refused compliance. The creditor appealed, and it was held, that this was not a “reasonable” request, within the meaning of the statute; that the application was properly refused, and that the appeal must be dismissed, with costs.

Quære—Whether the above-mentioned documents and proofs are within the language of the 232nd section.

This was the petition of Mr. Rimell, a creditor, who had proved his debt in the bankruptcy of Mr. Brewer, and who had applied under the 232nd section of the Bankrupt Law Consolidation Act, 1849 (1), by his attorney, to the Registrar of the

(1) The 232nd section of the act, 12 & 13 Vict. c. 106, The Bankrupt Law Consolidation Act, 1849, is as follows:—“That the proper officer of the Court in London and in the several districts in the country shall, on the reasonable request of any bankrupt or arranging debtor, or of any creditor of such bank-

district court, to permit him to have inspection at all reasonable times, or at such times as the Court should direct, of the affidavit of the petitioning creditor, the proofs of the act of bankruptcy, and the other proofs filed in court, upon which the adjudication in bankruptcy had been made. On the 14th of February 1852 the application came on to be heard, before the Registrar of the district court at Bristol, sitting for the Commissioner in his absence. The Registrar refused to grant the application, unless the object for which it was made were first disclosed. The applicant then stated that he intended to use the evidence he might obtain by means of the inspection for the purpose of impeaching the adjudication, by questioning the petitioning creditor's debt, and the act of bankruptcy. Upon the solicitor to the assignees objecting to any inspection being permitted for such a purpose, the Registrar, in accordance with the decision of the Commissioner (Mr. Hill) upon a similar application previously made, by the same attorney, on behalf of a different creditor, refused the application; proceeding in such refusal on the ground that the application was not a “reasonable request,” within the meaning of the statute. The petition prayed, by way of appeal from the Regis-

trary, having proved his debt, or of an arranging debtor, when the debt of the arranging creditor has been admitted in the petition or proved, or on the like request of the attorney of any such bankrupt, debtor, or creditor, produce and shew to such bankrupt, debtor, creditor, or attorney, at such times as the Court shall direct, every fiat, petition for adjudication of bankruptcy, adjudication of bankruptcy, and petition for arrangement, against or by such bankrupt, and all orders and proceedings under any such fiat, petition, or adjudication, and the Court shall order the official assignee or officer of the Court, as the case may be, to permit such bankrupt, debtor, creditor, or attorney to have inspection at all reasonable times of all books, papers, and writings relating to the matters of such fiat, petition, or adjudication, and the estate of the bankrupt or debtor in the possession of the assignees, or filed in court in such matter, and permit him to inspect and examine the same; and such official assignee or such officer shall provide for any such bankrupt, debtor, creditor, or attorney requiring the same, an office copy of such fiat, petition, or other proceeding, books, papers, and writings as aforesaid, or of such part thereof as shall be required, receiving such fee or sum or rate of charge as may be authorized in that behalf.”

trar's order of the 14th of February, that such order might be reversed, and that it might be ordered that the petitioner's attorney should be permitted to have inspection of the affidavit and other proofs filed in the said Court of Bankruptcy at all reasonable times.

Mr. W. M. James, for the petition.—The principle upon which the application was made to the Registrar of the district court, and on which the present appeal is founded, is this: inasmuch as a bankrupt has a right to see the evidence upon which his whole property is taken from him, his creditor has an equal right to see the evidence upon which the property of the debtor has been vested in trustees for the alleged benefit of the other creditors as well as of himself. It may be right that all a debtor's estate may be divided among all his creditors; but one creditor may have, by law, a claim to full payment, and he cannot be deprived of that right excepting in a legal manner, and how can he tell whether the adjudication is legal without inspection of the proofs of it? The papers, books, and documents filed in court, under the adjudication, are, in fact, the property of the creditors, for whom the Court or official assignee are merely trustees; and the creditors, as the *cestuis que trust* of the papers, are at all times entitled to inspection, without any restriction or qualification, except that of applying during the business hours of the office. The words "reasonable request," occurring in the first clause of this section, are not repeated in the second clause, namely, that part which is directory upon the assignee or officer to permit inspection. The two clauses must be read in the disjunctive; the second is not governed by the words "reasonable request" occurring in the first. That being so, the officer at Bristol was bound to produce the documents and proceedings at the request of the creditor, without inquiring into the reasonableness of such request. Should this Court, however, be disposed to hold otherwise, then, on behalf of the present petitioner, it is contended that the words "reasonable request" have reference merely to the time, opportunity, and place, having regard to the con-

venience and arrangements of the office, and not to the object or purpose of the application. But if the words "reasonable request" shall be held to have reference to the object or purpose of the application, still the object in the present instance is reasonable, being merely to ascertain the evidence upon which the assignees found their title; in order that by means of such evidence the creditor may consider and determine whether he will adopt or resist the adjudication, or, in other words, to enable him to say whether he will receive a dividend in common with other creditors, or take proceedings to insure full payment to himself. The bankrupt himself would clearly be entitled, under this section, to inspect the evidence upon which the proceeding was founded, by which he has been deprived of all his property; and if the bankrupt would be so entitled, the same privilege is extended by the act to the creditor. Courts of equity, in adverse suits, are in the habit of compelling the litigant to produce every scrap of documentary evidence material to the issue in the cause; and it would be strange, therefore, if the Court should itself set the example of defeating justice, by withholding evidence and concealing truth.

Mr. Bacon appeared for the assignees, but was not called on.

LORD JUSTICE LORD CRANWORTH.—I think that clause of the section which relates to the production of, and the permission to inspect the documents mentioned must be considered as one sentence. The former part of the section, which speaks of a reasonable request, is applicable to the words "such creditor," and so on in the latter part. The latter part of the clause is tacked on to the former in a way which renders the wording not very artistical, but the whole, I think, must be taken as one sentence. That being so, I am of opinion that the words "reasonable request" apply to the latter member of the clause as well as to the former, and that the official assignee or officer can only permit inspection to any of the parties enumerated in the clause upon such reasonable request. The former part of the sentence

speaks of "proceedings," the latter part of "books, papers, and writings," but every part is governed by the words "reasonable request." The only question then is, whether the application we are now considering is a reasonable one within the meaning of the act. I think it is not; and that the application was properly refused by the Registrar. It is hardly necessary to add that, in my opinion, the appeal is equally unreasonable, and ought to be dismissed, with costs.

LORD JUSTICE KNIGHT BRUCE.—Under the old practice in Bankruptcy no such liberty as is here asked would have been allowed, nor do I think it is intended to be given now. The reason given for a desire to inspect these particular documents is, to say the least of it, very odd; it is stated to be a desire on the part of the petitioner, a creditor, who has proved his debt, to impeach the validity of the adjudication. I am not perfectly satisfied that the particular papers or documents which this gentleman wishes to see are within the language of the 232nd section of the statute; but I would rather not, without necessity, give any opinion upon that. I will assume, for the purpose of the present question, and for that only, that these documents are within the language of the section; but if they are, still, the rational interpretation of this section requires a discretion to be exercised as to the reasonableness of the application for inspection. What, then, is the application before us? Property has been converted into a fund for the payment of creditors who are interested therein at large. One of the body happens to have a wish or interest adverse to the body at large, and seeks to avail himself of the power which the fact of his being one of the body gives him, in order to affect the interest of the whole body of which he is one. That is the effect of the application, the object being merely to destroy the adjudication, and to take away from his fellows the benefit of the documents and proceedings he comes to inspect, under the guise of being one of them. There never was an application more correctly refused; and I quite agree that this petition must be dismissed, with costs.

LORDS JUSTICES. } *Ex parte* HUNT, in re
1852. } HUNT.
Jan. 21, 22.

Bankrupt Law Consolidation Act, 1849.
—Certificate—Fraudulent Preference.

A bankrupt, having had his certificate refused, was taken in execution, and lodged in gaol. The ground of the refusal of the Commissioner was a fraudulent preference within the 256th section of the 12 & 13 Vict. c. 106; but the Court of Appeal, being of opinion that such a charge was not sustained, granted a certificate of the third class, and directed the release of the bankrupt from prison on a given day.

The facts of this appeal from the decision of the Commissioner, Mr. Ayrton, refusing the bankrupt any certificate or protection, were as follows:—

Henry Hunt commenced business, as a commission-agent, at Hull, with a capital of 10*l.* only, in December 1849. In March following, he married a widow, who carried on business as a Berlin wool dealer, and was the apparent owner of the stock in trade. This stock in trade was bought with monies belonging to a Mrs. Elizabeth Clark, the mother of the petitioner's wife, who, from time to time, advanced her daughter money, amounting to 400*l.*, to enable her to carry on the business; and the daughter executed to her a bill of sale, dated the 1st of November, 1849, of the stock in trade, as a security for 350*l.*, part of such amount. In January 1851 Mrs. Clark demanded payment of 140*l.*, part of the debt, and the petitioner not being able to pay the amount, a bailiff was put into possession, whereupon Mrs. Hunt, by direction of the bankrupt, addressed a letter to Mrs. Clark, requesting that she would consent to become a guarantee for the payment of a composition of 5*s.* in the pound to the creditors. She refused to become so, unless she were paid 140*l.*, part of the debt, and said, that unless it were paid, she would proceed to a sale under the bill of sale. To this the bankrupt agreed, and, on the 25th of January, remitted to Mrs. Clark 140*l.*, and she thereupon consented to become such guarantee, and to withdraw the bill of sale, provided the creditors would accept the

composition. In order to pay this 140*l.*, he borrowed of Messrs. I. & J. Martin, of Liverpool, 220*l.*, on the security of the bill of lading of a cargo of clover-seed, and out of it he paid Mr. Oakes 30*l.*, which had been advanced on the security of goods belonging to the petitioner's brother, and to his solicitor, 25*l.* The petitioner subsequently addressed a circular letter to his creditors, offering them the guaranteed composition; but, in the month of January 1851, before such proposed arrangement could be effected, Messrs. Thomas & Robert Raikes filed a petition for adjudication of bankruptcy against him, under which he was declared a bankrupt, owing 1,600*l.*, and not having sufficient assets to pay the expenses of the bankruptcy. From this he appealed to the Vice Chancellor sitting in Bankruptcy, on the ground that the alleged act of bankruptcy was not sufficient to support the adjudication; but further evidence having been adduced, sustaining other acts of bankruptcy, the Vice Chancellor, although doubting whether the act of bankruptcy relied on by the Commissioner was sufficient, thought that the new affidavits furnished evidence of an act of bankruptcy sufficient to support the adjudication, and therefore dismissed the petition, but without costs. Upon an application for a certificate, Mr. Commissioner Ayrton, on the ground that the petitioner had been guilty of a fraudulent preference, under the 256th section, by the payment made to Mrs. Clark and Mr. Oakes, and that his conduct as a trader had been reckless, refused to grant any certificate, and the bankrupt, being taken in execution, was conveyed to Lincoln Castle, where he remained at the date of the hearing of the appeal.

Mr. Bethell and *Mr. Kinglake*, for the petition.

Mr. Russell and *Mr. Greene*, on behalf of the assignees, opposed.

Mr. Kinglake was heard in reply.

LORD JUSTICE LORD CRANWORTH.—The conduct of the bankrupt in this case is, to say the least of it, most unsatisfactory. It is not strictly correct to say this Court administers punishment under the bankrupt laws; so to consider the act would be

a misconstruction. The statute declares, that under certain stated circumstances, the bankrupt shall have a certificate of the first, second, or third class. The only discretion left to the Court is the granting of the certificate, of what class it shall be, and when it shall be granted. If the granting of the certificate is delayed until a future day, its delay is tantamount to a punishment, because the bankrupt, in the mean time, is open to arrest by the creditor. That being so, the Court will direct which certificate shall be granted; or, acting still more severely, can, as the Commissioner has here done, refuse any certificate at all. If the conduct of the bankrupt has been more or less culpable, so the Court will award a higher or lower class of certificate, or refuse it altogether. Speaking for myself alone, in justice to the bankrupt, I must say that there does not appear to have been any fraudulent preference in the bill of sale, which was given to the wife's mother; it was given by the wife before the marriage, and the mother had at one time a bailiff actually in possession of the goods. It was an unfortunate circumstance that the offer of the 5*s.* in the pound was not accepted; it does not appear, nor has it been asserted, that the offer was not made *bond fide*, and for the purpose of relieving the bankrupt from his difficulties. In some respects the conduct of the bankrupt I consider to be very unsatisfactory. The system of commencing on so small a capital as 10*l.*, and entering into engagements of such a character as here appears, is absurd. When the bankrupt set up in business at Hull, he styled himself a merchant, and might, therefore, have led the public to believe he was a person of substance. The term "merchant" among commercial people would be received in a sense very different from that in which it here ought to be understood. Then, in a little more than a twelvemonth the bankrupt appears, for a person in his circumstances, to have expended in household matters a large sum, even allowing for a little latitude on account of his having married during that time. On the whole, I am of opinion that justice will be done if the bankrupt be allowed a certificate of the third class only; its issue to be suspended until the 31st of the present month.

LORD JUSTICE KNIGHT BRUCE.—Whether the view taken by the learned Commissioner can be sustained or not, I give no opinion; neither must I be understood as agreeing with him in the reasons for which he refused the bankrupt his certificate. On the evidence it appears to me, as it does to my learned Brother, that this is not a fit case for the entire refusal of a certificate. I consider that the quantum of imprisonment suffered by the bankrupt will, by the end of the month, be sufficient to satisfy the justice of the case. Viewing the conduct of the bankrupt, as the Court does, it appears to be open to the strongest observation and the gravest censure. Whether there has been a fraudulent preference or not, such conduct as is apparent here ought not to be passed over without censure and punishment. On the 31st of the present month the bankrupt will be set at liberty.

LORDS JUSTICES. }
1852. } *Ex parte OXFORD, in re*
March 3. } RUFFORD.

*Bankrupt Law Consolidation Act, 1849—
Friendly Society—Treasurer.*

Money which, by the rules of a friendly society, ought to have been deposited with a treasurer appointed by the society, was paid directly to the bankers of the society. The bankers were adjudicated bankrupts, and the society, under the 167th section of the Bankrupt Act, claimed to be paid in full, and in support of the claim filed an affidavit, swearing that the bankers were "employed in the office of treasurer."—Held, that the petitioners were not entitled to payment in full.

This was the petition of the stewards of a friendly society, duly enrolled, praying the reversal of the decision of the Commissioner, who had refused to order the payment in full of the sum of 132*l.* out of the estate of Messrs. Rufford, Rufford & Wragge, bankrupts. The second rule of the society provided for the keeping of the books "by a clerk, to be appointed by a majority of the members;" and the third rule directed that there should be a treasurer or treasurers, appointed in like man-

ner as the clerk, "in whose hands shall be deposited all the cash belonging to this society till the same can be placed out at interest," &c.; and the twenty-first rule provided that "as soon as sufficient money shall be collected, the same shall (after leaving a sufficient sum in the club box to pay the sick and other expenses of the society) be deposited in the hands of the treasurer or treasurers of this society, and that the clerk and two stewards shall take the same to the bank," &c. The bankers were not appointed treasurers. The petition, and affidavit in support of it, stated that the bankrupts "were employed in the office of treasurers of and in the said society, and they had in their hands and possession at the time of the said adjudication, by virtue of their office and employment," (the sum in question), "and the same was in their hands, not as bankers of the society, and in the ordinary way of banking business, but wholly as treasurers of the said society." It was, therefore, prayed that the decision might be reversed, and that payment in full might be ordered out of the estate.

Mr. Bacon and *Mr. Renshaw* contended, that as the 167th section of the New Bankrupt Act gave friendly and other societies the right to payment in full where bankrupts who have been either appointed "or employed" have money in their hands, the petitioners were entitled to that privilege. Had the words of the new statute been confined, as the old Bankrupt Act was confined, namely, to persons "appointed" to an office being bankrupt, the case would have been different, and would have been governed, adversely to the petitioners, by the case of *Ex parte Harris* (1); they, therefore, submitted that, upon this distinction, and the wider words used in the new statute, the legislature intended persons situated as were the petitioners to have, and the Court would give them, the privilege of full payment.

Mr. Swanston and *Mr. J. V. Prior* appeared for the assignees, but were not called on.

LORD JUSTICE KNIGHT BRUCE.—We are both very clearly of opinion that the bank-

(1) 1 De Gex, 162.

rupts were not officers within the words of the 167th section, which says, "if any person appointed or employed in any office in any society" established under the Friendly Societies Acts "or having in his hands or possession, by virtue of his office or employment, any monies or effects," and so on, the Court may order full payment of such monies "which the bankrupt received by virtue of his said office or employment;" and we think, therefore, that there is no foundation for the appeal. It must be dismissed, and with costs.

LORDS JUSTICES. } *Ex parte RUFFORD, in re*
1852. } *RUFFORD.*
June 4, 5, 7, 8, } *Ex parte WRAGGE, in re*
9, 10. } *WRAGGE.*

*Bankrupt Law Consolidation Act, 1849—
"Conduct as a Trader"—Banker—Certificate.*

Bankers who, upon the evidence before the Court, must be taken to have been, and to have known that they were, deeply insolvent, continued to receive deposits, and to issue notes for a period of eighteen months, during which time their assets would not pay more than 5s. in the pound; on an adjudication of bankruptcy, the Commissioner for this, among other reasons, refused them any certificate or protection. On appeal, the Court affirmed the refusal of certificate on the above stated ground, but, upon the consent of the assignees and of the opposing creditors, granted protection to their persons.

The certificate is a benefit to which a bankrupt may entitle himself by good conduct.

Whether, after a refusal of a certificate, the grant of protection is of any avail against the common-law right of creditors who do not come in under the bankruptcy—quære.

These were the petitions of Mr. Francis Rufford and Mr. Charles John Wragge, praying that the decision of Mr. Commissioner Balguy, of the Bristol District Court, dated the 1st of May 1852, by which he had refused the petitioners their certificates and protection, might be reversed or varied, and that certificates might be

granted; or, if the Court should refuse, that then they should have protection granted to them. From the documentary and other evidence, and from the examination of the bankrupts before the Commissioner, the following appear to be the facts:—Before 1840, Mr. Philip Rufford was engaged in partnership with his son Mr. Francis Rufford, in the Bromsgrove Bank, and they, together with Mr. Charles John Wragge, carried on, in partnership, the Stourbridge Bank. Mr. Francis Rufford managed the Bromsgrove Bank, Mr. Wragge managed that at Stourbridge; Mr. Philip Rufford was not actively engaged in either, and the adjudication having been extended to him, he had a third-class certificate granted to him, but it was suspended for twelve months. The two Ruffords commenced business with a nominal capital of 2,500*l.* each, and Mr. Wragge with that sum in cash. Among many speculations in which the bankrupts were engaged, were the British Alkali Company, which was indebted to the Bromsgrove Bank, in 1844, in 67,000*l.*, in full payment of which the bank accepted from Messrs. Fardon & Gossage their shares in that company, in the White Lead Company, and in the Disc Engine Company; and in 1851 53,000*l.* more had been spent by the Bromsgrove Bank in these speculations, besides which, for interest, costs and charges, this bank had a demand, in respect of such property, of 60,000*l.* The shares of the Alkali Company were of no value; and the Disc Engine produced no profits. A colliery proprietorship owed the Stourbridge Bank, in 1841, a large debt, and the colliery called the Churchbridge Colliery was conveyed to their bank in payment, but it was worked at a loss. The same bank advanced 10,000*l.* to the Bloxwich Colliery proprietors, and the debts increased in 1846 to 34,000*l.*, and in 1851 to 43,000*l.* The recklessness of these speculations formed a ground for the Commissioner's judgment. Down to 1843 the bankrupts banked with Messrs. Spooner & Attwood, when their account was closed, the Bromsgrove Bank account being in debt 40,000*l.*, while the Stourbridge Bank account was in credit 7,000*l.* The accounts were transferred to the house of Glyn, Hallifax & Mills, who, in 1847, made complaints of overdrawing,

and ultimately, in June 1851, they refused to honour the notes of the banks, and, accordingly, they stopped payment, and the partners were adjudged bankrupts. The books of the banks proved that, in the latter part of 1849, both were very deeply insolvent, and so continued down to June 1851. Between January and June 1851 the Bromsgrove Bank received deposits amounting to 7,000*l.* and the Stourbridge Bank to 8,500*l.* The Messrs. Glyn had a claim for 70,000*l.*, but they held property and securities covering the amount; but for the general body of creditors there was nothing but the balances which were due to the two banks. There had been transfers from time to time from one bank to the other of assets, and in June 1851 the Bromsgrove Bank owed the Stourbridge Bank 120,000*l.*

Sir W. P. Wood, Mr. Atherton, and Mr. Renshaw supported the petitions of appeal, and in their argument distinguished the present case from those of *Ex parte Dornford* (1), *Ex parte Wakefield* (2), *Ex parte Holthouse* (3), and *Ex parte Martyn* (then recently before the Court) (4). They also cited and commented on—

Ex parte Jardine, 1 Fonbl. Bankr. Rep. 182, and

The St. Alban's Bank case, Ibid. 84.

Mr. Swanston and *Mr. Huddleston* opposed the appeal, on behalf of the trade and official assignees.

Mr. Bacon appeared for opposing creditors.

Sir W. P. Wood was heard in reply.

Counsel, in answer to a question from the Court, said that the assignees and the opposing creditors had no objection to personal protection being granted.

LORD JUSTICE LORD CRANWORTH.—This is a very distressing case, and if further consideration would have been of any use, we would have taken further time to look at the examinations used in evidence; but the truth is, that the point we have to

decide does not depend on a very nice construction of the particular passages to which our attention has been drawn, but depends rather upon those general principles which have been discussed in the able arguments which have been addressed to us. The question is, whether these gentlemen, Mr. Francis Rufford and Mr. Wragge, or either of them, are entitled to a certificate under the 198th section of the Bankrupt Act. The learned Commissioner having heard the case, refused the certificates, and Mr. Francis Rufford and Mr. Wragge have appealed to us; and the question is, whether they have made out such a case as to warrant our saying that the Commissioner is wrong. It is our duty, and it is a very painful one, to say that they have failed in establishing such a case; and we think, therefore, that the Commissioner was right.

It is said that he proceeded on several grounds, one of which was, that the parties had laid out money on improvident investments as bankers; but it is not necessary for us to consider how far the investments were of such a character: for, independently of that, we think that the bankrupts have not so conducted themselves as to warrant the granting of a certificate; that they have misconducted themselves as traders, by going on trading and receiving deposits after they must have known they were utterly and hopelessly insolvent. Sir William Wood said—"This is often the case with men who afterwards retrieve their affairs, and recover themselves;" but I hope this is a somewhat exaggerated representation, caused by the sanguine view which he takes of his clients' case: for I must observe, that although that may be sometimes the case, it would be no justification for such conduct, and least of all in the case of bankers, because every one must know that the misery produced in a neighbourhood by the failure of a bank is so great that one almost shrinks from contemplating it, and it appears to have been the case in the present instance. The question is, did the bankrupts continue to carry on their business as bankers when they must have known that they were hopelessly insolvent, and that misery and ruin must be the consequence of their continuing to do so? I think it is impossible

(1) 20 Law J. Rep. (N.S.) Bankr. 7.

(2) 17 Law Times, 55.

(3) *Ante*, Bankr. 3.

(4) This case will be found in a subsequent page.

to answer that question otherwise than affirmatively. At the time of the bankruptcy there were assets of the Stourbridge Bank to the amount of 4*s.* in the pound, and of the Bromsgrove Bank to the amount only of 1*s.* in the pound, not taking into consideration the expenses of the bankruptcy. So that, looking at the facts of the case in the most favourable light, they continued as bankers to receive deposits, knowing that if their whole affairs were wound up, there would not be more than 5*s.* in the pound, and that, in my opinion, is conduct utterly unjustifiable. That was the state of the assets when the bankruptcy took place in 1851, and there was no great difference from the state of their assets in 1849 and at the time of the bankruptcy. When had the parties a knowledge of this state of affairs? There is abundant evidence to shew that the truth of the case was perfectly manifest to their minds. In September Mr. Wragge came to London, to Messrs. Glyn & Co. and had an interview with Mr. Glyn and his solicitor, and Mr. Glyn consented to make further advances with great reluctance, because, on the 19th, Mr. Wragge writes to Mr. Francis Rufford that if Mills—(he was the junior partner in the house of Glyn & Co.)—had been there, they would not have got the money. That was the state of things in September. On the 7th of October, Mr. Wragge having returned into the country, and at the instance of the Glyns, investigated the state as well of the Stourbridge as of the other bank, writes a letter to Mr. Francis Rufford, in which he says "I cannot see my way without something important and immediate from the engine." "Engine" means the patent right in the disc engine, the result of which is always doubtful; and to rely upon that, however useful and ingenious the disc engine might be, in order to make up the deficiency, was absurd. An investigation takes place, various letters pass on the occasion, and the Glyns, requiring further information, write into the country; and I was much struck by the letter of the 12th of October, from Mr. Wragge to Mr. Francis Rufford, saying that the "answer to Glyn must be written with great care." To be sure, all letters on business ought to be written with great care; and I cannot help seeing

that he meant, "Answer truly, but let it be such an answer as shall lull suspicion." It was an answer written with great care—the whole truth was not discovered. It was not *suggestio falsi*, but certainly it was *suppressio veri*. The correspondence goes on with Messrs. Glyn, and more assistance is obtained; but if, at that time, Mr. Wragge had looked into the affairs of the banks, he would have known, and must on the evidence be taken to have known, that the Stourbridge Bank owed 225,000*l.*, and had no more than 4*s.* in the pound, and the Bromsgrove Bank owed 227,000*l.*, and had less than 1*s.* in the pound of assets. Having ascertained that, they continued to receive deposits from rich and poor, but with a perfect knowledge that if all demands were made on them at once there was not the remotest hope of paying them in full. This state of things continued for a year and a half before the bankruptcy; and I must say it is conduct in traders such as clearly disentitles them to the benefit of certificates.

It is said that by refusing the certificates we shall be placing them in the same category as the bankrupt in the case of *The St. Alban's Bank*, which was clearly a breach of trust,—a misappropriation of a bill; and confounding them with the bankrupt in *Holthouse's case*, who bought goods on credit and immediately sold them at lower prices,—conduct something analogous to swindling. In one sense this is all true, so far as the refusal is to be regarded as a punishment; but this is a misfortune incident to all laws that partake of a penal character. It is impossible that persons shall not sustain the same amount of punishment, though they may not be precisely equal in guilt. If this were not so, no murderer could be hanged, except for the worst kind of murder. If we are to make nice distinctions, and say that if the moral guilt of one bankrupt be somewhat less than the moral guilt of another, we will not visit both alike, we might as well say, in cases of murder, that if one murder committed is not of equal aggravation with another,—that one has circumstances of extenuation which another has not,—you cannot possibly execute any murderer of the less atrocious dye. I do not agree to that; and to such an extent

the principle must be carried, if the appellants' case is to be decided on the evidence adduced. Human laws cannot make such nice distinctions, especially laws relating or analogous to criminal justice. But I do not agree that we have to inflict a punishment: the case is, whether the conduct of the parties as traders is such as entitles them to a benefit in the shape of a certificate, giving them protection from their creditors; it is rather withholding a benefit from them which good conduct might have entitled them to, than awarding to them a punishment. I think, however, with regard to this case, the interests of society require that we should not cast any doubt on the judgment of the learned Commissioner, and that we ought to refuse a certificate to both these gentlemen; for, though distinctions have been attempted to be made between their cases, and stress laid upon the difference of their temperaments, we cannot go into those niceties. I think it utterly impossible to believe that two persons who day by day, and almost hour by hour, were in communication with each other, by letter and personally, could either of them be ignorant of all that was known to the other; both of them must have known that in truth their affairs were desperate; and if they did not, they must have wilfully closed their eyes to the truth: and I am much struck with Mr. Wragge's answers in his examinations; for when he was asked as to the state of their affairs in 1849, he did not venture to say that he believed that the banks had the means of paying their debts; that they were not, in fact, insolvent. There is no objection raised on the part of the assignees to protection being granted to the bankrupts; and I am of opinion we ought only to grant it by consent as far as it can be made available. It is not necessary to discuss the question how far it is available. It is available against creditors coming in under the statute; but whether it may avail against the common law right of any creditor not coming in under the bankruptcy, it is not part of our duty to speculate. Our judgment must simply be to dismiss the appeal, qualifying the order in regard to protection so far as to shew that it is consented to by the assignees and the opposing creditors.

LORD JUSTICE KNIGHT BRUCE.—Acceding, entirely, to what has just been said by my learned Brother, I wish to be distinctly understood as not departing from anything said or done by me in the cases of *Wakefield*, *Dornford*, *Johnson*, and *Martyn*. If I had been persuaded that there had been any error in all, or any, of those cases, on my part, I hope I should have been prompt to have stated it; but having, since the commencement of the argument, considered those four cases, I adhere to them as decided by myself, observing only in passing as to *Dornford's case*, that my only doubt was, whether he had not been too severely dealt with by the Commissioner. My opinion, ultimately, was, that he was not. The present case is importantly distinguishable from each and every of those cases. The present case is distinguishable not only by the fact that these gentlemen were bankers in a populous neighbourhood, but also on other grounds. The bankruptcy happened in June 1851, and it is not necessary to go further back with the history of these gentlemen, or the banks, than the autumn of 1849, and I do not think that it would be of any advantage to the bankrupts to go further back. Commencing at that period, I have to ask myself these questions. "Is it, or is it not, clearly proved that, in the autumn of 1849 these parties then were, on a just and reasonable view and estimate of their assets and liabilities, deeply insolvent?" On the evidence, that question can only be answered in the affirmative. Again, "Did they, at that time, know the state of their affairs, and that they were insolvent?" It may be a proper question to consider, what was their own estimate of the state of their assets; might they not have supposed the state of their assets more favourable than it was? I cannot answer that question favourably to the petitioners. They knew no other word could represent their affairs than "insolvency." But they might say it was only a temporary insolvency, and that they might reasonably hope for improvement in the state of their assets, and for assistance from their friends, excusing, if not justifying, their continuing to transact business. However, from the statement in the books and other evidence, as rational men they could not, and, in point

off fact, they did not, consider their situation as one of hope. This, then, was their situation in 1849. They continued, however, to carry on business, to issue notes, and to receive deposits from rich and poor till 1851. Then, it is to be asked, "Did their position in that interval improve?" The answer upon the evidence is, "It did not;" and this includes in it the fact that they were, during the whole of that time, trading while deeply insolvent. Consistently, then, with the gentler estimate of their conduct which any man would wish to take, and attributing it to fear of exposure,—to the dislike which most men have of looking at what is disagreeable,—to the weakening nature of difficulties,—these gentlemen went on. It is not necessary to characterize their conduct by any harsh term, for who in a state of success and prosperity shall venture to say what would be his own conduct under similar circumstances? "Let him who standeth, take heed lest he fall." Still, the interests of society at large preclude the exercise of any private feelings, and require that such conduct should be marked with reprehension; and we have no doubt that we are acting rightly in affirming the decision of the learned Commissioner, of the correctness of whose judgment no doubt ought to be entertained. Let the appeal be dismissed; but, the assignees and opposing creditors consenting, let the bankrupts have protection. My own impression is, that protection will be available for all purposes; although I do not bind myself to that expression of opinion.

Mr. Swanston applied for the costs of the assignees to be paid out of the estate.

Mr. Bacon made a similar application as to the costs of the opposing creditor.

After some discussion on the latter point, an order was made for the payment of the assignees' costs out of the estate, and, the assignees not opposing, for the payment of 50*l.* out of the estate for the opposing creditor's costs.

LORDS JUSTICES. }
 1852. } *Ex parte SHERLOCK, in re*
 July 28. } SHERLOCK.

Bankrupt Law Consolidation Act, 1849, s. 198.—Certificate Meeting.

The Commissioner has authority under the 198th section of the act to appoint a sitting for the consideration of the grant of a certificate to a bankrupt, although the bankrupt does not make the application himself.

In this case Mr. Commissioner Stevenson had refused the bankrupt his certificate, and also refused him protection; and the case came before the Court, in the form of an appeal from his decision. The only point, however, worth notice turned on the question, whether the Commissioner had jurisdiction under the statute, 12 & 13 Vict. c. 106. s. 198, to appoint a meeting for the consideration of the grant of the certificate, without the bankrupt's own application for the same.

Mr. Swanston and *Mr. Renshaw*, for the petition of appeal.—Independently of the merits of this case, the decision of the Commissioner cannot stand, because he had no jurisdiction to call the meeting for the consideration of the question of the grant or refusal of the certificate to this bankrupt. This meeting was held not only without the application of the bankrupt, but was held against the argument and protest of both his attorney and his counsel. The certificate is a privilege, and has been so treated by this Court in some recent cases, and if the bankrupt does not seek to have the benefit of it, or does not esteem it a benefit, the Commissioner possesses no authority to call a meeting in order to thrust that benefit upon him; and if that be so, surely he has no jurisdiction to call a meeting, and thereat refuse the bankrupt what he does not ask. The question turns upon the true construction of the 39th section of the 5 & 6 Vict. c. 122. and the 12 & 13 Vict. c. 106, the Bankrupt Law Consolidation Act, 1849, taken together. The latter statute repealed the former act. By the 39th section of the 5 & 6 Vict. c. 122. s. 39. it is enacted, "That it shall be lawful for the Court authorized to

act in the prosecution of any fiat in bankruptcy already issued or hereafter to be issued, on the application of the bankrupt named in such fiat, to appoint a public sitting for the allowance of such certificate, of the purport whereof twenty-one days' notice shall be given in the *London Gazette* and to the solicitor of the assignees; and at such sitting any of the creditors of such bankrupt may be heard against the allowance of such certificate; but it shall not be requisite for such certificate to be signed by any of the creditors of such bankrupt; and such Court, having regard to the conformity of the bankrupt to the laws relating to bankrupts, and to the conduct of the bankrupt as a trader before as well as after his bankruptcy, shall judge of any objection against allowing such certificate; and either find the bankrupt entitled thereto, and allow the same, or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require: Provided always, that no certificate shall be such discharge unless such Court shall, in writing under hand and seal, certify to the Court of Review that such bankrupt has made a full discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fullness of such discovery, and unless the bankrupt make oath in writing that such certificate was obtained fairly and without fraud, and unless the allowance of such certificate shall, after such oath, be confirmed by the Court of Review, against which confirmation any of the creditors of the bankrupt may be heard before such Court." Then, to turn to the 198th section of the Bankrupt Law Consolidation Act, it will be found as follows, "That forthwith after the bankrupt shall have passed his last examination, the Court shall appoint a public sitting for the allowance of his certificate (whereof and of the purport whereof twenty-one days' notice shall be given in the *London Gazette* and to the solicitor of the assignees), and at such sitting the assignees or any of the creditors of such bankrupt who shall have given to the Registrar of the court three clear days' notice in writing of his intention to oppose, may be heard against the allowance of such certificate; and the

Court, having regard to the conformity of the bankrupt to the law of bankruptcy, and to his conduct as a trader before as well as after his bankruptcy, and whether the allowance of such certificate be opposed by any creditor or not, shall judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto, and allow the same, or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require." Now, although according to the 39th section of the repealed statute, 5 & 6 Vict. c. 122, it is enacted expressly that the application for the certificate must be made by the bankrupt himself, and there is not the same enactment in the 198th section of the Bankrupt Law Consolidation Act, still, upon a fair construction of that section, it was evidently contemplated by the legislature that the certificate meeting should be held only on his application. In the last act it is enacted that notice of the sitting on the allowance of the certificate is to be given to the solicitors of the assignees, and the assignees and the creditors are to give to the Registrar three days' notice of their intention to oppose the allowance of the certificate; but nothing is said about notice being given to the bankrupt, the person most interested in the proceeding — an omission which evidently shews that it was considered by the legislature that he was to take the initiative in calling the meeting. Notice to him was unnecessary, and if it were not so it might lead to very great injustice. The certificate is, as already has been said by one of your Lordships, a privilege to be conferred upon bankrupts in certain cases, and it would be no hardship to the creditors that the question of the certificate should not be taken into consideration, because by the bankrupt remaining without his certificate, all his property, and he himself personally, would be liable to their demands. On the other hand, a Commissioner had no authority to call a meeting for the purpose of granting or refusing a certificate, which the bankrupt did not ask, and when, perhaps, actuated by honest notions, he might desire that his liabilities should remain undiminished.

Mr. Bacon and Mr. Speed, for the assignees, were not called on.

LORD JUSTICE KNIGHT BRUCE.—The opinion of both of us, on the true construction of the 198th section of the Bankrupt Law Consolidation Act, especially when compared with the 39th section of the statute 5 & 6 Vict. c. 122,—and I will say, independently of that statute,—is, that the bankrupt's application is not necessary to give the Commissioner jurisdiction; that is our opinion on the question of the Commissioner's jurisdiction.

LORDS JUSTICES.

1852.

June 30;

July 8, 10.

} *Ex parte DUFUR, in re*
DUFUR.

Bankrupt Law Consolidation Act, 1849
—*Trading—Scrivener.*

A solicitor was adjudicated bankrupt as a scrivener, on evidence clearly establishing the fact; on appeal against the adjudication, he was examined, and the Court being satisfied that, upon the additional evidence, he was not a scrivener within the meaning of the bankrupt law, annulled the adjudication; the Lord Chief Justice expressing his agreement in the decision only on the authority of cases determined by Lord Eldon and Lord Chief Justice Gibbs.

The bankrupt in this case, Mr. Antonine Dufaur, carried on business, in partnership with Mr. Blakeney, down to March 1851, when it was dissolved. On the 22nd of May 1852 a petition was presented by Timothy Fogarty and Julia Regan, for an adjudication against him; and, on the 26th of the same month, he was adjudged a bankrupt. On the 2nd of June the bankrupt, by his solicitor, appeared before Mr. Commissioner Fonblanque, to shew cause against the adjudication, when the cause was disallowed, and the adjudication confirmed. The bankrupt did not submit or tender himself for examination before the Commissioner. The case now came before this Court, on a petition of the bankrupt, alleging that he was not a

trader, within the true intent and meaning of the bankrupt laws, and that the decision of the Commissioner was erroneous, for that the adjudication was invalid, on the ground that the proof of the trading was insufficient to support it, and it prayed that the adjudication might be annulled.

The evidence on which the adjudication was made was that of H. Stanley, who had been managing clerk of, and F. W. Dolman, who had been articled to, the bankrupt. The former deposed that, from 1843 to 1847, Dufaur exercised the trade, business, or profession of a money-scrivener, receiving other men's monies and estate into his trust or custody, and making merchandise thereof; and sought and endeavoured to get his livelihood thereby, as others of the same trade or business usually do; that the business of Dufaur, and of Blakeney, his partner, consisted for the most part of the procurement and advance of monies by way of mortgage and annuity, and occasionally for the discount of bills of exchange, for parties introduced to Dufaur, as requiring advances of monies: that Dufaur so applied monies in his hands, and which were entrusted to him for the purpose of finding securities for the same: that among several of such parties so entrusting their monies, were a Mrs. Browne, and Messrs. Basham & Blakeney, the trustees of Mr. and Mrs. Browne's settlement, a Mr. Cross, and a Mr. Williams, and others. The deponent then proceeded to set out items of a bill of costs, for one particular mortgage transaction, partly as follows: "attending Mr. S. jun., with reference to the trust fund, and raising of 250*l.* thereon," and "upon Mr. G. Hunter, who agreed to advance the same. Drawing memorandums," &c., (this loan went off). "Attending upon Mr. S. sen., who proposed that 530*l.* should be raised by way of mortgage, to pay off, &c., and begged me to write to Mr. S. jun. fully thereon, explanatory of the proposed transaction, and for his assent." "Attendances on Messrs. Basham & Blakeney, proposing security to them for 550*l.*, when they agreed to advance the money, provided the security was unobjectionable." "Attending in the city to sell out stock."

Mr. Dolman deposed at the outset in the same technical manner; and then

said, "Dufaur has been in the constant practice of receiving the monies of parties, the same being lodged in his hands by clients and others, for the purpose of being invested in securities, and for the purpose of finding securities for the same, and upon the money being invested he has charged not only for the mortgage deed and conveyancing part of the business, but also certain fees, bonuses, or compensation for such procurement of the said monies; but, in particular, the said Dufaur has invested monies entrusted to him, placed, or left in his hands by Dr. E. Blakeney, and a Mrs. Mary Browne, for the purpose of being invested in securities."

*** "That Dufaur, in an affidavit he made in April 1851, swore that he and his partner had been for the last four years concerned for the said Mrs. Browne, in investing her money on mortgages, or other securities; and that, in the course of such employment, they had recommended various investments to her, all of which had been accepted by her, and that she had from time to time left it to Dufaur and his partner to find fresh securities for such sums of money as might be paid off. That in answer to a letter from Dufaur to her, dated the 13th of August 1850, informing her of one sum of money having been paid off, and that another would be so soon, she wrote on the 4th of September, saying, 'I shall feel obliged by your investing the money for me in any way you may think desirable.' That 500*l.*, or thereabouts, was agreed by Dufaur and his partner to be advanced on behalf of Mrs. Browne to Lieut. Newenham." This deposition also referred to various accounts and bills of costs.

In the course of some disputes between Dufaur and Dolman, and of an investigation of the matters relating to Mrs. Browne, it had been asserted that the consent of Mrs. Browne was obtained to the loan of 500*l.* to Lieut. Newenham, and she made an affidavit in the Court of Queen's Bench as follows: "25th of April 1851. She has never been consulted, either by the said Dufaur or Blakeney, on the subject of a proposed advance of any portion of her monies to Lieut. Newenham: no mention has ever been made by either of them of such advances being required or contemplated, nor have the particulars or nature

of any interest or property whatever, proposed as a security for the loan of 500*l.* or any other sum of money, by the said Lieut. Newenham, been at any time mentioned to her; and, further, that had any such proposal been made to her she should most distinctly and peremptorily have declined to assent to any such application of her monies." This affidavit was read in evidence by the consent of the petitioner, to save the expense of an oral examination.

The affidavit of Dufaur stated his having been for twenty-one years past in practice as an attorney and solicitor; that he never exercised the trade, &c. (a denial of the technical passages in Stanley's and Dolman's depositions); that his business consisted of the usual business of an attorney and solicitor, namely, that of conducting affairs in common law, chancery, conveyancing, and all other branches of his profession; that some, but not the most part of his business consisted in the preparation of mortgages and annuities granted to clients; that he had not, since 1844, been in the habit of procuring the discount of any bills of exchange or promissory notes for clients or any other persons, but &c. (then followed an admission of two instances); that he had not, since 1844, invested any client's money, or any part thereof, in the discount of any bills of exchange or promissory notes, but, on the contrary, had most studiously avoided doing so; that monies had not been entrusted to him, nor to him and his late partner, for the purpose of finding securities for the same: he had never advanced the monies of Mrs. Browne, (repeating the names,) nor the money of any other client by way of mortgage or annuity, without first communicating to them the nature of the security on which he proposed to advance the same, and procuring their sanction, authority, and consent thereto. The affidavit then entered into a full explanation of several particular matters, and, in each case, stated the assent of the lender to the security, and contained the following passage: "I say that the statement in the examination of F. W. Dolman, sworn in this matter, that I have been in the constant habit of receiving the monies of parties, &c., (following the words of the deposition) is utterly

untrue; for I say I have never had money lodged in my hands, by clients or others, for the purpose of finding securities for the same."

In one of the accounts,—No. 6, "capital account," on which reliance was placed as proving that money was placed in Dufaur & Blakeney's hands, for the purpose of investment, at their discretion, were items such as these:—

To sums of money drawn out by Mr. Blakeney, for his own private purposes, between, &c., out of 1,202 <i>l.</i> 3 <i>s.</i> 1 <i>d.</i>	£	s.	d.
.....	187	14	6
To Best's mortgage	200	0	0
To Regan & Fogarty, in part of 600 <i>l.</i> agreed to be advanced to them on mortgage.....	420	0	0
To Mitchell, in part of 800 <i>l.</i> agreed to be advanced to him on mortgage	411	0	0
To Newenham, in part of 550 <i>l.</i> agreed to be advanced to him by way of annuity	420	0	0

On the other side of the account appeared, among others, these items:—

By cash, Salamans	£	s.	d.
.....	1,202	3	1
By cash, Beaver	200	0	0
By cash, Stevens	250	0	0
By cash, Rymer	400	0	0

Mr. Dufaur was examined and cross-examined at great length, and in the course of it he explained this to be that Dufaur & Blakeney had received monies belonging to Mrs. Browne, which had been lent on mortgage, and upon being paid off by Beaver, Stevens and Rymer, the amounts were paid to Dufaur & Blakeney as the solicitors of Mrs. Browne. As to the item 1,202*l.* 3*s.* 1*d.* and the 187*l.* 14*s.* 6*d.* as drawn out by Mr. Blakeney, Mr. Dufaur accounted for it thus: Mrs. Browne was present when Salamans paid the money, and requested her solicitors to put the money for safe custody into their bankers', which they did, and the 187*l.* 14*s.* 6*d.* was drawn out by Mr. Blakeney, the partner, upon some understanding or agreement (unknown to him, Dufaur,) between him and Mrs. Browne, they being brother and sister. The 1,202*l.* 3*s.* 1*d.* was never in the hands of the firm for any other purpose than for safe custody, Mrs. Browne not having any banker. He also swore that on every occasion when he advanced money for a client, he had the authority of that client to lend it on a particular security. Mr. Dolman was also examined,

and swore that while in Dufaur's office he knew the nature of his business, and that his chief business was to procure money "for money agents," that is, "for persons who are employed to borrow money." In the bills of costs relating to Mrs. Browne's money, it appeared that the only charges made by Mr. Dufaur were the usual solicitor's charges. In one or two particular instances in the bills, charges for commission on the receipt of rents appeared to have been made. The decision of the Court is founded on the case of Mrs. Browne, and therefore the other cases referred to in the evidence are omitted here.

Mr. Swanston and Mr. Bagshawe, for the appeal.—In order to support the adjudication of the Commissioner, it must be shewn that the alleged bankrupt was a scrivener when the petitioning creditors' debt was contracted in 1849; and beyond this, it must be shewn that scrivening was a general course of dealing of Mr. Dufaur. Did Mr. Dufaur, according to the definition in the statute 6 Geo. 4. c. 16, and continued by the present bankrupt law, "receive other men's monies or estates into his trust or custody"? Upon the evidence he most unquestionably did not. That he was not a "genuine scrivener" is plain, for we learn from the Lord Chief Justice Gibbs, in the case of *Adams v. Malkin* (1), that the last of that class was one Jack Ellis, a contemporary of Dr. Johnson. Then, was he an attorney employed by his clients not simply in his character of attorney, but as a money agent, to invest their money upon securities at his own discretion? Assuredly not. Mr. Dufaur's evidence disproves this in his explanation of Account No. 6, and the very items relied on in the depositions on which the adjudication was made disprove instead of support it. What Mr. Dufaur was, was an attorney who received money as a channel to convey it from Mrs. Browne and other persons, to lend it to other persons, making his charges as an attorney, and in some instances, charging commission, yet certainly not a scrivener; for, as the Lord Chief Justice said in the before-mentioned case, "this is only having incidentally on particular occasions the money of his clients

(1) 3 Campb. 539.

to lay out for them." In every case it is to be ascertained whether the business transacted was incidental to the character of an attorney, or distinct from it; for to constitute him a scrivener, the attorney must get the money into his hands in a course of trading, and it is impossible to deny that Mr. Dufaur did not receive monies in any such manner as trading, or to deny that he did transact the business in his character of an attorney.

Ex parte Bath, Mont. 82.

Malkin v. Adams, 2 Rose, 28; 2 Ves. & B. 31.

Ex parte Paterson, 1 Rose, 402.

Hutchinson v. Gascoigne, Holt, 507.

Mr. Bacon and *Mr. Cooke* were for the opposing creditors, and the official and trade assignees.

July 10.—LORD JUSTICE LORD CRANWORTH.—*Mr. Antonine Dufaur*, a solicitor of many years' standing and practice, being adjudicated a bankrupt as a scrivener within the meaning of the bankrupt law, appeals from the decision of Mr. Commissioner Fonblanque, who has, upon the evidence before him, so adjudicated. That evidence was of two clerks who had been in Mr. Dufaur's employ, and who said what, if true, was conclusive, and left the Commissioner no alternative. It is to be remarked that Mr. Dufaur did not tender himself for examination before the Commissioner, and doubtless if he had, that learned person would have taken his examination, and he now demurs to the result of the evidence. The evidence which was before the Court below, as to the practice of scrivening was, as I before observed, the testimony of two clerks who were formerly in the service of Mr. Dufaur, and, if their evidence is to be relied upon, no doubt the practice of scrivening within the meaning of the bankrupt law is made out. The question is, whether the evidence of these two persons is to be relied upon? They say that the general practice of Mr. Dufaur's business was the receipt of monies from clients, and the laying of it out upon securities at his discretion, and from time to time, as he found convenient opportunity. But their evidence is general, not specific, excepting to a certain extent as to the

dealings with the monies of Mrs. Browne. This Court is not at liberty to rely upon general allegations, unsupported by specific facts or instances. If such general evidence were to be relied on, no doubt can be entertained that Mr. Dufaur is a scrivener who receives other persons' money into his custody or trust in the manner stated in the bankrupt law. The trade of a scrivener has ceased in this country for two or three centuries, and its business is now divided between bankers and brokers. As bankers are now by statute declared to be within the operation of the bankrupt law, it never matters whether a banker has traded as a scrivener or not; but as attornies, as such, are unquestionably excluded from the operation of the bankrupt law, it is frequently, as in the present case, very important to see whether an attorney who is sought or seeks to be made a bankrupt can be so made by the fact of his acts of scrivening. In the case of *Adams v. Malkin*, it was said by Chief Justice Gibbs, "At the present day, the banker occupies one department of the business of the scrivener, by being the depository of the money, and the attorney the other, by drawing the securities. The banker would not be an attorney, though he were occasionally to fill up bonds for his customers; nor does the attorney become a money scrivener, though on particular occasions he incidentally has the money of his clients to lay out for them. In order to make a man a money-scrivener, he must carry on the business of being trusted with other people's monies to lay out for them as occasion offers. It is not being sent with the money of his client, or receiving it from the person with whom his client may have previously contracted, that will make an attorney a money-scrivener. In that part of the transaction, he is no more than a person employed to fetch and carry. Having negotiated the loan, and drawn the deeds, his happening to receive and pay the money is incidental to his business of an attorney. Nor, if on one or two occasions money were deposited with him to lay out, would that constitute him a money-scrivener. He must be carrying on generally the business of a money-scrivener. That must be part of his known occupation." I do not quarrel with the law of

that case,—the question is, whether Mr. Dufaur is brought, upon the evidence before us, within it. The evidence shews that from 1847 to 1848 he received monies of Mrs. Browne. Arrangements were made before the money was received. Several cases were relied on, but no evidence on more than one or two, and Mr. Dufaur denies that any other ever existed on which the question could arise. In the absence of any such evidence I think we are bound to believe Mr. Dufaur, and we must rely on Mrs. Browne's case, if any case can be relied on. Even supposing the evidence of the two late clerks of Mr. Dufaur, with relation to Mrs. Browne's case, were to be taken as true, still I am of opinion that it will not be enough, for the case of that lady is most peculiar. In every instance but one of the investment of her property, the security was agreed on beforehand; and if it had not been so, still, if the facts are true of her being the wife of a former partner of Mr. Dufaur, and the sister of a subsequent partner, and that he has been wholly confided in by her as to the disposal of her money, they will account for his dealing with it, and we should not, in any case of such description, hold Mr. Dufaur to be a scrivener. Lord Eldon and Lord Chief Justice Gibbs have both plainly laid down that the fact of scrivening, isolated acts of scrivening, is not sufficient to support a commission against an attorney as a scrivener, but it must be shewn that the general course of his business is of that nature. It is not to be forgotten that in all Mrs. Browne's investments Mr. Dufaur charged his attorney's costs only. Lord Chief Justice Gibbs says, in the case I have before referred to, "Though an attorney may have incidentally acted as a scrivener, that is not sufficient: though money may have been deposited with him, for which he was afterwards to seek a borrower, a few insulated instances of that sort occurring in the course of his business as an attorney, would not bring him within the operation of the bankrupt laws; for that would not be 'using the trade or profession of a scrivener, receiving other men's monies or estates into his trust or custody.'" And Lord Eldon, in *Ex parte Paterson*, observes, "The next question is, as to the trading as scrivener. That does not depend upon

the fact, whether the bankrupt has or has not occasionally done acts which a scrivener peculiarly and properly would have done; not upon what he may have done upon one day, and what upon another, but upon his intention generally to get a living by so doing." Now, this requirement is not proved on the evidence before us to exist in the present case. The few cases of Mrs. Browne, and Dr. Blakeney and others, so far as they go, are exceptional, and there is no evidence of a general intention on the part of Mr. Dufaur to get money by scrivening, and these cases are explained by the particular and intimate connexion existing between the parties. On the whole, I am of opinion that the examination of Mr. Dufaur, whose evidence was not before the Commissioner, has shewn that he is not a scrivener within the meaning of the bankrupt law, and the adjudication must, therefore, be set aside; but I do not consider Mr. Dufaur entitled to any costs, as he did not tender himself for examination before the Commissioner. It is not necessary to decide anything as to any charges made by Mr. Dufaur for commission, for the case does not depend on that. He must undertake not to bring any action.

LORD JUSTICE KNIGHT BRUCE.—The only possible objection to the adjudication the Commissioner has made, and which upon the only evidence before him he was bound to make, is, that Mr. Dufaur is not, and has not been, a scrivener, within the meaning of the bankrupt laws. Considering that the petitioner did not offer himself before the Commissioner for examination,—considering how he has conducted himself—considering that he is probably or certainly insolvent, I was at one time disposed to refuse to interfere to assist him against the adjudication, and to require that an action should be brought. Upon the whole evidence now before the Court—evidence not before the Commissioner—I agree with the conclusion of my learned Brother; but I agree because I find the law, as applicable to the facts proved, is in support of that view, and I agree only because of authority by which I do and ought to feel myself bound, and not on my own view of the question. The authority is that of great Judges and eminent men,

and is such as I consider myself bound by. I also agree with Lord Cranworth in holding that Mr. Dufaur can have no costs, and that he must undertake not to bring any action.

LORDS JUSTICES.
1852.
July 9, 10. }

Ex parte GULL, in re
GULL.

Bankrupt Law Consolidation Act, 1849
—Certificate.

A, a tallow-broker in business with B, became bankrupt, and on application for his certificate had the same suspended for two years, and then to be of the third class. The case of suspension was supported by the Commissioner on two grounds: first, that the bankrupt had fraudulently induced a creditor to forbear enforcing payment of a certain sum by withholding information known to him and not known to the creditor, and which, if known, would have induced the creditor to enforce payment; the other case was for receiving money for goods alleged by the bankrupt to have been purchased, and then re-transferring the goods to the person of whom he bought them, so that the creditor did not receive the goods, and lost his money. The Lords Justices were of opinion that the withholding of information, or the silence of the bankrupt regarding that information, was not dishonestly intended in the one case, and the act by which the goods were re-transferred and the money lost in the second case was, upon the evidence before the Court, not fraudulent, so far as the petitioner was concerned, and therefore they granted an immediate certificate of the first class.

In this case the bankrupt, Mr. Gull, carried on business in partnership with Mr. Wilson, as Russia brokers in Old Broad Street, and they having been adjudicated bankrupt applied to the Commissioner, Mr. Fonblanque, on the 24th of May last, for their certificates; but by an order, dated the 2nd of June, the certificate of Mr. Gull was suspended for two years, and then was directed to be of the third class, and the bankrupt was to be in the mean time without protection. The present appeal was presented against this decision. The cer-

tificate of Mr. Gull was opposed on many grounds, but on the appeal only two were insisted on, and they are distinguished here by Mr. Mollett's case and Mr. Kelly's case.

It appeared (from statements made, at the hearing of this appeal, by the official assignee and by the solicitor for the creditors' assignees) that Mr. Gull, who had been many years in business, failed in 1841, when he paid 4s. in the pound, and his failure was then attributed to the stoppage of large houses with whom he had dealings. He continued in business until Mr. Wilson joined him with 2,000*l.* capital. Mr. Mollett's case was thus stated by the Commissioner in his judgment:—"Mr. Mollett having sold a large quantity of tallow, as to fifty casks of which a specific objection attached, Gull obtained from Mollett's brother, before he had paid for the tallow, a delivery order. Mollett's brother inadvertently gave that order sooner than he ought. Another brother, whose duty it was as bookkeeper to look to these matters, seeing that the proper time of payment had arrived, called upon Gull for such payment, and then he was met by an application for time. Gull then went to the elder Mollett, and not disclosing that he had not only got the delivery order, but that he had sold the tallow, and been paid for it, obtained the forbearance of the payment of 700*l.*, which Mollett most distinctly swore he would not have granted but on the terms of the tallow being deposited as security, and in the belief that the tallow was at that time deposited at the wharf, and, consequently, Mollett retained, probably more as a memorandum than security, the delivery order, which he believed to be the only delivery order. As respected that transaction, the evidence of Mollett himself, of Robert Mollett, and of Isaac Mollett was clear, consistent; and distinct, and in a great measure corroborated by the evidence of Wilson; but Gull, on the contrary, repudiated the transaction. He (the Commissioner) could not say that either in its circumstances, or in the manner, the evidence of Gull was such that he could balance it against the conjoint evidence of the three Molletts, and especially with the evidence of the bankrupt Wilson, who swore distinctly (and he had no reason to doubt the truth of his assertion) that he repeatedly

brought to the notice of Gull that he had not paid Mollett for the tallow, but he put him off by saying that Mollett did not want the money. He (the Commissioner) must, therefore, come to the conclusion that the case of having obtained the forbearance of the payment of 700*l.* was under the false pretence that the tallow was still lodged as security; and was a most fraudulent act."

The case of Mr. Mollett was at the present hearing represented to be this: the delivery note for the fifty casks was sent to the bankrupts on the 1st of April, and by them transferred the same day to the persons for whom the tallow had been bought, but no demand for payment was made by Mollett on that day, and no payment was then made. The delivery order for the remaining thirty-two casks was sent to the bankrupts on the 8th of April, and paid for by them on the same day, and on the 15th of April a second delivery order for the fifty casks was sent and returned by the bankrupts to Mollett; and on the 19th, application being made for payment by Mollett's brother, Gull asked that the 700*l.* might remain as a loan, he paying 100*l.* on account, which was agreed to by Mollett, and the 100*l.* was paid. Thus matters stood until November, and although transactions between the parties took place to above 20,000*l.* no notice was taken by any one of the 700*l.* Mollett in his affidavit swore that he had allowed the money so to remain in the belief that the fifty casks had not been delivered, but he did not state that such a representation of his belief had ever been made to the bankrupt. Mr. Gull swore that he never made any false representation, and that he was not aware until after the failure that Mollett was acting under such an impression.

With regard to Mr. Kelly's case, the matter was thus stated in the Commissioner's judgment: "Kelly ordered from Dublin twenty-five casks of tallow. On the 13th of November the bankrupts sent him word that they had purchased the tallow for him, and Kelly thereupon remitted to them 330*l.* which arrived on the Saturday after, and was acknowledged by the bankrupts to have been paid into their hands on the 17th of November. Nothing could be more clear than that the bankrupts, after having written

to Kelly to tell him that they had bought twenty-five casks of tallow on his account, and after having received payment, had no right, and could have no right, whatever to dispose of that tallow; it was as much Kelly's as if it had been delivered in Dublin. Nothing until the bankruptcy shewed but that the ostensible ownership was in Gull and Wilson, nor made any alteration in the title to the property, and it was doubtful if even bankruptcy made any alteration in the title to it. Independently of the gross irregularity—to say no more—of this transaction, it took place at a time when the bankrupts, and especially Gull, must have known that they were, if not insolvent, threatened with immediate insolvency. The immediate cause of failure was, that they had very large transactions with some Scotch houses. Now, about that time some of the Scotch houses began to shew symptoms of distress, some as early as August, but several in September, and at the latter end of October the largest had actually failed. The transactions with these houses extended to more than 30,000*l.*, for which accommodation bills were given. It was clear, therefore, that when Gull and Wilson sold Kelly the tallow they had good warning that they were insolvent; and so pressing was that warning that on the 17th of November, the Monday after the Saturday on which they received Kelly's money, the bankrupt Wilson withdrew all the money remaining at the bank, and thereby occasioned an immediate stoppage of the house. He (the Commissioner) must, therefore, conclude that Kelly's case was abundantly proved, and that it was a case of fraudulently appropriating property which did not belong to them." The case as to Mr. Kelly was thus explained by Mr. Gull. The money was remitted on the 15th of November, in the absence of Gull, and was paid into the bankers', and on the 17th Mr. Wilson, for some cause unexplained, drew out all the money from the bankers, and being by this act of Wilson unable to pay for the goods he had purchased for Kelly, he re-transferred them to Palmer & Co., from whom they were bought. Beyond this, from Gull's uncontradicted affidavit, it appeared that before the certificate meeting Kelly called upon him and offered not to oppose if he

would make an arrangement for paying him. This Gull refused, and Kelly opposed the grant of his certificate; and, subsequently, after the petition of appeal was presented, Kelly again called and asked what he, Gull, was going to give him not to oppose the appeal. Upon these materials and upon these points, the petition was heard.

Mr. Swanston and *Mr. Roxburgh* supported the petition of appeal.

Mr. Bacon and *Mr. Cooke*, on behalf of the creditors *Mollett* and *Kelly*, supported the decision of the Commissioner.

Mr. Graham, the official assignee, and *Mr. Murray*, the solicitor to the creditors' assignees, were questioned by the Court, and stated that they attributed the failure of *Mr. Gull* to the losses occasioned by the failure of houses with which the bankrupts were extensively engaged; they believed there had been no intentional irregularity in the matter of *Mollett* or *Kelly*; that there had been no extravagant expenditure in the personal outlay of *Mr. Gull*; that the failure was attributable to misfortune in the proper sense of the term, and that there had been no reckless or imprudent dealing.

Mr. Swanston was not called on to reply.

LORD JUSTICE KNIGHT BRUCE.—This is a petition of appeal from an order of the learned Commissioner in Bankruptcy, *Mr. Fonblanque*, suspending the certificate of the petitioner for two years without protection, or, at least, without protection for a considerable portion of time; and it comes before the Court under unusual circumstances. The learned Commissioner appears to have proceeded upon five or six distinct grounds, but only as to two of them has any evidence been brought to our attention, or, indeed before us; and the others have in effect been tacitly disclaimed by the opposing creditors, and more than tacitly by the assignees, the latter, most certainly, and the others, as I believe, represented by solicitors of reputation, standing, and experience. It would not be reasonable to suppose or suspect collusion; nor am I inclined to think that merely on the two grounds I have already

mentioned as those to which the evidence in the contention before us has been confined, would the learned Commissioner have made the order he has made. We are bound, as we conceive, to confine our attention to those two grounds, one being that the debt of *Mr. Thomas Kelly* was fraudulently contracted by the bankrupts, and the other, that they, or the petitioner, fraudulently induced another creditor, *Mr. John Mollett*, to refrain from enforcing or pressing his claim, not, however, by way of contract, or in such a way as to bind *Mr. Mollett*. They are the two opposing creditors; for the assignees, though watching the case, take no part as assignees against the petitioner, in whose favour, rather than against, the statements made to us in court, by the official assignee, and *Mr. Murray*, the assignees' solicitor, have been made.

With regard to *Mr. Kelly*, he has, since the bankruptcy, shewn such a want of the most ordinary attention and propriety with regard to his debt, as almost to raise a case of personal charge against him; but we should be considered as justified in dealing with this case as if he had not acted with the gross incorrectness with which he has acted, and we do so. I think, however, whether assuming or not assuming perfect integrity on his part, that his case fails. A quantity of tallow was bought, or to be bought, on his account, but he had not the tallow, and he charges the bankrupts or the petitioner, one of them, with fraud,—in this respect, I think, on the evidence, without foundation,—for I believe the money was received by them *bond fide*; at least, *bond fide* so far as the petitioner was concerned, and that it was not for want of integrity on the petitioner's part that *Mr. Kelly* had not his tallow. Certainly, the liability of a trader for the acts of his partner is sometimes carried to a great extent, but to apply it to the principles which regulate debt would be rather too strong. I believe the petitioner, when he made his communication, did honestly the act which prevented *Mr. Kelly* from having his tallow; and whatever ought to be thought of *Mr. Wilson's* conduct, there can be no charge of fraud towards *Mr. Kelly*, by *Mr. Gull*, to deprive him both of money and goods

in respect of which the money was sent: all which I might have regretted now, had his subsequent conduct been different. His case, I repeat, fails on every ground, and under whatsoever view.

The case of Mr. Mollett stands thus—he refrained, he says, from enforcing his demand, and from pressure, in consequence of the fact, known, as he asserts, to the petitioner, and unknown to Mr. Mollett, and which, had he known, he would not have acted on. But it is neither proved nor asserted that the petitioner made any false statement or misrepresentation. The complaint is, that he was silent. It is true that instances may well be in which silence may be equivalent to actual falsehood. Is this one? I think not. The question is, whether the facts in evidence ought to lead to the inference that the silence could not have been that of an honest man, or was ill intended, or for an unfair motive. If Mr. Mollett was deceived or misled at all (of which I am not by any means persuaded) he was not so by or through any improper conduct or intention on the part of the petitioner, whose account and explanation of the matter I believe. But I have doubted considerably whether, on the composition made some years ago with the petitioning creditors, that we heard yesterday from Mr. Murray and the official assignee, Mr. Gull's certificate ought to be one of the first or second class; I have come to the conclusion, however, that a case is not made out for depriving him of his certificate of the first class, which may, I think, consistently with the interests of society, with the rules of law, and with the merits of the litigants before us, be at once granted.

LORD JUSTICE LORD CRANWORTH.—I have nothing to add, except to entirely concur in the judgment delivered by my learned Brother. We both arrived at the same conclusion, and there was only one doubt, and that was as to the class of certificate, and I am very happy that any doubts on that subject are removed. I do not mean to throw on him the responsibility of giving the certificate of the first class, for, on considering the matter, we thought that a case had not been made out

for depriving the party of the certificate of the first class. The refusal must be reversed, and a first-class certificate immediately granted.

LORDS JUSTICES. } *Ex parte MARTYN, in re*
1852. } *MARTYN.*
May 7.

Bankrupt Law Consolidation Act, 1849
—Certificate.

E. M. and H. M. purchased a business of their brothers, but it was not paid for. E. M. attended to the accounts, so far as they were attended to; and H. M. performed the duties of traveller to the business. E. M. and H. M. on various occasions raised money by deposits of goods and paid 60l. per cent. for discount. H. M. ordered goods one day and pledged them on the next. The brothers, the vendors of the business, sued for the purchase-money and issued execution on a judgment in the action. Both E. M. and H. M. were adjudicated bankrupts, and the Commissioner refused them their certificates or protection, on the ground of not keeping proper books of account (as to E. M., destruction of books), obtaining goods for the purpose of pledging and pledging them, and fraudulent preference to the brothers who sold the business. H. M. appealed, and swore that he pledged the goods to meet a sudden demand for payment of bills falling due; that he believed he was solvent when the goods were bought, and that he had nothing to do with the keeping of the books, and he produced a witness who swore that the goods were ordered because they were wanted in the stock. The Lords Justices were of opinion that there was no wrong intention as to the books or the pawning, and that there was pressure by the vendors, and, acquitting the appellant of fraud, granted him a second-class certificate, to be dated eight months after the adjudication.

The petitioner in this case, Henry Martyn, carried on the business of woollen-draper, in partnership with his brother Edward Martyn, in Aldgate High Street. They took the business in 1839 from their brothers Thomas and Robert Martyn, for

which they agreed to pay 300*l.*, and to take upon themselves a debt of 500*l.* At the date of the bankruptcy their debts amounted to 5,578*l.* and they were liable on bills of exchange, accepted by other persons for their accommodation, in 1,845*l.*, making together 7,423*l.* A rough estimate was made of the profits (there not being sufficient books), which were calculated at 3,677*l.* The bought-ledger and the goods account were regularly kept, though the others were defective, and in fact there was no stock-book or cash-book. The property realized only 883*l.*, there being an admitted loss on it of 500*l.*, and the loss by bad or doubtful debts was about 2,000*l.* Both the brothers were adjudicated bankrupts on the 15th of December 1851; and on the 29th of March following Mr. Commissioner Goulburn refused them both their certificates or any protection excepting during the twenty-one days allowed for appeal. The grounds of his refusal were four: not keeping books, destroying books, buying goods for the purpose of pledging and pledging them, and fraudulent preference. As to Henry Martyn, who now appealed from the Commissioner's decision, the second ground did not apply.

The other three points from the evidence before the Commissioner (but which was varied before this Court) appeared to stand thus: Transactions with Mr. Roberts (after mentioned) were not entered in the books of account; nor were the debts due to the bankrupts' brothers for the purchase of the business; nor was a sum of money, said to have been sunk in the business, and derived on the marriage of one of the bankrupts from his wife. No stock-book was kept, at least no proper stock-book, and no cash-book was to be found. The matter of the pledging was this:—when money was wanted, part of the stock was taken to the house of a person named Gregory, who made advances on it at the rate of 60*l.* per cent. In addition to this, the bankrupts received advances of money at the same rate from an attorney named Roberts, on discount of their bills, but no pledges were made to him. The most important instance of pledging was, that on the 5th of August the bankrupt, Henry Martyn, ordered of Mr. Ledgard certain goods, and on the same day he

ordered other goods of Mr. Nash, and on the following morning the goods were removed to the house of Mr. Gregory, and pledged to raise money. It did not appear that any representation was made to Mr. Ledgard or Mr. Nash, but the goods were purchased in the ordinary manner as if for sale. The question of fraudulent preference arose out of the debt alleged to be due to the brothers for the purchase of the business, and the Commissioner was of opinion that the transaction was one which was described in the 4th clause of the 256th section of the Bankrupt Law Consolidation Act, namely, "fraudulently, in contemplation of bankruptcy, and not under pressure from any of the creditors, with intent to diminish the sum to be divided among them." The writ at the suit of the brothers issued on the 22nd of July, and judgment was signed on the 5th of August. One of the brothers required security for the debt, and that was alleged as the pressure by a creditor to justify the execution. It turned out that judgment had been signed too soon, though it was not executed till the 19th of the same month. An attempt was made on behalf of the creditors to persuade the two bankrupts to commit an act of bankruptcy before the sale under the execution could take place, upon which Edward Martyn agreed to execute an assignment, but Henry Martyn refused for a time, and when he consented the sale had already taken place and Robert and Thomas Martyn had obtained the property. The Commissioner held that this was done in order to defeat the claims of the creditors, and was a fraudulent preference.

Henry Martyn, the petitioner, appealed from the decision of the Commissioner, and filed an affidavit in which he swore that when he entered the business he was only twenty years of age; that his partner was eight years older; that his brother kept the books; that he was himself the traveller; that the transactions of the discounts by Roberts and Gregory were duly and regularly entered according to the usual course; that the shopman, Wilson, told him on the 5th of August that two particular sorts of cloth were wanted for the stock, which he, Henry Martyn, accordingly ordered of Mr. Ledgard and

Mr. Nash; that being informed by his brother that on the 6th of August bills to the amount of 80*l.* were falling due, and that there was no money to meet them, he took these two parcels of goods, which were then unpacked, and pledged them with Mr. Gregory; that his reason for pledging these in preference to other goods was that the "tabs" being on them, the length, the quality and the price of them would be at once seen, and being already packed they could be the more easily removed, and that at this time he believed he was solvent, although he had no other means of raising the money to meet the bills. Wilson, the shopman, in his affidavit, stated the same facts as to the sorts of goods wanted for the stock. During the argument, their Lordships offered the assignees an opportunity of having Wilson before the Court and cross-examining him, but the offer was declined.

Mr. Swanston and *Mr. Roxburgh* supported the petition of appeal.

Mr. Rolé and *Mr. Bagley*, for the assignees, opposed it.

LORD JUSTICE KNIGHT BRUCE.—The first question is, whether it has been established against this bankrupt that he has been guilty of fraudulent conduct, or whether his conduct comes within the description of acts of impropriety beyond unskillfulness or imprudence, because, were such a case brought home to him—to any man engaged in trade—the general interests of justice and the safety of mankind would require it to be dealt with severely. Instances have been adduced in which it has been contended by the assignees, with great propriety, that the withholding of entries from the books cannot be attributed to unskillfulness or neglect, but must be attributed to bad and dishonest intentions. Upon this reliance must not be placed, for it is to be remembered that Henry Martyn, the petitioner, was not the keeper of the books, but a traveller, his brother Edward Martyn taking, or professing to take care of the book-keeping. Nor is it to be forgotten that the petitioner was partner with a brother eight years older than himself, and that when the business commenced the

petitioner was only a young man of twenty years of age. I do not discover in the books or otherwise any evidence to satisfy me of the fact on which the assignees have relied, namely, fraudulent omission of entries attributable to the petitioner. I do, however, find entries of exorbitant and oppressive interest made in a general way, without day of the month or any other particulars. This, however improper, I cannot attribute to fraud or bad intention in Henry Martyn. I am clearly of opinion, and so, I believe, is my learned Brother, that if fraud or bad intention in such conduct could be shewn, no amount of punishment which this Court has the power of inflicting could be too great to mark its sense of the impropriety of such conduct. Then, again, there is an omission of the entry of the sum they owed when they began business, and it does not appear that they kept a book in which such entry could be made. So, too, the fortune brought by the wife of one of the bankrupts; but, however improper such an omission may be, and few things can be more improper, still I do not find it necessary to attribute it to fraud or bad intention. Then comes the consideration of the conduct of the brothers as to the execution; and upon the evidence before the Court, it appears that the conduct of Robert and Thomas Martyn was rather harsh than collusive, and therefore the conclusion is that the petitioner and the other bankrupt did not permit the execution fraudulently or dishonestly. On these two grounds, therefore, namely, the defective keeping of the books and the fraudulent conduct as alleged in respect of the execution, we are not satisfied that the assignees have substantiated their case against the petitioner, Henry Martyn.

Then there is the third ground alleged against the petitioner,—and if it were established, hardly any amount of severity which the Court could visit upon the bankrupt would be adequate to its gravity,—the offence, namely, of taking up goods from a tradesman apparently in the ordinary course of business, but with the view and intention to pledge them. The time of the pledging of the goods was, undoubtedly, most suspicious; but the affidavit of Wilson, the shopman, is

clear and explicit, that he pointed out what goods were wanted and they were accordingly ordered, and although we gave the assignees the opportunity of cross-examining this witness, they did not avail themselves of the offer. From this person's account the goods were wanted, and then it appears that a sudden pressure for money arose, and the goods were pledged to answer immediate necessities. Much stress has been laid on the fact of the goods pledged being the very goods which but the day before had been received by the bankrupts, but the answer given to that was plausible, and the selection of these very goods was also plausible, for the tickets or "tabs" upon them shewed at once the quality, value, and quantity contained in each parcel.

There remains only this point, namely, that the bankrupts had been in very considerable difficulty for a long time; but the petitioner in his affidavit swears that he did not know that the partnership was in a state of insolvency, and as he did not attend to the books I see no reason for disbelieving him. I do not think any stress can be laid on that. Considering, therefore, the age of the petitioner when he began business, and recollecting that his elder brother was his partner, and considering that from the middle of February he was without protection, substantial justice will be done by granting the petitioner a certificate of the second class to be dated eight calendar months from the date of the adjudication.

LORD JUSTICE LORD CRANWORTH.—I only add a few words to express my entire concurrence in what has fallen from my learned Brother. It must not be thought that, because we differ from the conclusion at which the learned Commissioner has arrived in this case, we differ from the principle on which he acted. On the contrary, it must be distinctly understood that when such a course of dealing is established as that of taking up goods with the intention of pledging them, the Court will visit such fraudulent misconduct with the utmost severity. Here we are not forced to believe, and do not believe, that the petitioner had any dishonest intention, and he will, therefore, be enti-

tled to his certificate of the class and dated as my learned Brother has intimated. I may add, that if Wilson's affidavit be true, fraud is disproved, and I think it would be very unsafe to deal with the petitioner on a footing of fraud after such a course of trading as is here proved.

LORDS JUSTICES.

1852.

April 30;

May 1, 9.

Ex parte GLYN, in re
ASHLIN.

Bankrupt Law Consolidation Act, 1849, ss. 44, 54.—Payments to the Chief Registrar's Account—Allowance to Official Assignees.

The 54th section of the statute having enacted that certain amounts, not less nor greater than specified amounts per cent. on the gross produce, from time to time should be paid by official assignees to the "Chief Registrar's Account," the amount to be fixed by the senior Commissioner, with the approval of the Lord Chancellor; and the chief Commissioner having fixed the sums, with such approval, the Court refused to interfere to alter the same; but the Commissioner having made such allowances to the official assignee as, according to the amount of the bankrupt's estate and the nature of the duties performed, were, in his opinion, just and reasonable, the Court differing from the opinion of the Commissioner, and the official assignee not requesting the Court to fix the amount of allowance, the matter was, on this point, sent back to the Commissioner for re-consideration.

This was a petition presented by Messrs. Glyn, Currie & Gurney, the creditors' assignees to the estate of Mr. Spencer Ashlin, the bankrupt, by way of appeal from the order of Mr. Commissioner Goulburn, praying that such order might be discharged or varied, and that the difference between the amount actually paid to the chief Registrar's fund and such sum as the Court might find properly payable, might be refunded to Mr. Pennell, as official assignee, and that the Commissioner might be directed to review and to re-consider the

allowance or per-centage allowed to Mr. Pennell, and that the difference between the sums allowed and the amount which the Court should think fit and reasonable might be refunded to the bankrupt's estate. The material facts appearing upon the petition, and which were not disputed, were these:—Mr. Pennell, the official assignee, had received money belonging to the bankrupt's estate to the gross amount of 20,928*l.* 17*s.* 9*d.* up to the 24th of January 1852, which sum had been payable to him in the following way:—On the 18th of November Glyn & Co. paid over 15,539*l.* 2*s.* 6*d.*; on the 5th of December the sum of 1,037*l.*, the amount of one bill of exchange, and on the 9th of the same month 663*l.*, amounting together to 1,700*l.* were paid to him, and between the 18th of November 1851 and the 24th of January 1852, the day appointed for the audit of the accounts of the official assignee, he received, in twenty-three sums, money amounting to 3,689*l.* 15*s.* 3*d.*, making a gross amount of receipts of 20,928*l.* 17*s.* 9*d.*; of these twenty-three sums, fifteen were debts not exceeding 100*l.*, and amounted altogether to 444*l.* 7*s.* 5*d.*; four were debts exceeding 100*l.*, but not exceeding 500*l.*, and amounted altogether to 1,257*l.* 5*s.*; two were debts exceeding 500*l.* and not exceeding 1,000*l.*, and amounted to 1,195*l.* 0*s.* 10*d.*; and the remaining two were sums of 43*l.* 2*s.* and 750*l.*, the produce of the sale of furniture and other similar property. The official assignee, in his account, debited the estate with, among others, payments in respect of the 20,928*l.* 17*s.* 9*d.*, as follows:—"To chief Registrar's fees, 5*l.* per cent. on 500*l.*, 25*l.*; 3*l.* per cent. on 4,500*l.*, 135*l.*; 2*l.* 10*s.* per cent. on 5,000*l.*, 125*l.*; 1*l.* per cent. on 10,000*l.*, 100*l.*; 10*s.* per cent. on 928*l.* 17*s.* 9*d.*, 4*l.* 12*s.* 10*d.*;" these with other sums paid to the chief Registrar's account, amounted altogether to 419*l.* 5*s.* 10*d.* These, then, were the official assignee's charges and per-centage up to and including the first dividend under the estate; there were six sittings only of the Commissioner in the prosecution of the adjudication, for each of which 11*s.* was paid for court charges. The total receipts of the official assignees amounted to 21,584*l.* 2*s.* 9*d.*; the total payments among the creditors were 15,810*l.* 6*s.* 2*d.*

The charges of the official assignee in respect of the receipts (including 20*l.* for investigating the accounts) were 197*l.* 16*s.* 2*d.*; and for distributing the 15,810*l.* 6*s.* 2*d.* among thirty-three creditors and claimants, 169*l.* 15*s.* 11*d.*, making, with the sum of 419*l.* 5*s.* 10*d.*, paid to the chief Registrar's fund, a total out of an estate of 21,584*l.* 2*s.* 9*d.*, of 786*l.* 17*s.* 11*d.*

By the 54th section of the Bankrupt Law Consolidation Act, 1849, it is directed "That the official assignee of each bankrupt's estate, shall pay to the account intituled 'The Chief Registrar's Account,' such sum, not less than one-eighth of a pound, and not exceeding 5*l.* per cent. on the gross produce from time to time of any such estate; such sum within the limit aforesaid, and the time or times for payment thereof, to be fixed by the senior Commissioner, with the approval of the Lord Chancellor; and the senior Commissioner, with the like approval, may from time to time lessen or increase such sum, within the limit aforesaid, as may seem just and reasonable, upon consideration of the amount from time to time standing to the said account, and of the claims from time to time chargeable thereupon." The 44th section enacts, "That the Court may order and allow to be paid out of any bankrupt's estate, to the official assignee thereof, as a remuneration for his services, such sum as shall, upon consideration of the amount of the bankrupt's property, and the nature of the duties performed by such official assignee, appear to be just and reasonable."

Mr. Commissioner Evans, the senior Commissioner, made an order pursuant to the statute, which was approved of by the Lord Chancellor (Lord Cottenham), and the scale of payments to the fund was fixed thus:—Upon the first money of such gross produce not exceeding 500*l.*, 5*l.* per cent.; upon all further monies of such gross produce above 500*l.* and not exceeding 5,000*l.*, 3*l.* per cent.; and so on, using similar words up to 30,000*l.* and down to 10*s.* per cent., and ending between 30,000*l.* and not exceeding 100,000*l.*, 5*s.* per cent. The creditors' assignees, alleging that the sum of 786*l.* 17*s.* 11*d.* payable as before mentioned to the fund, and to the official assignee, was too large a deduction to be made out of the bankrupt's estate, and was not justifi-

able either by the Bankrupt Law Consolidation Act, or by the order of the senior Commissioner, applied to Mr. Commissioner Goulburn, on the 27th of February last, seeking a deduction of the charges. Two points were raised before him: the first as to the rates of per-centage paid to the fund; the second, as to the sums paid to the official assignee, for his remuneration. As to the first point, his Honour considered that as the charges were made according to the order approved of by the Lord Chancellor, he had no jurisdiction to vary the rate of per-centage; and, by an order made on the same day, he declared that according to the amount of the bankrupt's estate and the nature of the duties performed by the official assignee, the remuneration which he claimed was just and reasonable. From this order the creditors' assignees now appealed. It was admitted that the duties of the official assignee had ceased at the end of January last.

LORD JUSTICE LORD CRANWORTH.—The question for our consideration is, I suppose, what authority is given by the 54th section of the act?

Mr. Swanston and Mr. Selwyn, for the petition.—Yes, that is the question on one point; on the other point, the question will be, whether the allowance to the official assignee is not extravagantly large. As to the per-centage payable to the fund, the petitioners contend that in the first place the chief Commissioner has exceeded the authority given him by the 54th section in making a scale of charges in the form he has. What the legislature intended was, that within the specified limits of one-eighth of a pound and 5*l.* per cent., there should be one uniform amount per cent. on the whole estate of each bankrupt paid to the chief Registrar's account. Certainly, it never was intended that if the estate received consisted of 1,000*l.*, received in ten different sums, a per-centage should be paid upon each of these ten sums. Therefore, what should have been charged on the estate when the whole was received, should have been that amount per cent. which was warranted by an order properly made according to the act of parliament. The expression "further sums

or further monies," in the order of the Commissioner, Mr. Evans, only means "larger estate," and ought to be so construed, supposing it to be capable of a reasonable construction. All that a chief Commissioner was authorized to do was to fix a scale for each estate, and not a scale applicable to separate items of each estate.

Mr. Russell and Mr. Willes, for the official assignee; and

Mr. Daniel and Mr. Hopwood, for the accountant in bankruptcy, were not called on.

LORD JUSTICE KNIGHT BRUCE.—With all that respect for the two learned counsel who have addressed the Court which they deserve, and which is the highest, I confess myself surprised at the argument they have addressed to us. Assuming that we have jurisdiction to enter into the question of the legality of the order of Mr. Commissioner Evans, and assuming that it is legal, and only so assuming for the purpose of the question before the Court, I am most clearly of opinion that he was correct within the plain meaning of the 54th section of the statute in framing that order as he has done. If that order is found to be inconvenient, the Bankrupt Law Consolidation Act has pointed out how it may be altered, namely, by an application to the senior Commissioner, and with the approval of the Lord Chancellor. The next question is, as to the construction of that order; and what the Commissioner has done is on the estate received up to a given amount to allow for the sums collected, 5*l.* per cent., on one sum 3*l.* per cent., on a further sum 2*l.* 10*s.* per cent., and so on; and if that is not a correct interpretation of the order approved of by the Lord Chancellor, I must confess myself not to be acquainted with the meaning of the English language as there used. The costs of the petition as to this question must be paid by those who raised it.

LORD JUSTICE LORD CRANWORTH.—I entirely concur with the view taken by my learned Brother. It is quite notorious that allowances are made to brokers and others, not by reference to the amount

of trouble entailed upon them by their services, but by way of per-centage. It is by no means a novelty to pay a public officer by means of a per-centage on the money he collects, for by the statute of 29 Eliz. c. 4, an act passed to prevent extortion in sheriffs and others, it is enacted, that a sheriff shall not have more than a stated amount of poundage on monies received on executions "by reason or colour of his office," and this clearly is independently of his trouble being great or small, or even none.

Mr. Swanston and *Mr. Selwyn*, for the petitioners, then argued the question as to the remuneration allowed to the official assignee.—The allowance made to *Mr. Pennell* is much too great, for the bulk of the bankrupt's estate was merely handed over by the bankers to him as official assignee, so that he has undergone no labour or trouble in its collection. According to the terms of the 44th section of the Bankrupt Act, the official assignee is only entitled by way of remuneration to such sum as from the amount of the estate and nature of the duties "shall appear to be just and reasonable." If the sum which the Commissioner considered proper remuneration for the official assignee be allowed, counting from the time of the adjudication to the time of the dividend, it will be equal to a payment at the rate of 1,800*l.* a-year. There is still 6,000*l.* of the estate outstanding, for receiving which the official assignee will have still further remuneration, although what he could do for it will be little or nothing beyond the mere receipt of the monies.

Mr. Russell and *Mr. Willes*, for the official assignee.—The allowance made to the official assignee is not too large. The duties of those officers are of the most onerous and responsible nature, and often are even the cause of involving them in considerable losses. The duties are often rendered much more difficult by reason of the fraud of the parties, and the complicated and confused state of their accounts, of which the present case is one instance, in which to add to the embarrassment of the official assignee the bankrupt has absconded. If according to the general scale

or rule adopted by the London Commissioners the official assignee has been highly remunerated for his labours, in other cases he is ill remunerated and sometimes not remunerated at all, and even in some cases he has incurred a direct loss. The objection to a per-centage on the receipt of monies is one which cannot well be raised by persons in the position of the petitioners, a banker and a bill-broker, as it is the daily practice in the City to remunerate functionaries in that way, such as sheriffs, as already instanced by the Court, brokers, receivers and others. The Court will act in the same way as was done in *Ex parte Tiplady in re Dickenson* (1), where although it was held that the Court of Review had jurisdiction to entertain a petition against the allowance made by the Commissioner to an official assignee, still it declined to interfere with the decision of the Commissioner unless it was shewn that he had, as to the quantum of the allowance, proceeded on an erroneous principle.

Mr. Swanston, in reply.—The ground on which the petition is presented is clearly valid, and may be inferred to be so from the arguments used against it. All that can be urged is, that persons in the position of life of the petitioners ought not to contest the allowance, and that there is a general scale of allowance made by many of the London Commissioners without regard to the amount of the estate or the quantity of labour bestowed, or extent of services rendered by the official assignees. That is the mode of proceeding which is complained of in this petition.

LORD JUSTICE KNIGHT BRUCE.—The question reserved by us for our consideration in this case is, as to the amount of remuneration, under the 44th section of the Bankrupt Law Consolidation Act, 1849, which the Commissioner has allowed and directed to be paid to the official assignee. The amount of 367*l.* was, we understand, thus allowed and deducted as remuneration for services and labour done to the 30th of January last, there having been no labour or service since that time, the adjudication having taken place in the November preced-

(1) 3 Dea. & C. 570.

ing. We understand the sum in question to have been calculated upon the basis of a general rule, or general scale, approved and adopted by some of the London Commissioners (but which general rule, or general scale, has never received the sanction of the Lord Chancellor or the Lords Commissioners of the Great Seal), and not on the circumstances of this particular case. The probability is, that it would be consistent with a view,—not to save trouble or time,—but, to the general interests of justice, that there should be a general rule, liable in particular cases to variation, in the exercise of careful judicial discretion; and that there should be an attempt to obtain uniformity of practice, so far as due attention to the language of the act of parliament will permit; nor do we doubt that it would be as well were the London Commissioners to apply to the Lord Chancellor under this section. Here we ought not, as we think, to recognize any general rule. Regarding the particular circumstances of this case, although impressed with the belief that official assignees ought not to be remunerated in a niggardly or parsimonious manner, we think, with unfeigned deference to the learned and excellent Commissioner before whom this case was considered, but whose attention seems not to have been directed minutely to this particular circumstance, that the amount of remuneration allowed is too high, considered merely down to the period of last January. We think the case must go back to the learned Commissioner, unless the petitioners and the official assignee join in requesting us to fix what the amount of remuneration ought to be, which, upon being so requested, we are prepared and ready to do.

Mr. Swanston, on behalf of the petitioners, requested the judgment of the Court fixing the amount of remuneration.

Mr. Russell, for the official assignee, abstained from any remark.

Their LORDSHIPS thereupon referred the matter back to the Commissioner on this point.

LORDS JUSTICES. }
1852. } *Ex parte CURTIES, in re*
July 17, 21, 22. } CURTIES.

Bankrupt Law Consolidation Act, 1849
—“*Conduct as a Trader.*”

A bankrupt, who had twice before compounded with his creditors, made false and fraudulent entries in his books, consisting of fictitious accounts in particular names. He stopped payment, being at the time able to pay 12s. in the pound, and soon after offered 11s. in the pound. The Commissioner refused him his certificate and all protection, excepting for the twenty-one days; and on appeal, the Lords Justices, acting under the discretion given by the 198th section of the act—“a discretion to be exercised on judicial grounds with reference to the nature of the case in general, and on its peculiar circumstances”—dismissed the petition of appeal, with costs, affirming the decision of the Commissioner, and refusing any protection whatever, the conduct of the bankrupt being unfair, untradesman-like and disreputable.

A petition of appeal was presented in this matter by the bankrupt, Thomas Stephen Curties, of York Street, Westminster, wholesale cheesemonger, praying the reversal of the decision of Mr. Commissioner Evans, by which any certificate had been refused him, and protection only granted for twenty-one days. The peculiar features of the case will be collected from the narrative judgment of the Lord Chief Justice, and it will only be necessary therefore to state that the grounds of the Commissioner were, first, that the bankrupt had made false and fraudulent entries in his books with intent to defraud his creditors within the meaning of the 201st section of the Bankrupt Law Consolidation Act; secondly, a fraudulent contracting of debts within the meaning of the 256th section of the same statute; and, thirdly, that after adjudication he had withheld the production of books and papers relating to his trade-dealings and estate.

Mr. Swanston and *Mr. Roxburgh* supported the petition of appeal, and stated to

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the Court that 10*s.* in the pound had been paid, besides the costs of the bankruptcy, up to the time of the dividend meeting; and that the official manager had in hand 263*l.* to answer future costs, and to make a further dividend of probably not less than 2*s.* in the pound.

Mr. Malins and *Mr. Bagley* opposed the petition on behalf of the trade assignees, and urged upon the Court the necessity of dismissing the petition, with costs.

Mr. Bury appeared for the official assignee, also in opposition to the appeal.

Mr. Swanston was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—This is a case of certificate arising necessarily on one or more of the sections of the act consolidating the law of bankruptcy, of which, without entering into the 201st and 256th sections, it will be sufficient to refer to the 198th section, which directs that the Court, "having regard to the conformity of the bankrupt to the law of bankruptcy, and to his conduct as a trader before as well as after his bankruptcy, and whether the allowance of such certificate be opposed by any creditor or not, shall judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto, and allow the same, or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require." The discretion here reposed in the Court is, as *Mr. Swanston* truly says, not an unlimited discretion; it is to be discreetly exercised on judicial grounds, with reference to the particular nature of the case in general, and also on its particular circumstances; but, before all, is to have regard, if not to be restricted to the conduct of the bankrupt as a trader, and as a trader before as well as after his bankruptcy. The question before us is, whether, having regard to the conduct of the bankrupt as a trader before as well as after his bankruptcy, it is or is not fit that he should receive a passport (so to speak) in the world of commerce to recommence operations as a trader before paying in full the debts now due from him.

The conduct of the bankrupt has been impeached on several grounds: first, that suspending his payments, intending a stoppage and a composition with

his creditors on the morning of the 27th of October, he had on the preceding Saturday purchased goods of tradesmen for which he did not pay and has never paid, and it is contended that his purchase of goods on the Saturday, followed by the almost immediate stoppage in the forenoon of the Monday, was conduct unfair, untradesman-like and disreputable. *Prima facie* it was so; and it lies on the bankrupt to explain such a state of things; and it has been said on his behalf, that it was not unfair, untradesman-like, nor dishonest under the circumstances in which he was placed, to buy goods and within less than twenty-four hours in one sense, and forty-eight hours in every sense, to proceed to effect a composition. He says he intended nothing of the kind attributed to him, that he bought the goods in the ordinary course of business, and that he intended to continue his trade; but that on the Monday morning, so early as nine o'clock, he received an invoice of one parcel of the goods from one of the tradesmen thus used, by the deduction of discount on which it was shewn that he expected immediate payment of the amount. The invoice appears not to have been accompanied by a letter; but the bankrupt inferred, as he says, that no further supplies were to be expected from that quarter without immediate payment. In this instance, there was no demand or pressure either for that or a much larger sum due from him to the same creditor. The amount of this invoice was under 28*l.*, but he says it had such an effect upon him, as shewing an intention of no longer dealing with him on credit, but to make their dealings together ready-money dealings, he being so short of supplies, his trade so much depending on this man, that the receipt of the invoice induced him to determine at once to come to a stoppage. Now, certainly, this is a most extraordinary state of circumstances, and one which, although not absolutely impossible, yet is so improbable that it requires a very great stretch of credulity to believe. It is curious, too, that in his position he should have at all desired to have stopped payment or compounded with his creditors, for it is plain he had the means of paying 12*s.* in the pound; indeed, he shortly afterwards offered to pay

11s. in the pound. The whole affair, therefore, wears a most mysterious aspect, as to which it is impossible to account to the mind before we resort to the early history of this man.

It appears that in December 1831, being then a linen-draper, or recently an apprentice to a linen-draper at Worthing, and just out of his time, he married a lady of some fortune in his own rank of life. The fortune she had appears to have been short of 1,000*l.*, about 800*l.*—a very good fortune for his rank of life. Of this sum 500*l.* was settled strictly, and is not now in question. There was no other settlement, and the fortune came into the possession of the husband; but he says, though there was a formal deed as to the 500*l.*, there was an understanding (or an agreement of some kind) that he was to be a debtor for the rest of the fortune, and whether that is to be believed depends on the circumstances taken together. He appears on this occasion, with the aid of his wife's fortune, to have changed his line of business, and to have taken to the bacon and cheese trade, in which he was not long outwardly prosperous, for in 1836 he stopped payment, and paid 10s. in the pound. That was the conclusion of the first cycle of his business. Afterwards, he went on for some years without entering into any composition. But in 1847 he came to a second composition, and in that he paid 9s. in the pound. The ensuing period of trade is not so long, because the time for the third composition appears to have arrived in 1851. Looking back to these circumstances, to which others may be added, some light dawns upon the otherwise mysterious circumstances in which a man, such as he was with regard to property, should desire to stop business and compound with his creditors. I have endeavoured to account satisfactorily to my own mind for his conduct with respect to this third transaction, and I have failed in the attempt; and I regret to say that I am unable to give credit to the reasons he assigns for his stoppage,—for his last act, the attempt at composition. I am unable to assign it to any motive consistent with credit to him.

This is not all. He did not at this stage contemplate bankruptcy, he in-

tended a composition; but against his will, his creditors not wishing to accept 11s. in the pound, he was made a bankrupt, and his books and documents have undergone an adverse inspection. From the ledger he seems to have abstracted four pages or two leaves; these, he says, were taken out by himself. The knife, also, has been in use in more than one place in the books, and must be taken to have been so used by himself; but what makes the matter the subject of graver consideration is, that the abstracted leaves and the erasures are all accompanied by suspicious accounts in the same books, and to which I must now refer. The book contains, at least four fictitious accounts, that is, they are accounts ascribed to persons with whom he had no dealing. The allegation, however, on his part is, that the transaction was fair, and this form of account was merely adopted because he did not wish his clerks and servants to know to what they really related. One of the accounts is ascribable to a man of the name of Payne, making Payne a creditor to the extent of 200*l.* That is admitted to be fictitious in every sense, but the bankrupt explains it thus: "I say that previously to the 10th of January 1848, I had saved 200*l.* from the sale of bacon wrappers, empty hogsheads, and preferences on compositions with my creditors, which I had kept apart from my business as a private fund; but then, wanting the amount in my business, I entered the same in my books under the head of John Payne." The phrase "preferences on compositions," is one of which I never before heard. Of the other three accounts, one is a closed account, entered in the name of Maria Curties, the mother of the bankrupt. Of the other two, being open accounts, one is with Mr. Webberley, the brother-in-law of the bankrupt, the other with Mr. Pointon, his cousin; they are all of them fictitious in point of names, but then he says they were honest accounts, merely intended for the purpose of concealment from his clerks; and he says the money all belonged to his wife. There is no pretence for saying that it belonged to his wife for her separate use; but it is said by Mr. Swanston, and said truly, that the bankrupt and his wife might so have treated the money, and this would remove

any dishonest intention. I have stated the settlement on the marriage of the 500*l.*; I have stated the closed accounts with Maria Curties. The two accounts with Webberley and Payne amount to 1,100*l.* Now, that certainly is a great amount of accumulation on 300*l.*, the remainder of her fortune not in settlement. This is accounted for by the interest on the 500*l.* and on other money accrued due in her right, and by her saving from the expenses of the household, which appears to have been conducted with economy. It is, however, impossible that all this should be presented to the mind of any reasonable being without exciting an exclamation of surprise. I agree that the improbable is not always the untrue: and I agree that innocent men have been convicted on circumstantial evidence, apparently most satisfactory, but which has afterwards turned out to be untrue. Those, however, who have to determine on questions of doubtful facts must do their best to come to a conclusion, and must not avoid doing so merely on the ground of that liability to error which is incident to all. In viewing the matter in that way, I am obliged to say I cannot come to the conclusion that the history of this account is credible. I do not believe it.

The matter does not rest here, for this tradesman employed an accountant, Mr. Glover. In the course of the communications which passed between Mr. Glover and himself, it appears that these accounts struck Mr. Glover as seeming remarkable, but it does not appear that the bankrupt then explained to him that these accounts, as to Webberley and Payne, were accounts relating to property of his wife; but he led Mr. Glover to believe that they were true and honest accounts with persons described. The matter does not even thus end. There appears in the account under the name of Webberley, on the 27th of October 1851, a cheque debited to Webberley, in part payment of the apparent debt due to him. This struck the accountant as being on the day of the stoppage of payment, and he remonstrated. The bankrupt, however, at first insisted on its propriety, and that it ought to stand, but at last he gave way, and withdrew it. Though there are other circumstances to

which I might allude, I lay no stress on them.

I find the facts, already mentioned before me, and I am asked, in the exercise of a judicial discretion, and on a tribunal having, to a certain extent, to arrange the affairs of commerce—I am asked to give the passport of the tribunal to this man to enable him to enter again into trade. I am surprised that such an application should have been made with the sanction of any disinterested adviser. It is a demand without pretext; it is a demand without colour, and I do not recollect a case where a certificate has been asked in which there were such plain, palpable, and irresistible grounds for refusal. For my part, and so far as I am concerned, I dismiss the petition; I refuse the petitioner his certificate, and I also refuse him any protection whatever.

LORD JUSTICE LORD CRANWORTH.—I entirely concur in the conclusion at which my learned Brother has arrived. The case has been by us most fully and carefully considered; and there never was one more fit for refusal. It is a mistake to suppose that the question before the Court is, whether or not sufficient punishment has been inflicted; but the question is, whether, under the circumstances of such dishonesty as are here charged, and where the explanation given is so entirely and utterly incredible, the Court ought to sanction the re-entry of the bankrupt into business, without his having previously paid his debts in full. I think most clearly not; and the petition must be dismissed, and with costs, and all protection be refused.

LORDS JUSTICES }
1852. } *Ex parte STANER, in re*
July 24. } STANER.

*Bankrupt Law Consolidation Act, 1849—
"Conduct as a Trader"—Fraud—False-
hood—Certificate.*

A trader carried on business as a baker, and, before the statute 12 & 13 Vict. c. 106. came into operation, obtained money from J. on pretence that it should be invested on mortgage, which was not done. He also ob-

tained money from F, on a similar pretence, which was not so invested. The trader became bankrupt, and the Commissioner refused him any certificate; and, on appeal, held (dismissing the appeal), that the money of J. and the money of F. were obtained by fraud and falsehood; that on these grounds he was not entitled to his certificate; that before a bankrupt can ask for his certificate he should have conformed to the bankrupt law since his bankruptcy; that if a trader so obtains money, though not in the course of his trade, or in matters connected with his business, it is, on a question of certificate, conduct as a trader, within the meaning of the act; and that if a case comes otherwise within the act, it is not the, less so because the conduct complained of took place before the passing of the act.

This was an appeal by the bankrupt, George Staner, a baker, at Margate, against the decision of Mr. Commissioner Holroyd, who refused him either certificate or protection, on the grounds of fraudulent contracting of debts, and of conduct as a trader within the 256th section of the statute, 12 & 13 Vict. c. 106. From the evidence before the Commissioner, it appeared that the bankrupt, although a baker, was in the habit of borrowing money, and laying it out on mortgage and other securities. His assets amounted to sufficient to pay 10s. in the pound, and his unsecured debts were 7,600l., or thereabouts. At the certificate hearing, before the Commissioner, Mr. Jay and Mrs. Fife severally opposed him, each on the ground that he had obtained money by false and fraudulent pretences. Mr. Jay alleged that the bankrupt obtained 450l. from him, on pretence that it was to be laid out on mortgage, while the bankrupt swore that it was lent to him on his own personal security. The matter turned on a correspondence, one of the most material letters of which was, however, alleged to be lost. The particulars of this correspondence are, as to their material points, fully stated in the judgment of Lord Cranworth. At the present hearing, Mr. Jay, the creditor, and the bankrupt were examined *vidé voce*, and each adhered to his version of the affair. Mrs. Fife, in her examination before the Commissioner, swore that she and her late

husband were acquainted with Staner, and that after her husband's death he asked her how she was left off, and that she told him she had 200l., which was too much to be in the house, whereupon he offered to lay it out on mortgage. The particulars of this evidence, which on the present occasion was repeated, in an affidavit of Mrs. Fife, she being too ill to attend personally, are fully stated in Lord Cranworth's judgment. Miss Fife, the daughter of this creditor, was examined *vidé voce* upon the subject of the loan, and so was the bankrupt; and, as in the case of Mr. Jay, the evidence was not only contradictory, but was in every respect diametrically opposed. The bankrupt swore that he did not recollect the transaction as detailed by Miss Fife and as set out in her mother's affidavit; and then he said her story was untrue, and that the money was lent on his promissory note only. Before Mrs. Fife's affidavit was admitted, the Lord Chief Justice stated that in his opinion it was due to the bankrupt that the case should stand over for the personal attendance of that lady, if the bankrupt desired it. The bankrupt, however, did not avail himself of the offer, and the case was heard on the affidavit of Mrs. Fife and on the oral testimony of her daughter, and on the *vidé voce* examination of the bankrupt.

Mr. Cooke, in support of the appeal.—This case divides itself into three parts: first, is it or is it not, upon a fair estimate of the evidence before the Court, made out that the bankrupt did, in each of these two cases, as he unquestionably has done for a long time in other matters, receive the monies of these opposing creditors upon his own personal security, and to be laid out by him in such securities as he might from time to time see fit, the creditors relying on his personal security, and not on any investments he might make? Secondly, whether, however the money was obtained, and for whatever purpose lent to him, or intrusted to his care, can it be said that whatever his conduct in the affair might be, it was "conduct as a trader" within the meaning of the bankrupt law, his trade being that of a baker, and the money being in no way whatever placed in his hands in the conduct or for the purposes of his

business? And, thirdly, if neither of those points can be answered favourably to the bankrupt, can the Court properly hold the case to come within the new bankrupt law, seeing that the two transactions took place before that law came into operation? Upon the first point, the fair estimate to be derived from the opposing testimony is, that the money was lent to him, and was not intrusted to him for the purpose of being invested on mortgages for the creditors. This, too, was done at periods when the bankrupt believed he was solvent, and when, in fact, he was so, and he would have so remained but for unforeseen and unavoidable mischance. As to the second question, how can it be said to be "conduct as a trader" within the meaning of the Bankrupt Law Consolidation Act for a baker to obtain money, however fraudulently, if fraud there be, which is not obtained in his character as such trader, and not to be applied or used in his trade? To hold that it were, would be a contradiction. If the legislature meant the words to apply to the general conduct of the bankrupt, the act would have spoken merely of his conduct, but by adding the words "as a trader," the legislature manifestly intended "conduct of the bankrupt in his character of a trader," or "in the conduct and management of his trade." There are two cases, decided by one of your Lordships, on the construction of this expression, and both cases are very distinguishable from this. They are *Ex parte Wakefield* (1) and *Ex parte Dornford* (2). In these cases, although the transactions complained of were not strictly in or relating to the business of the parties (and they are not at all so here), yet, in the latter case, the bankrupt obtained the money, though by misrepresentation yet still to the knowledge of the lender, for the purposes of his trade, while in the former the breaches of trust were held not to be committed by the bankrupt as a trader, and he was left open to all the consequences of them in this character of breaches of trust. There is nothing in the judgments to shew that the Court would have come to the conclusion it did if the

facts had been there as they are here. Indeed, I infer quite the contrary from those two judgments. Finally, upon the third point, even if the case set up by Mr. Jay and Mrs. Fife be true, or what is the same, if their statements are believed, and the bankrupt be disbelieved; still, what the bankrupt has done was done before the statute came into operation, and, therefore, cannot possibly be said to come within the meaning of the 256th section of that act. For all these reasons, the bankrupt ought not to be deprived of his certificate, and the decision of the learned Commissioner should be reversed.

Mr. Bacon and Mr. Bayley, for the opposing creditors, were not called upon.

Mr. J. T. Wood appeared for both the official and creditors' assignees.

LORD JUSTICE LORD CRANWORTH.—This is another of those distressing cases with which we have to deal. It is an application by a party against the decision of the Commissioner for a certificate, which he thought it his duty to refuse. It is an extremely painful duty to have to perform, sitting in a civil matter, to adjudicate whether a punishment (for such in effect it is,) is or is not to be inflicted. I confess I think the Commissioner is right in refusing the certificate, on several grounds. In the first place, before the bankrupt can ask for a certificate, he should have conformed to the bankrupt law since his bankruptcy; he should have stated the truth and the whole truth respecting his estate, and I do not shrink from saying that here he has not done so. I do not believe the statements he has made.

There were two transactions relative to loans brought in question. The first was that of Mr. Jay. Now, if the question was, whether Mr. Jay could be considered as in any other light than a simple contract creditor, there might be doubt, because his subsequent conduct led to the conclusion that the 450*l.* advanced by Jay should be in the hands of Staner, to be as well secured as he could, on his (the bankrupt's) houses. That is not now the question; the real point is, what was the original transaction? Mr. Jay says, that he advanced his money to Staner

(1) 17 Law Times, 55.

(2) 20 Law J. Rep. (N.S.) Bankr. 7.

originally on an undertaking that it should be invested on security; he says, that in a letter, which is now lost, Staner told him that it was to be invested on a mortgage of an estate of a Mr. Petley, but after many inquiries made by him, and many excuses made by Staner, the latter called on Mr. Jay, and told him the mortgage was at length completed, but he added that it was taken for 900*l.* or more, and that as he (the bankrupt) had advanced the greater proportion of the money, he would retain the mortgage in his own hands, and give Mr. Jay a security on his own property, and to this Mr. Jay acceded. As I have already stated, it is immaterial to consider whether that did or did not absolve the bankrupt from the former engagement. But the purpose for which I wish to consider it is this: what was the true transaction? If what the bankrupt has stated to be the true transaction is not so, then he has been deliberately stating what he knew to be untrue. Mr. Jay says it was a contract for a mortgage from Mr. Petley. The bankrupt says it was a loan to him on his promissory note. Looking at the documents, which statement do they bear out? The transaction opens by a letter in May, in which Staner tells Jay as to the state of the funds, recommending him to sell out, and adds: "Now, if you get this letter soon enough to have time to answer me to-night, do it in the following way: are you desirous to sell out if I can get you 5*l.* per cent. upon my own security? For what I expect it may be wanted for, is equal to that. Next, the amount: what would be convenient to invest? Your answer will be waited for by me, because if I can do this service I shall be very pleased, and do not always have the opportunity." Can any one understand that, otherwise than that he was proposing some security other than his own? Mr. Jay agrees to sell out, and letters pass as to the mode of transmitting the money by a registered letter, to which Mr. Jay objects, and then the bankrupt writes to him: "I take it for granted you will have the money on Friday. The security, you may rest assured, is of the most desirable character, or you should not have the investment. Leave that to me." Now, these are terms utterly irreconcilable with the notion that he was borrowing money on

his own security. I come to the conclusion that Jay is a person to be believed, and that the bankrupt is to be disbelieved. One circumstance is important for the bankrupt, that it does not appear in writing that the name of the mortgagor was mentioned. Jay, however, says, it was mentioned in the lost letter; that was fairly a matter for observation, but I do not attach much importance to it, because what passed between those parties was by word of mouth, and a person desirous of manufacturing a story which is untrue, would more probably have put it on what passed by word of mouth, instead of referring it to a lost letter. I am, therefore, inclined to regard the circumstance as favourable, rather than otherwise, to the truth of the statement made by Jay. If the case relied on the evidence of Jay alone, I should have come to the conclusion that the bankrupt had wilfully intended to deceive his assignees and the parties interested in his estate, and had not conformed to the bankrupt laws.

The case does not rest here: there is another transaction; and if anything is to be gained by the maxim "*noscitur à sociis*," it is by its application to the present case. This transaction, of a similar character to the former, took place between the bankrupt and Mrs. Fife; and in this instance also we have had the advantage of seeing the demeanour and hearing the statement of Miss Fife and the bankrupt, and we have had the affidavit of her mother Mrs. Fife, who cannot be examined here orally, on account of her illness; and the bankrupt, who knows the evidence she gave before the Commissioner, and is probably aware that her cross-examination would not be favourable to him, did not wish that the matter should be delayed on that account. Now, what is the account given by the mother in her affidavit, and in a very straightforward manner by the young woman here to-day? Mrs. Fife lost her husband in 1849, leaving a little money, about 200*l.*, in the house. Staner knew them at Margate, and took, or professed to take, some interest in him and his family, and the widow and the daughter supposed him to be their only friend. He tendered his advice to them, and appointed to meet them at the London terminus of the Black-

wall Railway by the hour he said, of ten o'clock on a certain day. The daughter says, and the mother states in her affidavit, that they went, and Staner asked them how they were left off, and was told that she had 200*l.*, and that was more money than she liked to have in the house. He said that it was unlucky he had not known it sooner, as he could have got it invested; that a Mr. Powell, of Quex-park, was just dead, that the Cottons were, therefore, in want of money, and that he could have got 5*l.* per cent. He then asked them how long it would take them to get the money, as perhaps it was not too late. He then promised to wait while they went for the money, and in the mean time to see if he could manage the matter. They went and got the money, and on their returning with it, he said, he had seen the party and was happy to say it was not too late, and that he could put the money to work directly. Then, relying upon him and his friendship, they put their all into his hands; he took it, and went away. The bankrupt denies all this, and that there was to be any security, except his own personal security. It is utterly incredible that the story told by the daughter of Mrs. Fife can be an invention; and it is strangely corroborated by the mode in which the bankrupt himself has answered the questions put to him regarding it. At first, he said, he did not recollect it: why he must have recollected it if it had occurred, and if it had been untrue, he would at once have contradicted it. When pressed with further questions, he seemed to feel his position, and then he denied the story to be true. A man may well say, "I do not recollect whether it rained this day fortnight," but he could not be heard to say, with any hope of belief, that he did not recollect whether a man gave him a blow, or did any other act of violence on that day. So, if he was speaking the truth, he would not in this transaction have said he did not recollect. We have the duty cast upon us, in this case, of saying whether we disbelieve this young woman, supported as she is by the affidavit of her mother (too ill to be examined), or to pay no attention to the oath of the bankrupt. I have no hesitation in saying that, in my opinion, the bankrupt has told a deliberate and intentional falsehood, and that

on that ground alone the certificate has been most properly refused him.

Further, I believe his debts to have been contracted by fraud, and in every way by means such as are not proper in the conduct of a trader. I do not think his application for his certificate is to be for one moment listened to, and I am of opinion that his petition must be dismissed.

LORD JUSTICE KNIGHT BRUCE.—The agreement of Lord Cranworth with the decision of the learned Commissioner, would be an affirmation of it, whatever might be my own opinion; therefore, it would be unnecessary in me to state my view of the case, whatever that view may be. I think it right, however, not to abstain from stating what my opinion really is.

First, as to the law. It has been suggested, with great propriety, by Mr. Cooke, the learned and able counsel for the bankrupt, that even if the case set up by the opposing creditors were made out, it does not fall within the 256th section of the Bankrupt Act, 1849, because these particular facts having occurred, these acts having been done by the bankrupt before that statute, they cannot be said to come within its operation. For this no decision was cited; and considering the learning and experience of Mr. Cooke, the learned counsel who supports the bankrupt, I think I may take it that no case exists, and I state my opinion to be, that if this case comes otherwise within the act of parliament, it is not the less so because the conduct complained of took place before the passing of the statute.

Another observation made was, that the debt was not fraudulently contracted by the bankrupt in his trade, and that, therefore, it was not conduct in a trader within the meaning of the Bankrupt Act, and for this my decision in *Wakefield's case* was referred to and relied upon. My impression is different as to the effect of that case, and I think that such conduct would be conduct of a man in trade shewing him to be unworthy of that degree of estimation which ought to belong to one engaged in the transactions of commerce, or indeed in any other transactions of life. If in *Wakefield's case* I said anything contrary to this, I was wrong; but I

do not think I so said. My impression has always been, and my opinion now is, that if a man in trade deals in the way alluded to, though not in the course of his trade, or in matters connected with his business, it is, for the purpose of such an application as the present, conduct of a man "as a trader" within the act of parliament. So far as to the law in this case.

There are two acts of the bankrupt impeached. How the matter would have stood if *Jay's case* had been the only one against the bankrupt I will not give any opinion, because it is not necessary; but I am satisfied on the evidence, so far as any one, subject to infirmity in judging, can be satisfied, on the comparison of a conflict of testimony by adverse witnesses, that the money of Mrs. Fife was obtained from her unfairly, improperly, and fraudulently. A state of things was represented to her and her daughter, who has been examined, which did not exist; they were ignorant (I do not use the term in an offensive sense) and helpless women, whom this tradesman, who professed to be their friend, ought to have assisted, advised, and supported, and if he saw they were about to commit an act of imprudence, he ought to have prevented them; at all events, he ought to have told them the exact truth. He allowed them, however, to part with their money in a mistake, which he might have prevented. I come to the conclusion, then, on the evidence, that the bankrupt contracted a debt with Mrs. Fife by fraud and on false pretences.

Considering that I come to that conclusion, and considering the 256th section of the Bankrupt Act, I am to ask myself, whether a man capable of committing this single act as to these women, is worthy to receive what I have called a passport to enter into trade again without paying his debts. I am of opinion that he is not, and on the ground of his conduct to these helpless women alone, I refuse him his certificate. Let the petition be dismissed, and the costs of the assignees and opposing creditor only come out of the estate.

LOrds JUSTICES.

1852.
May 10;
July 24.

Ex parte BOWER, in re BOWERS.

Bankrupt Law Consolidation Act, 1849
—"Trader Debtor"—Summons—Particulars of Demand.

A creditor, a wholesale dealer, issued a summons under the 78th section of the act, demanding payment of money due from a retail dealer in the same line of business, and described the items in the particulars of demand as "goods." Held, that this described with sufficient certainty the wares supplied, so as to prevent the annulling of the adjudication on the ground of uncertainty.

The situation of parties and nature of demand are to be considered in determining what is convenient certainty.

A doubt on the legal validity of an adjudication is not sufficient ground for annulling it.

The contest between John Bowers, of Worcester, grocer, and John Bower, of London, fruit-merchant, is detailed in the case of *Ex parte Bowers, ante*, p. 18. John Bowers appeared before the district court, at Birmingham, and shewed cause against the adjudication on the ground, among other grounds, that the particulars of demand served by John Bower, his creditor, were insufficient within the 78th section of the Bankrupt Act. After two adjournments, the question was gone into by Mr. Commissioner Balguy on the 2nd of February 1852, when John Bowers attended, and upon examination deposed as follows:—"I purchased the goods of the petitioning creditor at two months' credit, and received an invoice, which had at the top of it the words 'cash in two months'; I gave the petitioning creditor a bill, which I had received from a customer, for 29*l.* 17*s.*, and paid the 7*l.* balance, and the two months' credit had not expired when the notice of demand was made upon me." The Commissioner annulled the adjudication; but in the memorandum made by him, the reason assigned did not in any way relate to the point of the time of credit not having expired, nor to the question, whether the

particulars of demand were sufficient. The particulars of demand were as follows:—
 “The Bankrupt Law Consolidation Act, 1849. Particulars of demand and notice requiring payment. To John Bowers, of the city of Worcester, in the county of Worcestershire, grocer, dealer and chapman. The following are the particulars of the demand of the undersigned, John Bower, of No. 8, Botolph Lane, in the city of London, fruit-merchant, against you, the said John Bowers, amounting to the sum of 66*l.* 9*s.* 1*d.*

1851.	£.	s.	d.
April 14.—To goods	20	10	0
June 9.—Ditto	17	0	4
October 8.—Ditto.....	36	1	9
1852.	73	12	1
October 6.—Cr. by cash	7	3	0
	£66	9	1

Take notice that I, the said John Bower, hereby require immediate payment of the said sum of 66*l.* 9*s.* 1*d.* Dated this 2nd day of December, in the year of our Lord 1851. (Signed) John Bower, carrying on business at No. 8, Botolph Lane, in the city of London.”

The petitioning creditor, John Bower, appealed from the decision of the Commissioner annulling the adjudication. The case was argued on several points; but this report is confined to that arising on the sufficiency of the particulars of demand.

Sir W. P. Wood and Mr. Baggalay opened the appeal; but the Court called upon

Mr. Swanston, who appeared for the trader debtor.—The whole of this adjudication is invalid, and, among other reasons, because of the defective condition of the particulars of demand. The rule of the Court is, that the particulars of demand must be reasonably certain in order to enable the debtor, or alleged debtor, to ascertain the nature of the items, and therefore whether he is indebted at all. This was so held in *Ex parte Greenstock* (1), from which case it is plain that the alleged debtor has a right to have this reasonable certainty in the particulars of demand, so

that he may see the nature of the items, and that if any means exist of producing evidence to shew such items, or any of them, to be wrong, the alleged debtor may have an opportunity of producing it.

[LORD JUSTICE KNIGHT BRUCE.—I do not hear it said that the bankrupt in this case was misled by the particulars of demand. Does he swear that he was?]

[LORD JUSTICE LORD CRANWORTH.—Particulars of demand in one case, and between one man and another would be good and sufficient, which between one of those men and a third would be otherwise. Suppose the case of a debtor and creditor, one set of particulars would be enough, while between the executors of the debtor and the creditor it would not. Can any general rule be laid down applicable to every case? I think not. Convenient certainty must be construed with reference to the information which the person, to whom the particulars are sent, already has.]

The bankrupt, it must be admitted, has made no such affidavits, nor is it in any manner shewn that he was actually misled, but still it is to be observed, that in the particulars there is no degree of certainty whatever. There is, to be sure, a vague and general description, and under it any demand might be set up against the debtor, and he would have no opportunity of defending himself, while the rules and practice of the Court require a reasonable and convenient certainty as to dates.

LORD JUSTICE KNIGHT BRUCE.—Reference having been made during the argument to the case of *Ex parte Greenstock*, it may not be out of place to observe, that whether all the reasons given for the judgment in that case are sustainable or not, the conclusion appears to have been correct, namely, that it would have been better that there should not have been an adjudication upon the materials which then existed. The amount of the demand was 132*l.* 15*s.* 2*d.* Now, it was requisite, with reference to what had been sworn upon the affidavit, that the whole of this should appear to be for goods sold and delivered. But upon the amount set out in the particulars of demand, as much as 122*l.* 9*s.* 6*d.*

(1) 15 Law J. Rep. (N.S.) Bankr. 5; s. c. 1 De Gex, 233.

of the total amount was due for bills returned, and interest upon those bills, which (however the truth might have been) were not shewn upon the particulars of demand to have been given for goods sold and delivered. Therefore, out of 132*l.* 15*s.* 2*d.* the particulars were, as to so large a portion as 122*l.* 9*s.* 6*d.*, plainly defective with reference to the affidavit. With regard to the small remaining portion of the debt, being 10*l.* 5*s.* 8*d.* only, it was doubtful whether the dates were sufficiently set forth. I agree that the date 1845 was set at the head of the particulars; but when the separate items were looked at, if all of them belonged to the year 1845, they were not chronologically arranged, and this gave rise to a doubt as to what debts were meant. There were items in September and October, and then one in August. Now, I was not persuaded that it was a necessary inference from an account so prepared, that the month of August 1845, so placed below and separate from September and October, was the month meant. If that were so, the adjudication would on that ground have been insufficiently supported. But if it could have been legally supported, still this jurisdiction is not bound to suffer every adjudication which may be legally valid, to remain; and I am of opinion that the Court there rightly exercised its jurisdiction, in declining to give effect to the proceeding relied upon as the foundation of an act of bankruptcy. All the reasons there assigned for the decision may possibly not be sustainable; upon that point I give no opinion. But I adhere to the conclusion.

In the present case, several objections have been made to the proceedings relied upon as the foundation of an act of bankruptcy. The most serious objection appears to me that founded on the form of the particulars of demand, which is a point on which the decision of the Commissioner did not proceed, or is not expressed to proceed. It appears to me that a set of particulars of demand sent out by a trader to one individual may be sufficient, which would have been insufficient if sent to another, although the demands were the same. The question in each case must be, whether the particulars communicate a reasonably sufficient degree of information

to the alleged debtor as to the demand. Now, in *Ex parte Greenstock*, the information may or may not have been sufficient. But in this case, considering what goods have been furnished,—considering the station in life of the alleged debtor and creditor, and the words of the particulars of demand, my impression is that they were sufficient in the particular circumstances of this case. And I am of opinion that the particulars are not vitiated legally because they contained one claim which is not sustainable, either because the debt claimed is not due at all, or because it is not actually due at the time of the demand, whatever effect such an error ought to have in the exercise of the discretion of the Court upon an application not made *ex debito justitiæ*. So much for the legal points in the case, on which the inclination of my opinion is against the objection made to the adjudication.

The Commissioner, however, was here executing a jurisdiction given by the 104th section of the recent act of parliament. Now, suppose this case to arise (which occurred frequently in former states of the bankrupt law), that the validity of the bankruptcy being in question before a Court having jurisdiction to annul it, the legal validity being doubtful, in such a case under the former law, the Court having this jurisdiction was more in the habit of annulling,—unless there were some circumstances to induce the Court so to exercise its discretion beyond the legal doubt. If there were no such circumstance, the legal doubt was not sufficient ground for annulling,—for this reason, that the mischief arising from the continuance of the bankruptcy, if unsupported by legal requisites, was remediable, whereas that arising from annulling the proceedings, if it was valid, was irremediable. Now, I consider that the Court is, at least, in the position which I have described, in the present case. There is an arguable objection against the validity of the adjudication in point of law; but I am not only not satisfied that the objection is sustainable, but the inclination of my opinion is against its sufficiency. Therefore, as I apprehend, it is not the duty of this Court to annul the adjudication; but the proper course is to leave the bankrupt to question the adjudication as

he may think fit, giving him every facility to proceed at law for that purpose. Here every consideration, as to the consequences of annulling the bankruptcy, seems to be against taking that step. The result is that, in my opinion, so far as this objection is concerned, the adjudication must stand unreversed.

LORD JUSTICE LORD CRANWORTH was of the same opinion, and the appeal was dismissed.

LORDS JUSTICES. { *Ex parte* NICHOLAS, in re
1852. THE MONMOUTHSHIRE
July 29. AND GLAMORGANSHIRE
BANKING COMPANY.

Joint-Stock Companies Winding-up Act, 1849—Proof—Separate Creditors—Official Manager.

A. B. was a shareholder in a joint-stock banking company, which stopped payment. He became bankrupt, and afterwards, before he obtained his certificate, an order for the winding up the affairs of the banking company was obtained, and, subsequently, he obtained his certificate. The Commissioner in Bankruptcy declined to permit the official manager to prove for the amount of calls on the bankrupt's shares; but the Court held that, under the 14th and 30th sections of the Winding-up Act of 1849, the official manager was entitled to go in, and prove for the amount of calls in competition with his separate creditors.

This case came before the Court of Review in a twofold character,—one as being under the bankruptcy; and the other, under the winding-up order, made in the matter of the above-mentioned company. The facts were shortly these; and they were confined to the question under the bankruptcy.

Mr. Jacob Jenkins Nicholas, of Newport, Monmouthshire, was a shareholder in the Monmouthshire and Glamorganshire Bank, in which he was the holder of fifty shares. The bank stopped payment on the 6th of October 1851; and, on the 6th of November, Mr. Nicholas was adjudged a bankrupt, on a petition of adjudication presented against him. On the

12th of January 1852 an order was made under the Joint-Stock Companies Winding-up Acts, for winding up the affairs of the company. On the 7th of February following, the bankrupt obtained his certificate; and, on the same day, a dividend of 10s. 6d. in the pound was declared on his estate. His name was excluded from the list of contributories—on the authority, it was said, of the case of *Ex parte Chappell*—(1), on the settling of the list; but, subsequently, and on the 27th of April, a call was made of 60l. on each contributory of the company, and among them on the bankrupt, “in respect of fifty shares, with the qualification of a certificated bankrupt not personally liable, but included in the list for the purpose of being represented by his assignees, and for the purpose of enabling the official manager to tender proof of calls in the matter of his bankruptcy in respect of fifty shares.” The Master then ordered that the official manager should attend any meeting in the matter of the bankruptcy, to prove, or tender a proof against the estate of the bankrupt, “for the balance, if any, which shall be found due from the said Jacob Jenkins Nicholas, after debiting his account in the company's books with such call upon the said fifty shares.” The official manager, in obedience to this order, tendered a proof for 3,000l.; but the Commissioner declined to admit the proof, without the sanction of the Court.

Mr. Bethell and Mr. W. M. James, for the official manager, in support of the right to prove, cited the cases of *Steward v. Greaves* (2) and *Davison v. Farmer* (3).

Mr. Roundell Palmer and Mr. Karslake, for the assignees.

LORD JUSTICE KNIGHT BRUCE.—These applications, the one in the bankruptcy of Mr. Jacob Jenkins Nicholas, and the other under a winding-up order that applies to a joint-stock company, of which Mr. Nicholas was a shareholder, raise substantially this only question,—whether by the effect of the acts of parliament, called the “Wind-

(1) 19 Law Times, p. 29.

(2) 10 Mee. & W. 711; s. c. 12 Law J. Rep. (N.S.) Exch. 109.

(3) 20 Law J. Rep. (N.S.) Exch. 177.

ing-up Acts," the general separate creditors of a bankrupt, who happens to hold shares in a joint-stock company, which is made liable to the operation of these acts, are placed in a different position from separate creditors of any other person engaged in a mercantile partnership. The question is, not whether there ought to be an alteration, nor whether there are grounds or reasons for making it, but whether the legislature has said it shall be so, in language not to be mistaken. Now, the case stands thus: Mr. Nicholas was unfortunately a shareholder in one, I believe, of the most wretched of the joint-stock companies in its results, which stopped payment on the 6th of October 1851. At the time of the stoppage Mr. Nicholas had not become a bankrupt; he became a bankrupt afterwards, and, after that event, but before his certificate, a winding-up order was made, and, after the winding-up order was made, his certificate was obtained; it is now contended by or on behalf of the official manager of the company, that a call made in respect of the shares which this bankrupt held before his bankruptcy is to be treated for every purpose as a separate debt of the bankrupt in the administration of his estate,—a startling proposition, certainly to any person who has not his attention called to the details of these acts of parliament.

It is clear that, independently of these acts of parliament, according to all the ordinary law relating to bankruptcy, proof could not be made in competition with the separate creditors. It could not be made on behalf of the partners in the joint-stock company, because all the debts are not paid by the partners; according to the law in ordinary cases it could not be done. If, therefore, general separate creditors are to suffer, it is on the ground of a particular law created by these acts. The case seems, to myself and to my learned Brother, to turn entirely upon the 14th and 30th sections of the Winding-up Act of 1849. By the 14th section it is enacted, "That if any contributory or alleged contributory be a bankrupt or insolvent, he shall be entitled to attend by his assignees, and in all proceedings against his estate under the said act shall be sufficiently represented by such assignees."

By the 30th section it is enacted, "That where any contributory of the company is a bankrupt or insolvent, it shall be lawful for the official manager to prove in the matter of such bankruptcy or insolvency for any balance ordered by the Master to be proved against the estate of such contributory, and to take and receive dividends in respect of such balance in the matter of the bankruptcy or insolvency as a separate debt due from such bankrupt or insolvent, and rateably with the other separate creditors: Provided always, that if any creditors of the company, not being such petitioning creditor under the fiat as after mentioned, shall have proved or shall prove against the estate of such bankrupt or insolvent contributory in respect of any debt due from the company, then the dividends received by the official manager from the estate of such bankrupt or insolvent contributory shall be paid and distributed by the official manager, under the direction of the Master, in the first instance, rateably amongst the creditors of the company so proving against the estate of such bankrupt or insolvent contributory as aforesaid, until the debts due to such creditors respectively be fully paid, and, subject thereto, such dividends shall be applied by the official managers towards the general purposes of the winding up of the affairs of the company: Provided also, that in case any such fiat shall have been issued on the petition of a joint creditor of the said company in respect of his joint debt, and he shall have proved such joint debt for the purpose of receiving dividends under such fiat, then any dividends paid to such petitioning creditor under such proof shall be set against the dividends payable to such official manager in respect of the proof so made by him as aforesaid, so far as the same will extend." It is difficult to surmount these words; but it has been contended that this act does not apply to a case of this description, where the bankruptcy has taken place before the winding-up order. As I have already said, the word "is" cannot be construed literally; it means "shall be," or, "may happen to be." According to the construction offered on the part of the assignees, the word ought to be rather "becomes." The bankruptcy did not

relieve this gentleman from his liabilities; he was as liable at the moment of the winding-up order as ever, and so is his estate now. He was liable, because he had no certificate. The estate is liable, because it was liable before bankruptcy. This act clearly changes the law of the country as to particular persons under circumstances which I do not understand; but our business is to construe it. I fear the rights of these persons are changed by the legislature. The latter clauses are, perhaps, *locus communis*, and afford an argument each way; but the argument preponderates in favour of the view taken by the official manager. It is true they are not provisions which seem to be well or correctly adapted to any theory or any practice that ever prevailed in the country; but it is very unsafe to rely on such words

as contravene language so clear as the provisions of these sections. I feel myself, therefore, obliged to say with regret, that this demand has been directed by the law of the country to come in competition with the separate creditors, so that they are placed in a different position from any other separate creditors.

LORD JUSTICE LORD CRANWORTH.—I concur in arriving at the same result, and with the same degree of regret. Whatever the date of the bankruptcy, there is the same anomaly, if the separate creditors are put on a different footing from that in which they would have stood, if the act had not passed. It is difficult to believe the legislature intended to put them in a different position; but it is our duty to consider the language of the act, which we cannot construe in any other way.

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TO THE SUBJECTS OF THE

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IN THE

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the marriage, or none who should attain a vested interest, then as to 5,000*l.*, part of the fund, and 600*l.* long annuities, subject to a life estate, the same should be in trust for C. absolutely, to be vested at twenty-one. A. had notice of the settlement, but was not a party to it. No transfer of the fund was made. The marriage was solemnized, but no issue was born, and the husband died. B. contracted a second marriage, and in contemplation of it she assigned her interest, subject to A.'s life interest, to trustees upon trust for her benefit for life, and then upon trusts for C. (the niece) and the issue of the second marriage, as she (B.) should appoint by will, and in default of appointment among issue of the marriage equally, and in default of issue, as to 5,000*l.*, part of the fund, for C. absolutely. No transfer of the fund was made. The marriage was solemnized, and one child was born, and then the second husband died. A, the mother, the original tenant for life, then died, and the fund was still standing in the names of A. and B. C, the niece, married, and a suit was instituted by trustees of first settlement, and by C, and her husband, against B, trustee of second settlement, and the child of second marriage, praying a transfer of 5,000*l.* to trustees of first settlement, and an injunction to restrain the transfer of the fund by B. to trustees of second settlement. Bill dismissed in court below; but, on appeal, it was held that, whether or not the first settlement was voluntary (which the Court did not decide) as to the trusts in favour of C, the niece, still it was a complete alienation of the fund by B, and the decree below was reversed, a transfer being directed as prayed. *Kekewich v. Manning*, 577

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— In April 1847, joint-stock banking company, carrying on business under provisions of 7 Geo. 4. c. 46, of which A. was a member, became indebted to B. in 5,000*l.* A. continued to be partner until his death, and died in December 1847. In April 1848 B. recovered judgment against public officer of company. In December 1848, usual decree for accounts made in a suit for administration of estate of A. B. presented a petition for liberty to go in before the Master to prove, as a creditor against A.'s estate, for 5,000*l.* and interest. Petition did not state that bank had ceased to carry on business, or that any proceedings had been taken to enforce judgment against existing partners. Petition dismissed. *Howard v. Wheatley*, 864

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— Upon marriage of infant the husband by antenuptial settlement covenanted that upon his wife attaining twenty-one, he would join with her, if she would consent thereto, in settling upon her

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— A, husband of B, to whom share of residue of testator's estate had been bequeathed, assigned it to C. for valuable consideration. Stock representing this share was carried to account of B. in a suit. The proper terms of settlement of part allowed to B, by way of equity of settlement, were held to be to B. for life, with remainder to her children as she should appoint, with remainder to children in default of appointment, and in default of children, if B. should survive A, to B. absolutely; but, if A. should survive B, to C. Court has power to direct that, in last event, fund shall be at disposal of wife by will; and that in default of such disposition, it shall go to next-of-kin of B; but special case must be made for such settlement, and circumstance that B. has needy relatives not sufficient to justify it. *Carter v. Taggart*, 215

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— Under will of testator a married woman was entitled to 600*l.* and upwards, and a share in sum set apart to answer life annuity amounting to 346*l.* In administration suit the 600*l.* was paid to husband, with consent of wife. Husband and wife then joined in assigning their reversionary interest in annuity fund for value, and assignees procured a stop-order upon the fund. On death of annuitant, wife petitioned for settlement of fund. Wife entitled to have whole fund settled on herself and children, husband being insolvent and having made no settlement upon her; claim of wife properly raised by petition; and assignees, though no parties to administration suit, had, by obtaining stop order, sufficiently brought themselves before the Court to enable it to deal with the fund upon petition. *Scott v. Spaskett*, 349

— Suit by *feme covert* in respect of her separate estate, in which her husband was named as defendant. Plaintiff proved at hearing that her husband was out of the jurisdiction. Suit properly constituted. *Monday v. Waghorn*, 353

— A sum of stock was vested in trustees upon trust to pay dividends to A. a married woman, for her life, for her separate use, without power of anticipation, and, after her decease, to pay capital to B. On petition of A. and B. Court ordered transfer of a portion of the stock to B. and sale of such other portion as would be sufficient to purchase a government annuity equal to dividends of two sums of stock, and that sum thereby produced should be laid out in purchase of such annuity, to be settled on A. for her separate use, without power of anticipation. *Dodd v. Wake*, 356

— An heiress-at-law being a married woman cannot contract not to have a cause re-heard, nor can she by her conduct be in any way bound, nor can her consent inserted in an order establishing a will in any way prejudice her right. Petition of rehearing restored to the file. Decree varied by striking out the consent of the heiress-at-law, and

adding words reserving to her, if she should survive her husband, and to her heirs if she should die in his lifetime, the right to dispute the will; but although the decree was inoperative against the heiress-at-law to bind her inheritance, it was conclusive as against the husband as tenant by the courtesy to the extent of his estate; the decree being, in fact, a bargain that all his and his wife's costs, to which he was alone liable, should be costs in the cause, he agreeing that they would no longer dispute the will. *Turner v. Turner*, 422

— Deeds of gift by a wife to her husband of property over which she has a power of appointment are regarded by the Court with jealousy, and inquiries will be directed as to the circumstances under which they were executed. If such deed is afterwards impeached by the wife, the burden lies on her of shewing that the circumstances were such as ought to invalidate it, and the burden does not lie on the husband of shewing that the circumstances were such that it ought to be supported. What circumstances will invalidate such deeds. An inquiry was directed to be made by the Master; the Master made his report, which was not excepted to. The parties were held to be at liberty, at the hearing of the cause for further directions, to refer to affidavits and other materials used before the Master on his inquiry. *Nedby v. Nedby*, 446

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Chapel—Chapel founded in England, and services therein performed according to mode of worship in Established Church of Scotland.—Held, that no person could enjoy office of minister who was disqualified to be minister of Established Church of Scotland: and minister who had become so disqualified ordered to be removed, and trustees who co-operated with him also removed, and he and they ordered to pay costs of suit. Lord Chief Justice Cranworth dissenting from part of decree of Court below, declaring that "no minister or other person was qualified for, or competent to exercise, office of minister or pastor without being a licentiate and recognized minister of Established Church of Scotland, and in full connexion therewith." Application to suspend execution of decree of Court below, pending an intended appeal to House of Lords, refused. *Attorney General v. Murdoch*, 684

Charge. See Contempt. Power of Sale.

Charity—A bequest made as an inducement to third parties to convey land in mortmain, and not to take effect unless land should be conveyed accordingly, is void. A bequest which tends directly to bring fresh lands into mortmain is void. And a bequest of money to be expended in erection or repair of buildings is void, unless an intention is clearly expressed that the money is to be expended upon land already in mortmain. The validity or invalidity of deeds must for all purposes date from their execution. *Trye v. Corporation of Gloucester*, 81

— Construction of charitable bequest. Words "education and learning" read "education in learning." Statute 9 Geo. 4. c. 83, which provides, that all laws and statutes of the realm shall be enforced in the administration of justice so far as the same can be applied, means "reasonably applied," and the statute 9 Geo. 2. c. 36. is inapplicable to lands in New South Wales. *Whicker v. Hume*, 406

— Protection of the interests of a large body of persons upon application for a scheme. *Ex parte the Mayor, &c. of Lincoln*, 621

— Court will sanction sale of piece of land, which in 1747 was purchased by trustees with charitable funds and conveyed to them, it being plainly advantageous to the charity. It will also sanction re-investment of money in real estate; and Court will confer upon trustees powers to perpetuate themselves, as well as to lease land, there being such powers in deed conveying land to trustees originally purchasing. *Ex parte Overseers of Poor of Eccleall Bierlow*, 729

— A claim to participate in charity funds, which had been appropriated for 240 years to certain parishes, ought to be brought before the Court by information and not by petition, under Sir Samuel Romilly's Act, 52 Geo. 3. c. 101. *In re Magdalen Land Charity*, 874

— See Grammar School. Power.

Chose in Action. See Mortgage.

Church—Rector justified in cutting timber, provided he specifically apply it to repairs of rectory-house and buildings on the glebe; but not in cutting timber and selling it. That rector had applied larger sum in repairs of rectory-house than proceeds of sale of timber cut by him, not an answer to a case made against him of cutting and selling timber, in suit instituted by the patron. *Marlborough v. St. John*, 381

Claims—Upon claim by equitable mortgagee against mortgagor, asking for sale, and also that several other mortgagees might be summoned before Master, or decree made to ascertain what mortgages there were, and their priorities, Court refused the order. *Burgess v. Sturgis*, 53

— Widow of deceased debtor having, without letters of administration, got in all the assets of her husband and compounded with his creditors, upon claim by creditor to obtain payment of a debt due to him in full, a legal personal representative of intestate ought to be made a party; leave given to amend. *Crescor v. Robinson*, 64

— A claim not stating all the facts of the case within plaintiff's knowledge liable to be dismissed, with costs, and if plaintiff withholds those facts and takes the chance of relief from what may turn up from the affidavits, Court will not adjudicate upon claim. *Goode v. West*, 127

— Errors having been committed in carrying out proceedings under original claim, leave given to file supplemental claim. *Naylor v. Robson*, 230

— Testator dying in the Mauritius appointed executors in that country, and left residue of his property to his mother in England. The executors in the Mauritius transmitted residue to England, but the mother of testator having died, the amount was paid to her executors, who paid all her debts exceeding the amount to which she became entitled from testator's estate. Plaintiff was a creditor of testator, and filed a claim to obtain payment of his debt, or to have testator's estate administered. The Mauritius executors were improperly made parties to this claim, and plaintiff could not have relief against executors of testator's mother without having legal personal representative of testator constituted in this country, a party to the suit. *Silver v. Stein*, 312

— On hearing of appeal from the whole order, made at hearing of a suit by claim, the same rule is followed as to opening as on appeal from the whole decree made in suit by bill. *Sims v. Helling*, 387

— At the hearing of a foreclosure claim, an issue was directed as to a question of notice, which issue was afterwards abandoned by the defendant. Before the claim could come on again for hearing, an order must be made on motion, that the issue should be taken *pro confesso*. *Harland v. Danvers*, 449

— The joining in a claim parties whose interest is contingent, to ask for the preservation of a fund is not multifarious, or a misjoinder of parties. *Quere*—If an objection to a claim is to be raised by motion to take it off the file. *Davis v. Davis*, 543

— See Specific Performance. Trust and Trustees.

Colonial Law—Mortgagor, resident in this country mortgaged, by deed executed in England, to mortgagees, also resident here, real estate in Demerara, and before mortgagees completed their title to mortgaged property according to laws of Demerara, mortgagor became bankrupt, and his assignees in this country sold the property and received the proceeds. *Quere*—Whether the rights of the contracting parties have ceased to be governed by the law of Demerara, the *lex loci rei sitæ*, and must be governed by the law of this country, the *lex loci contractus*. *Waterhouse v. Stansfield*, 881

Company—Plaintiff filed a bill on behalf of himself and the other shareholders in a company against the persons forming the financial committee, praying that an account might be taken of all monies received by defendants in respect of deposits upon shares, and an account of costs and expenses incurred by them, and that the amount due to plaintiff and the other shareholders, after giving credit for monies paid by them, might be distributed rateably amongst the shareholders. Upon demurrer to the bill, the fact of defendants having already rendered an account was held not

to preclude plaintiff from having an account taken under authority of the Court; and that the remedy provided for these cases by the Winding-up Acts did not take away plaintiff's right to file a bill for a similar purpose. On demurrer as to parties, it was held that as all the shareholders had a common interest the plaintiff might without their consent file a bill on behalf of all, and that as the financial committee were the only persons alleged by the bill to have had power over the funds of the company, it was not necessary to make any other persons who might have acted as directors parties to the suit. *Clements v. Bowes*, 306

— Observations on the difficulty of applying the doctrine of acquiescence to joint-stock companies. Where partnerships, as in the case of joint-stock companies, consist of a great number of individuals, the Court will hold them in their transactions strictly to the terms of the partnership contract. *In re Vale of Neath and South Wales Brewery Joint-Stock Co. ex parte Lawes*, 688

— Money paid into court in respect of lands taken by company from persons under disability, and with exception of a small surplus, afterwards laid out in purchase of lands settled to same uses. Court will allow surplus to be paid to tenant for life, if under 20 $\frac{1}{2}$, but not otherwise. *In re Bateman's Estate*, 691

— See Contract. Winding-up Acts.

— Compensation. See Lands Clauses Act.

Composition Deed.—W. D. by deed, agreed to guarantee a composition of 8s. in the pound to all creditors of his brother who should execute a release of their debts by a day named. A, a creditor, failed to execute the release by the day named, in consequence, as he alleged, of a parol agreement between him and the agent of W. D. that he should be allowed to postpone his execution until after certain legal proceedings against third parties, the result of which might influence the amount of his debt. Upon bill by A, for specific performance, W. D. by his answer, denied any such agreement. The condition not being performed, the agreement never took effect as to A; and, further, the agreement being to pay the debt of a third person was within the 4th section of the Statute of Frauds, and any alteration in its terms must be evidenced by writing; and no fraud being alleged, a parol agreement, if proved, would not be binding. *Emmet v. Deschird*, 497

Condition. See Will.

Conflict of Laws. See Foreign Law.

Consent. See Baron and Feme.

Consideration. See Principal and Surety.

Contempt.—A party in contempt in a suit in another branch of the Court will be ordered to be brought up if wanted for examination. *Hill v. Travis*, 541

— Judgment having been entered up against a beneficed clergyman for a debt, the Court held it a charge upon the benefice, and that creditor entitled to have receiver of profits of benefice appointed. Another creditor of the clergyman obtained judgment upon his debt, and issued a writ of sequestration directed to the receiver already appointed. Upon motion to commit the second creditor for contempt, it was held that upon his undertaking to deal with the tithes as the Court should direct, and pay costs of the motion, no order should be made. *Hawkins v. Gathercole*, 617

Contract.—In construing contracts, what the Court has to ascertain is the real meaning of the words of the contract, which are to be construed most strictly against the contracting party. Contracts for marriage portions cannot be enforced unless something definite or specific is mentioned as to

the sum. What is sufficient evidence of marriage on the faith of a particular sum being given by will. *Moorhouse v. Colvin*, 177

— A father bound himself to give his daughter a marriage portion of 2,000*l.*, and said that she was and should be noticed in his will. He had previously made a will, giving her a lac of rupees; but afterwards he made another will, which, after giving all his property to his wife for life, and then to his two sons, gave the same, if they should die without issue, to his daughter's issue. It was held, affirming a decree below, that there was no contract by the father to give more than the 2,000*l.* *Moorhouse v. Colvin*, 782

— Railway company, defendants in a cause, entered into agreement or undertaking with plaintiff not to do any act contrary to a then pending notice of motion, unless under authority of parliament, until hearing of cause, or further order of Court. Company subsequently obtained act of parliament, which did not by positive enactment, nor, in opinion of Court, by necessary conclusion from its provisions, take case complained of by plaintiff out of reach of undertaking, although it did not prohibit the act, and might have contemplated the act consistently with provisions of act of parliament:—Held, on motion by plaintiff, that undertaking was binding on company until further order of Court: but that company, on shewing merits, might have moved to discharge it; and Court deeming such merits to have been shewn by answer, accordingly discharged undertaking. *Stevens v. South Devon Rail. Co.*, 816

— Legality of, under 22 Geo. 2. c. 46. s. 11. See Solicitor and Client. And see Specific Performance.

Contributories. See Winding-up Acts.

Copyhold.—A bishop, lord of a manor, enfranchised certain copyhold lands held of the manor under the Copyhold Enfranchisement Act, and the consideration money was paid into court. On petition by the bishop for investment of money, it was held, that the Copyhold Commissioners had a right to appear at the hearing of the petition, and that their costs of the petition and those of the bishop were payable out of the consideration money. *Ex parte the Bishop of Hereford*, 608

— See Executors.

Copyright.—Prints in books containing letter-press and prints, the prints being illustrative of the letter-press, are protected by 5 & 6 Vict. c. 45. Provisions of 8 Geo. 2. c. 13. as to date of publication and name of proprietor being printed on every print, apply only to prints published separately, and not to prints forming parts of books made up of prints and letter-press. *Bogue v. Houlston*, 470

Costs.—Taxing Master has authority, under 6 & 7 Vict. c. 73, to disallow charges for an action which he in his discretion considers to have been improperly brought. The 14 & 15 Vict. c. 83, constituting Court of Appeal, not pointing out what is to be done as to costs, where, in consequence of the Judges differing in opinion, decision of Court below is affirmed, such costs follow result of the appeal. *In re Clarke*, 20

— A married woman cannot sue by a next friend incapable of giving security for costs. *Stevens v. Williams*, 57

— In suit by decree against heir-at-law to establish the will, verdict at law having been given in support of will, heir-at-law not entitled to any costs of suit or issues, but bound to pay so much of costs of suit and issues as were occasioned by his raising questions of incompetency of testator and fraud of devise. *Grove v. Young*, 95

Costs (continued)—A. contracted to sell an estate to B. Before completion of purchase B. died intestate. Bill filed by A. against heir and administrator of B, praying for re-sale of estate and for application of purchase-money to payment of A.'s expenses and sum agreed to be paid by B. A. bound to pay the costs of the heir, with liberty to add them to his own. *Popple v. Henson*, 811

— Upon bill by *feme covert* by next friend, objection stated in answer that next friend in needy circumstances, and that security for costs ought to be given, cannot be taken at the hearing. *Monday v. Waghorn*, 353

— Where a Court of Appeal agrees with the main part of the relief granted in the court below, it will not depart from its adjudication of the costs, excepting in a very strong and clear case. *Blenkinsopp v. Blenkinsopp*, 401

— An order of course to tax solicitors' bills of costs, obtained by a married woman without the intervention of a next friend, is irregular, and though the solicitors hold some security from her for costs, it will be discharged, if further security is not given. *In re Waugh*, 567

— If a suit be instituted on the authority of a case, and the doctrine upon which the same was founded has been since got rid of, plaintiff is entitled to have his bill dismissed, without costs. *The Sutton Harbour Improvement Company v. Hitchins*, 568

— Direction in order upon unopposed petition, containing statements immaterial to the prayer, to the Taxing Master to have regard to such statements. *Hyder v. Coleman*, 592

— Where the Master of the Rolls or a Vice Chancellor has given substantial relief against a defendant, with costs against him personally, it is competent to this Court, in affirming the decree as to relief, to vary it as to costs, if its dissent from the decree as to costs is strong, clear, and undoubting. The Court being of opinion that, although the solicitor had acted contrary to public policy, whether through misapprehension or otherwise, and although his duty professionally prohibits him from assisting where there is *aliud simulatum, aliud actum*, and although he abetted in the composing and uttering of documents which recorded an affair as it was not, yet still as the Court had no firm impression that the decree below ought to have charged him with costs, it refused to vary the decree in this respect. *Reynell v. Sprye and Sprye v. Reynell*, 633

— By railway act company empowered to take lands belonging to a vicarage, and it was declared that purchase-money should be paid into court, and, that, on a petition by vicar and patron, and with consent of ordinary of diocese, it might be laid out in purchase of other lands. Upon purchase made accordingly, bishop entitled to be paid by company, not only costs of his attendance in Master's office, but also of his appearances on petitions to the Court for reference and confirmation of Master's report. *Ex parte Vicar of Creech St. Michael*, 677

— Next friend of married woman went to reside abroad. Defendant entitled either to security for costs from this next friend, or to have new next friend appointed. *Alcock v. Alcock*, 740

— on appeal. See *Taxation*.

— See Grammar School. Lunacy. Mortgage. Pauper. Prochein Ami. Solicitor and Client. Staying Proceedings. Trust and Trustee.

Creditors' Suit. See *Administration of Estate*.

Debtor and Creditor. See *Composition Deed*.

Decree—Where errors in a decree are obvious, the

Court will rectify them, even after it is enrolled. *Fearon v. Desbrisay*, 511

Deed—G. P. executed a document, which was attested by two witnesses, giving and granting to E. P. his wife a freehold house in which they resided. G. P. afterwards died, without having made any will, and his heirs-at-law brought ejectment to recover possession of house and premises from E. P., and obtained a verdict; upon which E. P. filed this bill. Upon motion to dissolve injunction which had been obtained,—held, that the gift was incomplete; that relationship of trustee and *cestui que trust* was not created; that the Court would not assist either party, but leave them as it found them; and injunction dissolved. *Price v. Price*, 53

— A deed executed by a husband, pending proceedings in the ecclesiastical court, for the purpose of preventing the suit, if successful, from affecting his property, declared void, and all arrears of alimony directed to be paid; but as to future payments, *quære*. *Blenkinsopp v. Blenkinsopp*, 401

— Conveyance set aside by reason of fraud and misrepresentation. Where a party has induced another to act on the faith of several representations made by him, any one of which has been made fraudulently, he cannot set up the transaction by shewing that every other representation was truly and honestly made, or was the result of innocent error. A representation, that remuneration for professional services rendered, as above stated, were customary, being untrue, is a ground for setting aside a conveyance and contract founded on it. Whether the agreement amounted to champerty, or savoured of champerty, still as the parties were not *in pari delicto*, and as the vendor had no legal advice but that of the solicitor of the purchaser, who adhered more to the purchaser than to the vendor, and failed in his duty to the latter, the Court considered that the vendor's suit ought not to fail, on the ground that he was a party to a contract against public policy and illegal. *Reynell v. Sprye and Sprye v. Reynell*, 633

— See *Baron and Feme*. *Charity*.

Devise—Direction, upon bequest of leaseholds, to renew insurance: discretion of trustees. *Mortimer v. Watts*, 169

— since the Wills Act, by mortgagee in fee of (*inter alia*) the residue of real property and securities, &c. after payment of his debts, &c. to residuary devisee for her own use and benefit comprises legal estate of mortgaged property of gavelkind tenure. *In re Field's Mortgage*, 175

— Testator devised estate to his daughter for life, and after her decease to all and every the children of the body of his daughter lawfully begotten (in case she should leave more than one child), their heirs and assigns for ever, as tenants in common; but in case his daughter should have only one child, then he devised the estate to such one child in fee; but in case his daughter should die without leaving any issue of her body, then he devised the estate to all such children of his body as he should leave or have living at decease of his daughter, in fee. Testator's daughter had two children, both of whom died during her life. The two children of testator's daughter took absolute and devisable estates in remainder under the will, and their devisees were consequently entitled. *In re Tooker's Trust, in re Bucks Rail. Co.*, 402

— Testator gave and devised all his freehold and copyhold messuages, farms, lands, tenements, hereditaments, and real estate situate at Market Rasen, to his wife for life, and then to his son, his heirs and assigns for ever. The testator had no property at Market Rasen except a leasehold estate held for

1,000 years. The leasehold estate passed under the above clause. *Nelson v. Hopkins*, 410

— See Charity.

Disclaimer. See Trustee Act.

Discovery.—Bill alleged that an estate devised under power to defendant for life or until he should alienate by forfeiture or otherwise; that execution of power invalid, and that plaintiff entitled to estate in default of appointment. One interrogatory to bill was, whether defendant had not in his possession title deeds of estate, and if not in whose possession were they? Bill also asked that defendant might set forth a schedule to deeds in his possession, and that he might state in whose possession those deeds were which he had parted with. Defendant admitted that some of the deeds were in his possession, and set forth a schedule of them, and he stated that he had had other deeds, but refused to answer in whose possession they now were, as it might subject him to forfeiture of the estate. Exception which comprised the answer to the whole of the interrogatory was good, although part of it had been answered. Also, as in one event documents might assist plaintiff at the hearing he was entitled to production. And further, the estate having been given to defendant until alienation, he could not protect himself from discovery on ground of forfeiture. *Hambrook v. Smith*, 320

Domicile.—Circumstances under which a person who had removed all his goods from Scotland, and also his sister and only relation, and never afterwards returned, had not lost his domicile of origin. *Brown v. Smith*, 356

Dower.—In deed of settlement, made on marriage of E. S., an adult female, it was recited that "for providing a competent jointure and provision of maintenance for the lady in case she should survive her husband," the father of T. D., the intended husband, had paid to T. D. 3,000*l.*, and the father of the lady had paid to T. D. 841*l.* and had covenanted to pay him a further sum of 500*l.*; and that it had been agreed that T. D. should give a bond to the trustees of the settlement, conditioned for the payment of 2,000*l.* within six months after the marriage; and it was declared that the trustees should hold the 2,000*l.* upon trusts for the benefit of the husband and wife for their respective lives in succession, &c. T. D. gave the bond accordingly, and died, leaving E. S. surviving him, having paid 500*l.* only in discharge of the bond. After the marriage, T. D. acquired real estate, which he sold during the coverture. Upon bill by the wife against the purchaser, claiming dower, it was held, upon appeal, that the settlement, being expressed to be "for providing a competent jointure," must be understood to be in bar of dower; and (reversing the decision below) that the partial non-payment of the money secured by the bond, did not entitle the widow to claim against the purchaser of the husband's real estates her dower *pro tanto*. Equitable bar of dower depends altogether upon contract; and has no analogy to legal bar of dower under the Statute of Uses. The observations of Sir A. Hart, in *Power v. Sheil*, disapproved of. *Dyke v. Rendall*, 905

Election. See Will.

Equity. See Jurisdiction.

Evidence.—taken in original suit is admissible in a cross suit, under the common order. *Gray v. Haig*, 542

— Document, purporting on face of it to be receipt for purchase-money, but inadmissible as evidence of payment of money for want of sufficient stamp, is nevertheless admissible as evidence of agreement

for sale, if it contain requisite terms — *semble*. *Evans v. Prothero*, 772

— See Baron and Feme. Principal and Surety. Settlement.

Executors.—Liability of, to co-executor for wilful default. *Jones v. Morrell*, 630

— Testator devised freehold estates to A, B, C, and D, and their heirs, on usual trusts for sale. He then directed that A, B, C, and D, the executors of that his will, or survivors or survivor of them, or executors or administrators of such survivor, should sell his copyhold estates. He then gave all his personal estate to same persons, and declared trusts of all monies to arise from his real and personal estate. A. died in lifetime of testator. Testator died in 1830. B. and C. sold copyhold estates in 1832. In 1851 D. executed usual deed of disclaimer. There was no evidence that D. had refused to accept executorship before sale in 1832. It was held, first, that copyholds were within 21 Hen. 8. c. 4; secondly, that, under that act, sale of copyholds had been properly made by B. and C. *Peppercorn v. Wayman*, 827

— See Claims. Mortgage.

Factors' Act.—Plaintiff consigned pearls to a Liverpool merchant for sale, and drew bills upon him to an amount greater than the value of the pearls, which bills he accepted. The Liverpool merchant then handed the pearls to his London agent to be sold, and drew bills upon him, as an advance, upon account of the pearls. The London agent accepted the bills, having notice that the pearls had been consigned by the plaintiff for sale. The Liverpool merchant became insolvent, and the bills drawn upon by the plaintiff were not paid. The London agent sold the goods to recoup himself the bills drawn upon him by the Liverpool merchant. Upon bill by the consignor alleging fraud and collusion, and praying that the London agent might be desired to pay him the amount produced by the sale of the pearls, it was held, affirming the decree of the Court below, that the pledge was valid within the 5 & 6 Vict. c. 39. as made *bond fide* and in the ordinary course of business. Notice to the pledgee of the fact that the goods were transmitted to the consignee, with directions to sell simply, will not vitiate the pledge; *secus* if the pledgee had notice that the consignee was prohibited from pledging. *Navulshaw v. Brownrigg*, 908

— See Principal and Agent.

Foreign Railway.—A railway company in Belgium was established as a "*société anonyme*." There were English and foreign directors. Deposits on allotted shares were paid into the bankers. Disputes took place between the English and Belgian directors, in consequence of which all the former resigned. In following month J. and G., two of the English directors, to whose account deposits had been paid, returned deposits to all allottees who were willing to take them, and they also purchased back some shares, which had been allotted, for benefit of the company. Accounts of all this were laid before the committee of management, and the balance remaining in the hands of English directors was paid over, and the transactions were approved by a general meeting. A shareholder filed a bill on behalf of himself and all other shareholders not defendants, against J., assignees of G, and the committee of management, praying repayment of the money returned to the allottees, and for an account, but the bill was dismissed at the Rolls, and, on appeal, the decree was affirmed; the Court holding that by the law of Belgium plaintiff was not competent to sue for such a pur-

pose, and by the law of England he had shewn no case for the suit against the English directors. *Kent v. Jackson*, 438

Foreign Law—Messrs. P. and R, plaintiff and defendant, were writers to the Signet in Edinburgh, P. being agent of the mortgagee, and R. being agent of the mortgagor of an estate in Scotland, upon which various incumbrances were existing. 2,100*l.*, part of mortgage-money, was deposited in Bank of Scotland, in joint names of Messrs. P. and R, to discharge existing claims upon estate, but this sum was subsequently drawn out by them from deposit account, and applied partly in payment of charges upon estate, and partly to satisfy other liabilities of mortgagor. Some creditors of mortgagor afterwards obtained an order from Court of Session in Scotland to arrest the money in the hands of Messrs. P. and R, and after various proceedings in Scotland an order was made upon them jointly and severally that they should deposit in Bank of Scotland the fund paid out. R. did deposit a part, and afterwards left Scotland and came to England. P. then re-deposited the whole of the fund, in pursuance of order of Court of Session, and took an assignment of the order of the Court, and after exhausting process in Scotland against R, and failing to enforce payment there, filed a bill in this court. No final judgment had been obtained. This Court would enforce a foreign judgment if final; but order made was not final, and this Court would not enforce an interlocutory order of a foreign court. Assignment of order by parties in foreign suit not render them the less necessary parties to this suit, and created no separate contract between Messrs. P. and R.; and this Court had no jurisdiction, and bill dismissed, with costs. *Paul v. Roy*, 361

Fraud. See Deed.

Frauds, Statute of. See Composition Deed. Specific Performance.

Friendly Societies—In 1845 a society, called the Frugal Investment Society, was established, and rules framed and approved by the barrister under the Friendly Societies Act. By these rules society was to last one hundred months, and every member to pay 1*l.* a month in respect of each share held by him. Members might be paid their shares in advance upon terms of paying 8*s.* a month by way of interest in respect of each share so anticipated, in addition to subscription, and giving security for such payments. All monies paid to society, exclusive of subscriptions, were to be divided among members every year. Society consisted of 180 members. A. took shares and received amount of them in advance, and made mortgage of real estate to trustees of society, for purpose of securing sums payable by him under rules. A. paid sums to society, to an amount, however, less than sums so payable. He afterwards filed a bill against trustees, praying that, upon accounting for sums advanced to him and interest, difference, if any, between this amount and sums paid by him might be repaid to him by trustees, and that mortgaged property might be re-conveyed to him. On this bill, A. had no right to relief. Above-mentioned loans made to A, under rules of society, not usurious. Whether Society within Friendly Societies Act, or whether it was an illegal one—*quære*. *Burbridge v. Cotton*, 201

Fund in Court—Lands having been settled on A. for life, with remainders over, a railway company took part of land and money was paid into court. An eligible property being found for re-investment of part of money, tenant for life petitioned for payment of so much out of court for that purpose.

Petition need not be served on parties entitled in remainder, and order made on petition of tenant for life alone. *Ex parte Staples*, 251

— See Baron and Feme. Waste.

Grammar School—On information to vary scheme, regulating management of a Free Grammar School, Court varied the scheme as to religious tests (without costs) according to decree in *Warwick School case*, and dismissed remainder of information, with costs. *Attorney General v. Bishop of Worcester*, 25

Guardian ad Litem—to lunatic defendant (not found so by inquisition) appointed without a commission. *Piddock v. Smith*, 359

— Comparative expenses of appointment of guardian *ad litem* for infant defendants on motion in court, by commission, and on their appearance in court. *Carwardine v. Wislake*, 464

— Motion refused for appointment of guardian *ad litem* for infant defendants without their appearance in court, no reason being given for their not appearing. *Crabbe v. Morley*, 504

— See Infant.

Infant—Shares of infants in testator's estate under 20*l.* each ordered to be paid at once to the persons maintaining them. *Farrance v. Viley*, 313

— The Court will not give a direct benefit out of an infant's income to his father. Scheme by which an infant (whose father was living) was to be articulated to a solicitor, and to live with an uncle residing in the same place, approved of by the Court; and the uncle was appointed to act in the nature of a guardian to the infant, and to have an allowance out of his income. *In re Stables*, 620

— By post-nuptial settlement, income of trust monies was made payable to parents and the survivor of them, upon condition of providing for the children with suitable diet, maintenance, &c. in proportion to circumstances of parents, and expectancies of children; but that, in case of an advance to any of the children, the parents should be released from the condition. Husband petitioned Court of Bankruptcy, and, under the 5 & 6 Vict. c. 116, a conditional order was made for his protection upon payment of a yearly sum. Husband and wife afterwards mortgaged all their interest in trust fund, which was then transferred into court, under Trustees Relief Act. On petition by infant children, the Court ordered the whole income to be applied for maintenance of the petitioners. *In re Dalton's Settlement*, 681

— In suit by adult plaintiffs and infant plaintiffs, order obtained for changing next friends of infants, and drawn up and entered. Adult plaintiffs obtained at the Rolls an order for changing solicitor to suit, and alleged that order appointing a new next friend had not been drawn up and entered. New next friend moved to discharge order obtained at the Rolls. Order for changing solicitor irregular; motion to discharge ought to have been by the infants by their next friend, and not by next friend in his individual capacity. Application refused, but leave given to amend notice of motion. *Pidduck v. Boulbee*, 786

Injunction—Plaintiff obtained the common injunction to stay execution in an action on the same day that the action was tried, but before the verdict was given against him. Upon motion by defendant before answer, plaintiff must pay the amount for which judgment has been signed into court within a specified time, or the injunction must be dissolved. *Anderson v. Noble*, 536

— Upon demurrer for want of equity to bill for an injunction to restrain bell ringing in a chapel,

held that a bill may be filed by an individual alleging private nuisance, although the nuisance may at the same time be public; also, that plaintiff, having brought his action for damages in respect of the ringing of bells, though to greater extent than was subsequently practised, need not commence fresh action for every modified form of bell-ringing; but that if plaintiff had not obtained a verdict at law, that was no ground of demurrer to bill for an injunction. The demurrer was therefore overruled, and an injunction to restrain the ringing of these bells was granted so far as they occasioned an annoyance to plaintiff or his family. *Soltan v. De Held*, 153

— A party who has a secret in a trade and employs persons under contract express or implied, or under a duty express or implied, can restrain by injunction such of those persons as have gained a knowledge of the secret from setting it up against him. *Morison v. Moat*, 248

— A person having established his right at law is not, as a matter of course, entitled to an injunction, particularly where injunction would not restore plaintiff to the right he has established, and where act complained of may be compensated by pecuniary damages. What amount of acquiescence will disentitle to an injunction. *Wood v. Sutcliffe*, 253

— The Court will restrain a party from enforcing a legal claim where promises have been made to the person legally liable not to enforce it, upon the faith whereof obligations have been entered into. *Money v. Jordan*, 631

— *Mdlle. J. W.* agreed in writing with *L.* that, for certain considerations therein expressed, she would sing and perform at his theatre for a specified period; and that, during her engagement with *L.*, she would not sing elsewhere without his licence in writing. Afterwards, *J. W.* contracted with *G.* to sing and perform at his theatre during the period specified in her engagement with *L.* Upon bill by *L.*, praying simply that *J. W.* might be restrained from singing and performing elsewhere than at his theatre during the period specified, the Court granted an injunction accordingly. Where a contract contains covenants to do certain acts, and also to abstain from doing certain other acts, the Court has jurisdiction to restrain the breach of the negative covenants, though there may be no jurisdiction to specifically perform the affirmative covenants—*Kemble v. Keen* and *Kimberley v. Jennings* disapproved of. But in such cases the Court will decline to interfere where the jurisdiction cannot be beneficially exercised, as in *Collins v. Plumb*, or where its exercise would work injustice, as in a case where the consideration for the negative covenant of the one party is the affirmative covenant of the other party, which latter the Court cannot specifically perform—*Hills v. Croll*. *Lumley v. Wagner*, 898

— The Court below having held that a party who, by representations, had induced another to enter into irrevocable engagements, must be restrained from taking proceedings to enforce obligations and promises of the abandonment of all intention to enforce what was the subject of those representations, the decree granting a perpetual injunction to restrain such proceedings was confirmed—Lord Justice Cranworth dissenting: first, because this case was not within the principle of the cases on which the decree below was professed to be grounded, those cases depending on misrepresentation of fact, while here there was no misrepresentation of fact; and, secondly, because the promise alleged by the plaintiff was supported by the evidence of

one witness only (who had since died), and which was not, in his Lordship's opinion, supported by the surrounding circumstances, and was positively denied by the answer. *Money v. Jordan*, 893

— See Deed. Patent. Railway. Settlement.

Insolvent—Annuity awarded to country Commissioner of Bankrupts, under 5 & 6 Vict. c. 122, passes to his assignee in insolvency; and is not within excepted cases mentioned in 56th section of 1 & 2 Vict. c. 110. Where insolvent refused to make requisite affidavit that he did not hold any public office or employment in terms of 58th section of 5 & 6 Vict. c. 122, Court allowed other evidence to be given of that fact to enable assignee to receive annuity. *Spooner v. Payne*, 791

— See Alienation.

Insurance—A sum of money was borrowed from an insurance company, and bond given to secure repayment. The borrower at same time insured his life as further security, and bond extended to payment of premiums for keeping up the policy. The insurance company having ceased to carry on business was dissolved, and affairs being wound up, company transferred, amongst other things, this bond and policy to another insurance company. No premiums were paid to second company, and policy allowed to drop. Surety in the bond died, and second insurance company claimed to be creditors against his estate for amount of premiums unpaid, on ground that policies ought to be kept on foot until the money due upon the bond had been paid. As regarded the premiums, this not such a contract as assignees of first insurance company could enforce, although they had a good claim against the estate of the surety *quoad* the amount secured by the bond. *Atkinson v. Gylby*, 848

— If policy varies from agreement to effect an insurance, a court of equity will interfere and deal with the case of the insured on the footing of the agreement, and not of the policy. Observations on relief in equity against insurance companies in cases of fraud. *Collett v. Morrison*, 878

— See Administration of Estate. Legacy.

Interest—When it may be claimed on a retention of balances. *Jones v. Morrell*, 630

— An assignment of property was executed to trustees for benefit of creditors, who were to be paid equally, and it was stipulated that any securities held by creditors might be realized and applied towards payment of their debts, and as to any deficiency such creditors were to stand *pari passu* with the others, but not to receive more than the principal and interest. A schedule was added containing the debts, calculated with interest up to date of deed, but there was no express contract that simple contract debts should carry interest. Upon exceptions to Master's report, it was held, this deed did not convert the simple contract debts into specialty debts, and that no right to interest after date of deed was created which did not otherwise exist. *Cloves v. Waters*, 840

Interpleader—*G. P.* the elder was owner of one-third of a ship, Messrs. *S. M. & Co.* of Calcutta, were owners of another third, and mortgagees of the other third, of which *G. P.* the younger was owner. *R. I. & Co.*, of London, were agents of *S. M. & Co.*, and they appointed Messrs. *T.* ship's brokers, who as such received freight, amounting to 2,721*l.* 2*s.* 7*d.*, and paid one-third, 907*l.* 0*s.* 10*d.* to *G. P.* the elder. *R. I. & Co.* accepted several bills of exchange drawn against this freight, and before they became due stopped payment. *S. M. & Co.* also stopped payment, and finally became insolvent. Claims were made upon Messrs. *T.* for the whole

freight by B. I. & Co., and also by holders of the bills drawn by them, as well as on behalf of S. M. & Co. and G. P. the younger, and upon bill filed by Messrs. T, that the defendants might interplead in respect of 1,814*l.* 9*d.*, it was held, that no decree could be made in the suit to compel plaintiffs to bring entire freight into court; that as no defendant asked to have bill dismissed, Court must make decree of interpleader; and that such decree would only protect them to extent of 1,814*l.* 9*d.* *Toulmin v. Reid*, 391

Investment—Land belonging to a vicarage was taken by a railway company, and the purchase-money paid into court to the account of the vicar. On a petition by the vicar, stating an agreement to purchase land particularly mentioned in the agreement, and that the title had been approved of by a barrister, and that the title deeds had been examined and found correct; and praying for a conveyance and payment of the money out of court, without a reference to the Master—the Court made the order. *Ex parte Vicar of East Dereham*, 677

—Order made on petition by rector for investment of money arising from sale to a railway company of part of rectory lands. Pending proceedings in Master's office rector died. New rector consenting that proceedings should go on, no supplemental order necessary—*semble*. *Ex parte Rector of Lea*, 776

Irrelevant Matter. See Costs.

Judgment—W. C. being in receipt of an annuity payable out of stock standing in name of the Accountant General, became indebted to F. C. who brought an action against him and obtained a judgment, upon which a *fiery facias* issued, but nothing was found upon which to execute it. Upon half a year's annuity falling due, F. C. obtained an order stopping the Accountant General from parting with the cheque; but upon petition, the Court declined to make an order authorizing the sheriff to seize the cheque or to direct it to be dealt with as if it was standing in the name of a trustee, and petition dismissed. *Courtney v. Vincent*, 291

—A. was entitled to stock carried over to his account in a suit. B. a judgment creditor of A. obtained a Judge's order charging the stock, and then filed a claim against A. and served him with it. The claim was brought on, and A. did not appear. B. could not obtain the stock without petition to be presented in the suit, but it was not necessary to serve A. with the petition. *Reece v. Taylor*, 463

Judgment Creditor—On claim by judgment creditor against his debtor in respect of certain real estate belonging to debtor, Court refused to give decree of foreclosure. *Footner v. Sturgis*, 741

Jurisdiction—A surgeon having obtained from a poor patient, on a change of circumstances, his promissory note for an amount beyond what was due for medical attendance, the Court, in absence of evidence to prove that the patient intended to pay more than what was justly due, ordered the note to be impounded, and directed an issue at law to ascertain the amount actually due. *Billing v. Southes*, 472

—See Building Societies. Contempt. Patent. Ship and Shipping.

Lands Clauses Act—A harbour improvement company, in prosecution of their works, under authority of special act of parliament, obstructed access to a wharf from place of business of M. H. by which he was put to expense in loading and unloading ships. M. H. claiming compensation, gave notice

and proceeded to appoint an arbitrator, under 8 Vict. c. 18. s. 68. Upon bill filed by company, injunction granted to restrain further proceedings of M. H. until he established his right at law, but on appeal injunction dissolved. *Sutton Harbour Co. v. Hitchens*, 73

—See Railway.

Lease—In carrying an informal contract for a lease into effect, the Master will be directed to regard previous leases containing special covenants, when specific performance of such contract will be enforced. *Bell v. Barchard*, 411

Leaseholds—Testator gave all his real and personal estate whatsoever to his wife and son, whom he appointed executrix and executor, upon trust to permit his wife during her life to receive the clear rents, issues and profits, interests, dividends, and annual proceeds thereof, subject to all outgoings; and upon death of his wife then, as to all his said devised and bequeathed freehold and residuary real and personal estate, with their appurtenances, and of which his wife was to have the clear yearly income for her life, upon trust for his son absolutely. Leaseholds belonging to testator were to be held by his widow in specie, no intention of conversion being expressed. Shortly after testator's death his widow was called upon to make good dilapidations to the leaseholds, under covenant in the lease. These expenses, which the widow had paid out of her income, properly chargeable upon the corpus of the estate. *Harris v. Poyner*, 315

—Renewal. See Specific Performance.

Legacy—Testatrix gave her residuary estate, after death of three persons, upon trust to pay and assign it equally between G. B. and E. B. their executors, administrators and assigns; but if neither of them should be living at death of survivor of tenants for life, she gave same to F. H. G. B. died in lifetime of testatrix, but E. B. survived tenants for life. This gift lapsed as to moiety of residuary estate; no joint estate created between G. B. and E. B.; no right by survivorship arose by implication; event had not happened upon which gift over to take effect; and one moiety of residuary estate was undisposed of and belonged to next-of-kin of testatrix, and costs must be paid out of her estate. *Barter v. Losh*, 55

—Testator by will recited that on his marriage he had entered into a bond to leave his wife 800*l.* on his death, and that he intended shortly to distribute 6,000*l.* in his lifetime amongst her relations, in lieu of any claims under the bond. Testator then directed that, in case of his death before carrying his intention into effect, the 6,000*l.* should be divided between and amongst said relations of his wife in such manner, shares, and proportions as would have been the case if his wife had died possessed of said sum a spinster and intestate. Testator's wife had died before date of his will, and had left sixteen next-of-kin, five of whom died before testator. The eleven surviving next-of-kin took each one-sixteenth of the 6,000*l.*, and the shares which the other five would have taken had they lived, lapsed, and went to testator's residuary legatees. The lapsed shares, being the only residuary property over which the Court had power, costs of petition for determining question raised upon construction of the will, were borne by them. *Ham's Trust*, 217

—No claim for legacy duty arises under 26 Geo. 3. c. 52, or 45 Geo. 3. c. 28, upon a transfer by wife, out of funds which had survived to her, to pay her husband's debts and legacies. *Laurie v. Clutton*, 226

—Testator gave real and personal estate, subject

- to one "clear" yearly rent-charge or annuity of 100*l.* a year to S. G. Legacy payable without any deductions for legacy duty, which was to be paid out of the real estate, personal estate of testator being exhausted. *Bailey v. Boulton*, 277
- The Court will not hold a testamentary disposition to be void for uncertainty if there is a reasonable degree of certainty as to testator's intention. Where testatrix bequeathed legacy to wife of a person by name of one of their daughters, an infant of tender years, they and not the daughter were entitled to the legacy, and the gift not void for uncertainty. *Adams v. Jones*, 362
- Testator bequeathed certain chattels to A, and afterwards insured them from loss by sea. Testator embarked with these goods in a ship, which was totally wrecked, and he and chattels perished together. A. had no interest in money recovered by executors from insurance office. Testator gave residue of his estate to B. interest to be paid to her until her first-born son should attain twenty-one; one-half of said principal sum then to be paid to her aforesaid son, other half to be paid to his mother. Should his mother die before said son, the whole to be paid to him. Should aforesaid son die before his mother, his share to go to her. B. had one illegitimate son at date of will, who was maintained by testator. This son not entitled under above bequest. *Durrant v. Friend*, 363
- Testator gave his residuary estate equally among his six children, and directed that sums of money appearing by his private ledger to be due from them, should in the division be brought into account. Allowance to be made for all sums appearing due, though barred by the Statute of Limitations. *Rose v. Gould*, 360
- Testatrix bequeathed leasehold property to R. A. absolutely during the residue of her term, subject to the payment of the rent and performance of the covenants reserved and contained in the lease; and, as to her residuary estate, subject to the payment of her debts, &c. she gave the same to J. B. absolutely. Upon appeal, reversing the decree below, R. A. took the leaseholds with liability to make good dilapidations that had accrued during life of testatrix; and R. A. has to indemnify executors against liability under covenant to repair before he was let into possession. *Hickling v. Boyer*, 388
- Next-of-kin *ex parte materna* not excluded, as filling also the character of next-of-kin *ex parte paterna*. "Next-of-kin" means next-of-kin at the death of the party whose next-of-kin are spoken of. *Gundry v. Pinniger*, 405
- A bequest of 500*l.* to the Westminster Asylum for pregnant women.—Held, upon extrinsic evidence, and the context of the will, without any inquiry, a gift to "The General Lying-in Hospital." *General Lying-in Hospital v. Knight*, 537
- W. L. by his will, directed his executors to pay the residue of his property to M. F. but in case of her death then to pay the same to the executors or executrixes which M. F. might appoint. M. F. died before W. L. and by her will gave the residue of her property to I. W. and appointed M. L. her executrix. Upon a bill filed by M. L. against I. W. M. L. did not take the residue of W. L.'s estate beneficially, but she took it as part of the personal estate of M. F. and was to hold it upon trusts and for purposes of M. F.'s will. *Long v. Wilkinson*, and *Same v. Long*, 844
- Testator by will gave real and personal estate to trustees to pay debts and legacies; by codicil she devised to her sister for life, and directed it, at her death, to be sold for payment of legacies; she then gave various legacies, amounting to 50,000*l.* Upon personal estate proving insufficient to pay legacies, said estate not made primary fund for payment of legacies, and subject to life estate of sister, said estate an auxiliary fund. *Whieldon v. Spode*, 913
- See Annuity. Marriage. Trust and Trustee. Will.
- Lien*—for unpaid purchase-money. See Limitations, Statute of. And see Solicitor and Client.
- Limitations, Statute of*—Notice by an attorney that purchase-money for property comprised in contract of sale was ready to be paid is an acknowledgment in writing within section 40. of 3 & 4 Will. 4. c. 27. A person by whom "the money is payable," means, in the case of a claim by equitable lien, the person entitled to the land on which the charge is sought to be fixed, and the acknowledgment being by devisees in trust for payment of debts is good as against the *cestui que trust* under same will. There being no proof as against the *cestui que trust* that the attorney who wrote the notice was in fact agent of devisees in trust, the Court granted an inquiry. *Toft v. Stephenson*, 129
- Upon application for payment of 450*l.* due upon two promissory notes dated 25th of March 1836, upon which interest had been paid up to 25th of March 1841, a letter was written by the creditor on 13th of January 1846, stating "I hope to be in H. very soon, when I trust everything will be arranged with Mrs. W. agreeable to her wishes." This a promise to pay, which would take the debt out of the Statute of Limitations, and exceptions to Master's report allowing the debt, overruled. *Edmonds v. Goslar*, 290
- See Legacy.
- Lunacy*—Order that, upon allowance to lunatic being paid direct to committee of the person, instead of passing intermediately through the hands of committee of the estate, committee of the person be accepted as one of the sureties for committee of the estate, the general rule, however, to remain unaltered. *Ex parte Mount*, 221
- L. was found lunatic as from a certain day. He presented petition to traverse, and order made allowing same. On same day order made, granting care and custody of L. and his estate to B. who never perfected his securities, and no grant made to him. On traverse jury found traverser was then of sound mind. Costs of inquisition had been ordered to be taxed. L. presented petition for supersedeas of commission and for delivering up of his deeds and papers in hands of B. or of those who had issued commission. These parties having applied for order for payment of costs out of traverser's estate, Court refused the order, first, on the ground that, independently of 6 Geo. 4. c. 53, there was no jurisdiction, either original or as delegate of the Crown; and, secondly, because 4th section only authorized Court to deal with property pending, and notwithstanding a traverse. Court also decided it had no authority to make delivery up of property dependent and conditional upon payment of costs. *In re Loveday*, 231
- A lunatic made defendant as one of next-of-kin of intestate. He and his committee presented petition entitled in the suit, and also in the lunacy, praying that lunatic might defend by his guardian, and that committee might be appointed such guardian. Committee prayed that, as such, he might be at liberty to prosecute claim of lunatic as next-of-kin, and that all such costs as should be properly incurred, and as should not be paid out of the estate to be administered in the suit, might be raised and paid out of lunatic's estate. Court gave liberty to committee to defend the suit, but refused to appoint a guardian as being unnecessary, or to

- make any prospective order as to costs, and directed the title in the cause to be struck out. *In re Manson*, 249
- Lunacy** (continued)—*Quære*, if the Lords Justices acting in lunacy under the royal sign manual have jurisdiction to make order vesting trust estate, of which person of unsound mind, heir-at-law of deceased trustee, was seised,—the words of Trustee Act, 13 & 14 Vict. c. 60, being "the Lord Chancellor intrusted by virtue of the Queen's sign manual." *In re Pattinson*, 280
- A person of unsound mind, not found lunatic by inquisition, was entitled to sums of stock in court, income of which was not sufficient for her maintenance. The Court directed that part of one of the funds should be invested in purchase of Government annuity, in name of lunatic and for her life, to be paid to her brother until further order, he undertaking to apply the same towards her maintenance. *Davies v. Davies*, 419
- Party interested under deed executed ten years back was allowed to attend execution of commission *de lunatico inquirendo* when lunacy was alleged to have existed for period antecedent to date of deed, but upon undertaking to abide by such order as Court might make as to party's own costs and increased costs occasioned by his attendance at inquisition. *In re Richards*, 739
- Lunatic died without leaving ready money to pay expenses of funeral, and there was no committee of his person or estate. The heir-at-law, who was one of the next-of-kin, petitioned that a sufficient sum belonging to lunatic should be paid out of court for such purpose; but Court directed the persons with whom lunatic had resided to proceed with funeral, and ordered petition to stand over. A petition for this purpose is necessary; a warrant from Lunatic Office is not sufficient. *Re Townsend*, 747
- Two committees of estate of a lunatic were appointed, one of whom died, and no new committee was appointed in his place. The estate being small, the Court permitted the income to be paid to survivor on production of affidavit of his solvent circumstances. *In re Noble*, 748
- A sum of money having been lost to estate of lunatic under circumstances which Court considered to be the fault of committee in not taking steps to enforce payment, the estate of committee, who had died, was charged therewith. *In re Swindell*, 748
- Person found lunatic by inquisition is entitled as of right to traverse finding; but before granting writ Court will be satisfied by personal examination that alleged lunatic is competent to exercise volition upon the subject, and desires to have a traverse of finding. Where personal examination of alleged lunatic by Court is impracticable, Court will adopt some other mode of inquiry—*semble*. Whether party may file traverse in Petty Bag Office without intervention of Court—*quære*. *In re Cumming*, 753
- Where Court thinks it for the benefit of lunatic that the care of the person should remain undisturbed, it will so direct, and will direct whole income of property to be paid to lunatic, pending a petition to traverse; although Court will confirm report of Master in lunacy, appointing a committee of the person and a committee of the estate. *In re Cumming*, 753
- Costs of obtaining a re-transfer of premises mortgaged to a lunatic are to be paid out of lunatic's estate where petition for that purpose is presented by committee of the estate. If petition be presented by mortgagor, he will not be allowed costs, except in a case where the committee has refused to proceed. *In re Wheeler*, 759
- Solicitors, who claimed costs for taking out commission, and for other business in the lunacy, obtained order for taxation, but did not tax. Five years after order, lunatic died, leaving real estate, but no personal property. Solicitors sued committees at law, but they set up Statute of Limitations, and action failed. Solicitors now presented a petition, praying order for taxation, with view to proceedings to make real estate liable, and Court made order, but without prejudice to any question whether petitioners had any claim on lunatic's estate. *In re Hart*, 810
- Where lady who had separate property married, and agreement was made that out of her income certain domestic expenses should be defrayed, and agreement was acted upon until her lunacy, and husband continued same expenses out of her property till his death; and where lady was under moral obligation to give her nephew 500*l.*, part of which she gave, and a further part her husband, after her lunacy, paid out of her property; Court allowed executors of husband to deduct all money paid for keeping up establishment after lunacy, till his death, and also the money paid by him to nephew, before paying over separate income of wife to her committee. *In re Hewson*, 825
- See *Guardian ad Litem*.
- Lunatic Pauper**. See *Trust and Trustee*.
- Maintenance**. See *Infant*. **Lunacy**.
- Marriage**—Testator directed his executors to sell the whole of his real and personal estate, and invest the proceeds in some government annuity for benefit of his wife and M. L., to be equally divided between them, and at death of either of them her share to pass to the survivor, and in case either his widow or M. L. should marry or live in a state of adultery, then her share to pass to the other, but if they both should marry, then their shares to go to his nephew. Testator also directed his wife and M. L. out of their annuity to keep in good repair the tomb in which he was buried. This restriction upon marriage good as related to the widow, but not good with respect to M. L., who was a single woman. The direction to testator's widow and M. L. to repair the tomb, being confined to the lives of the annuitants, not void on ground of perpetuity. *Lloyd v. Lloyd*, 596
- Marriage Portion**. See *Contract*.
- Mortgage**—Mortgagor, a solicitor, having prepared mortgage deed, and mortgagee not having employed another solicitor, mortgagor is to be considered to be solicitor of mortgagee in transaction of mortgage; but latter not therefore deemed to have notice of prior deposit of title-deeds by mortgagor, or of any uncommunicated fact which it was the interest of mortgagor to conceal from mortgagee. Constructive notice is knowledge imputed by the Court on presumption, too strong to be rebutted, that knowledge must have been communicated. Legal mortgagee not postponed to prior equitable one, on ground of not having got in title-deeds, unless there has been fraud or gross or wilful negligence on part of legal mortgagee. Fraud or gross or wilful negligence not imputed to mortgagee who has made *bond fide* inquiry for title-deeds, and reasonable excuse has been given for non-delivery of them to him. *Secus*, if he has not made any inquiry. *Hewitt v. Loosemore*, 69
- G. S. insisting that J. F. owner of an agreement for building lease, had deposited it to secure to him 900*l.*, claimed payment from administrator of J. F. who had expended money out of his own pocket

in finishing the houses, and had obtained leases from the lessors, and questioned the deposit and extent of advance if any had been made. Affidavits affording evidence of deposit, Court bound to act upon them; when deposit made, it gave G. S. a title to a mortgage, and he had a right to payment; and Court made decree for account and sale of houses comprised in agreement. *Sims v. Helling*, 76

— A mortgagee instituted a foreclosure suit, in which he was ordered to pay the costs of an interlocutory motion, but died before payment and before the hearing of the cause. His representatives filed an original bill of foreclosure without noticing or reviving the abated suit of the mortgagee. The Court refused to allow the plaintiffs their costs in the second suit unless they submitted to pay the costs of the motion in the first suit ordered to be paid by their testator. *Long v. Storrie*, 521

— The purchase of a piece of land at an exorbitant price not allowed to stand, being the condition of a loan of money to a party whose necessities compelled him to borrow. A mortgage of a fund in court in a suit of *Collett v. Maule*, by W. G. C. the purchaser of the land, to secure 6,000*l.*, the purchase-money, to G. W. F. the vendor, set aside as fraudulent. Assignment of chose in action must be taken, subject to all prior claims. Sub-mortgages of the fund in court, made without noticing G. W. F. were therefore set aside, as his title was either void or subject to the prior equity of W. G. C. notwithstanding he had been induced to create or countenance such sub-mortgages. Acts of W. G. C. in joining to create the sub-mortgages not a recognition of or an acquiescence in sub-mortgages, as they were done in entire ignorance of his rights, and under the idea that the original transaction with G. W. F. was unimpeachable. *Cockell v. Taylor*; *Preston v. Collett*; *Collett v. Preston*, 545

— An executor borrowed money upon a representation that it was wanted for purposes of testator's estate. The money was lent upon personal security of executor, who afterwards mortgaged part of testator's property as security for the money antecedently advanced. — Held by the Vice Chancellor, the onus of proof lay on the person who advanced the money, to shew that it was applied for executorship purposes: held on appeal, there was no evidence to shew that the advances were not made for executorship purposes. The bill was filed by representative of executor, who had borrowed the money, in the character which he also filled of executor to original testator, and it sought to impeach the mortgage. — Held, by the Vice Chancellor, the plaintiff, although he was executor of original testator, in which character he might sue, could not repudiate the character of representative to the executor, who could not sue; but, *contra*, on appeal; and bill therefore dismissed, so far as it sought to impeach the mortgage. *Miles v. Durnford*, 667

— Owner of reversion in personalty mortgaged it. He then mortgaged equity of redemption to second person, and then agreed to sell, subject to mortgages, to a third party. First mortgagee required to be paid off. Mortgagor in memorandum, reciting that purchaser had paid first mortgagee in discharge of her debt, out of purchase-money, agreed to execute assignment to purchaser, and until it should be executed that purchaser should stand in place of first mortgagee. It was held, reversing decree below, that debt of first mortgagee was not extinguished, and that purchaser was entitled to benefit of that security. Second mortgagee was

also mortgagee of other property of mortgagor. — Held, also reversing decree below, that one mortgage could not be redeemed without the other. *Watts v. Symes*, 718

— A mortgaged estate in fee to B, and covenanted to pay B. mortgage debt and interest. A. died intestate, and arrear of more than six years' interest was due. A.'s heir not entitled to redeem, except on terms of paying principle and whole of interest due. *Elvey v. Norwood*, 716

— A mortgaged real estate to B. for 3,000*l.*, and died, having devised two-thirds of it to C, and one-third to D. and E, in equal moieties. By deed of transfer, after reciting that B. had required payment of debt from C, D. and E, which they were unable to pay, and that they had applied to F. to lend them the amount, which he had consented to do, on having repayment secured as thereafter expressed, B, at the request of C, D. and E, conveyed premises to F, subject to proviso for redemption on payment by C, his heirs, executors and administrators, of 2,000*l.*, and by D. and E, their heirs, executors and administrators, of 1,000*l.*; and C. covenanted to pay 2,000*l.*, and D. and E. covenanted to pay 1,000*l.* As between the real and personal representatives of D, he had not taken on himself the payment of his share of the mortgage debt. *Hedges v. Hedges*, 858

— See Devise. Trust and Trustee.

Mortmain—Testatrix gave the residue of her estate to her trustees to be applied towards establishing a school. This gift void under the Statute of Mortmain. *Longstaff v. Rennison*, 622

— See Charity.

Multifariousness. See Claim.

Municipal Corporation—The borough fund is a trust fund, and is so constituted by the Municipal Corporations Acts, and the Court will restrain any misapplication of the fund at the instance of the Attorney General. The borough fund may be applied to purposes not expressed in the 92nd section, if plainly and of necessity within the scope and spirit of the act. *Attorney General v. Norwich*, 139

Notice. See Mortgage.

Nuisance. See Injunction.

Order of Course. See Practice.

Orders of Court, i—xv

Outlawry—Order of Court of Bankruptcy directing plaintiff to prepare and file his accounts by a certain day, and certificate and proclamation of the Court, that he had failed to surrender himself on that day, do not amount to formal judgment of outlawry so as to support a plea of outlawry. *Winthrop v. Elderton*, 145

Parent and Child. See Settlement.

Parties. See Building Societies. Claims. Company.

Foreign Law. Trust and Trustee.

Partition—Tenants in common, plaintiffs in a suit for redemption, are not entitled to a decree for partition in the same suit against the will of the mortgagee. *Watkins v. Williams and Haverd v. Davis*, 601

Partnership—Under articles of agreement between three partners, partnership was to be dissolved by notice from any of them, on breach of articles by others or other. Notice of dissolution having been given by one of the partners, in consequence of breach of articles by another, and third partner having adopted notice, held that partnership was dissolved as to all, but without consequences to the non-offending partner which attached, under an-

- other clause of articles, to a general dissolution. *Smith v. Miles*, 808
- Patent**—Upon plaintiff entering into usual undertaking to bring action, injunction granted to restrain foreign owners of foreign vessels whilst in this country from infringing a patent within limits of grant, unless and until they obtained proper licences from owners of patent, where invalidity of patent had been *bona fide* twice unsuccessfully contested at law in action brought by patentee, and once in action against him and assignees of patent, under writ of *sci. fa.* to repeal the grant of letters patent. *Caldwell v. Van Vliessen*, 97
- Pauper**—Court of Chancery having given married lady leave to sue *in forma pauperis*, made decree in her favour. One of defendants appealed, but appeal was dismissed, with costs.—Held, that appellant must pay the lady herself *dives* costs. *Wellesley v. Wellesley. The Countess of Mornington v. the Earl of Mornington*, 788
- Payment of Money out of Court**—A party having paid in money, in obedience to decree of Court below, and decree being varied in such a way that he is entitled to have that money paid out, the same can be directed in order on appeal to be so paid out without any petition being presented for that purpose. *Robinson v. Robinson*, 111
- Trustees and executors of personal estate situate wholly in diocese of C. sold and realized the same. Will proved in diocesan court. One of trustees and executors died in lifetime of the other, and on death of the other trustee and executor letters of administration to his estate were taken out in the same court by A, B. and C. One of the parties entitled to a share, under will of testator, died intestate, possessed of no other property, and letters of administration to his estate were taken out by his next-of-kin in the same court. A, B. and C. paid the share into court, under 10 & 11 Vict. c. 96. The person entitled to the share petitioned for its payment out of court, and the same was directed, notwithstanding that prerogative letters of administration were not taken out. *In re Knowles*, 142
- An order for payment of money out of court will not be made except upon petition, however small the sum may be. *The Blind School v. Goren*, 144
- A sum of money had been paid into court to the account of female infant, a ward of Court. Infant married, and petition presented by her and her husband for payment of the money out of court to husband, upon authority of two cases cited. The Court disapproved of principle upon which those cases decided; but allowed petition on affidavits that it would be beneficial for husband to receive the money. *In re Cooke*, 145
- A. was entitled to a share of produce of certain chattels and of no other property. She was domiciled in diocese of L, and the chattels were in that diocese. A. died intestate. Chattels were sold by trustee, and A.'s share paid into court, under 10 & 11 Vict. c. 96. After this, letters of administration to A.'s estate were taken out in diocese of L, and on application, payment of this fund out of court to administrator was ordered, a prerogative administration being unnecessary. *In re Spencer*, 314
- See Trust and Trustee.
- Perpetuity**—Family estates, subject to mortgages, were conveyed to trustees, to raise money for payment of incumbrances, and subject thereto, for A. B. for life, and then for C. D, his eldest son, for life, without impeachment of waste, but subject to power to trustees, with ultimate remainder to A. B. in fee simple. The power to trustees was during life of A. B. and after his death, with consent of C. D, if he should be the survivor, to fell timber, and apply proceeds towards paying off incumbrances so long as they should exist.—Held, that power was paramount to any authority in tenant for life without impeachment of waste, and that it was not an infringement on the law of perpetuity. *Briggs v. the Earl of Oxford*, 829
- See Marriage.
- Persona Designata.** See Will.
- Pleading**—A pending suit in a foreign or colonial court between A. and B. cannot be pleaded in bar to relief sought in a suit in Chancery in England between the same parties relative to the same matters. *Ostell v. Lepage*, 501
- Power**—Testatrix, having general power of appointment, upon her death, over 2,000*l.*, after referring to the power, directed and appointed that said sum should, after her death, be paid to her four daughters and her two sons, John and Joseph; and appointed her son Joseph her executor, and constituted him her residuary legatee. John died before the testatrix, whereby his share lapsed. Such share passed by residuary clause in the will to Joseph, under Wills Act, 1 & 2 Vict. c. 26. s. 27. *Spooner's Trust*, 151
- If an intention to exercise a power be clearly shewn, a Court of equity will, in favour of a charity, give effect to informal or defective execution. A power to dispose of personality was directed to be exercised, amongst other modes, by last will and testament, &c. signed, sealed, published, and declared in the presence of two or more witnesses, and the donee, in exercise of the power, bequeathed part of the personality to certain charities by an unattested will (executed before the passing of the Wills Act), signed and sealed by the donee, but in presence of witnesses, and not published or declared. This a valid execution. The gifts being specific, the state of testatrix's property at time of her will and of her death may be looked at. *Innes v. Sayer*, 190
- G. P, tenant for life of real estate, with remainder for all and every, or any one or more, to exclusion of other or others of his children as he should by deed or will appoint, appointed to trustees upon trust for his son G. S. P, his heirs, executors, administrators and assigns, and to be conveyed to him when and as he should attain the age of twenty-three years; and in case his son G. S. P. should die before he should have attained twenty-one years, to the use of second, third, and fourth, and every other son of testator successively in tail, with remainder to daughters in tail, with remainder to his brother in fee. And after directing payment of two annual sums of money during minority of his son, he directed his trustees to invest residue of rents and profits to accumulate until G. S. P, or such other sons as aforesaid, should attain twenty-three, and on his or their first attaining that age, then upon trust to pay over all such securities and accumulations unto G. S. P, or to such other sons, his executors, administrators and assigns, for his and their absolute use and benefit. This a due exercise of the power of appointment. G. S. P. took an estate in fee upon death of testator liable to be divested in case of his death under twenty-one, and trust for accumulation valid until G. S. P. attained twenty-three. *Peard v. Kewick*, 456
- By post-nuptial settlement, R. M. settled policies of insurance on his own life, in trust for his wife for life, and after her death, upon trust for appointees of R. M, and in default of appoint-

ment for children of the marriage. In 1821 R. M. by deed, appointed the monies to become payable on the policies to his executors and administrators. Under an order in a suit instituted for purpose of carrying the settlement into effect, policies were sold, and proceeds invested, to accumulate during joint lives of husband and wife. In 1847 wife died. In 1828 R. M. took the benefit of the Insolvent Debtors Act, and in 1845 became bankrupt. Under this appointment, the money representing the policies became part of general personal estate of R. M. *Mackenzie v. Mackenzie*, 465

— Principles of construction, and what is to be deemed fraud on the power so as to vitiate its execution. *Fearon v. Desbrisay*, 505

— By settlement made on marriage of A. and B. real estate was conveyed to trustees and their heirs upon trust for A. for life, with remainder for B. for life, and, after the death of the survivor, in trust to apply the rents in maintenance of all and every the children of A. and B. until such children should attain twenty-one, and, when such children should attain twenty-one, to convey to such children in such manner as A. and B. jointly, or the survivor, should appoint, and, in default of appointment, to convey to such children equally as tenants in common; and, if there should be but one such child who should attain twenty-one, to convey to such child, his or her heirs and assigns. This not an exclusive power of appointment, and, in default of appointment, all the children took as tenants in common in fee, without reference to their attaining twenty-one or surviving their parents. *Strutt v. Braithwaite*, 600

— A widow, upon marriage, settled her real and personal property on herself for life, and reserved to herself power to appoint by will during intended coverture, with remainder over on default:—Held, that an appointment by will, after determination of coverture, was invalid. *Holliday v. Overton*, 769

— Testator bequeathed certain property to A. for life, with remainder to such persons as A. should by any deed or deeds, instrument or instruments in writing, to be by her signed, sealed and delivered in presence of, and attested by two or more witnesses, appoint. A. made a will, dated after operation of Wills Act. This will an execution of the power. A. having power of appointment over consols, some leasehold ground-rents, and some shares in an assurance company, made a will, by which she bequeathed all her real estate, money and securities for money to B. and all the rest, residue and remainder of her personal estate to C. All the property subject to the power passed by the will, and B. entitled to consols, and C. to the shares and ground-rents. *Turner v. Turner*, 848

— See Perpetuity. Will.

Power of Sale—Testator, by will, appointed A, B, and C. his executors, in trust to dispose of his property as follows: He then directed that all his debts should be discharged by his executors, and residue of his property, real and personal, should be disposed of by them at time therein mentioned, save and except his estate at M, which he gave to A. for life, and at A.'s death to be disposed of as aforesaid. A, B, and C. had a power of sale of estate at M; and it was not necessary for them to shew that there were any of testator's debts left unpaid. *Mather v. Norton*, 15

Practice—Applications to discharge orders obtained as of course at the Rolls are to be made to Court to which cause attached. *Cooper v. Knox*, 383

— Supplemental answer may by consent be filed after replication, without withdrawing replication already filed. *Parsons v. Hardy*, 400

— A party to a matter may be examined *vide voce* by the Master on an inquiry directed to him. *Kirby's Trust*, 464

— Testatrix directed her executors to pay the debt which she owed to two persons named, and for security of payment of which she had given her promissory note. The promissory note was voluntary. Whether this a good debt or a legacy was a question for a court of law, and it was not a case in which the Court could call in the assistance of a common law Judge under the statute 14 & 15 Vict. c. 83. s. 8. *Longstaff v. Rensison*, 622

— Abandoned Issue. See Claim.

— A plaintiff, whose case wholly fails, will not be allowed to perfect it by the gift or waiver of one defendant against another. If the case made by the bill is clear, a defendant who brought the cause to a hearing instead of demurring, was refused all costs though he succeeded. Interest on balances may be charged against an executor, though it is not prayed by the bill. *Hollingsworth v. Shakeshaft*. *Andrews v. Shakeshaft*, 723

— Court will discountenance all attempts to convert offers of compromise, by letter, into admissions prejudicial to parties using them. Observations as to limited purpose for which such letters may be used. *Jones v. Foxall*, 725

Principal and Agent—Plaintiff consigned goods to a Liverpool merchant for sale, and drew bills upon him to amount of their value. Liverpool merchant then handed the goods to his London agent to be sold, and drew bills upon him, as an advance, upon account of the goods. London agent accepted the bills, having notice that they were consigned by plaintiff for sale. Liverpool merchant became insolvent, and bills drawn upon him by plaintiff were not paid. London agent sold the goods to recoup himself amount of bills drawn upon him by Liverpool merchant. Plaintiff then filed a bill against both firms for an account, alleging collusion, and praying that London agent might be decreed to pay him amount produced by sale of the goods. Factors Acts apply to cases where goods are pledged; no *malu fides* in this transaction, and it was one expressly intended to be protected by the acts. Bill for account by principal against his agent cannot be sustained in equity where transaction is single, and not tainted with fraud, plaintiff in such case having his remedy by action at law. Bill dismissed, with costs. *Navulshaw v. Brownrigg*, 57

Principal and Surety—A surety, upon being informed that proceedings were contemplated against himself and his principal, stated by letter his intention to pay the debt. It was determined after his decease, that the letter was a promise to pay; that his undisputed right to payment was a sufficient identity of the plaintiff, whose address was not set out in the claim; and that the forbearance to sue was a sufficient consideration for the promise. *Jones v. Beach*, 543

— J. W. joined in a bond as surety, and the creditor subsequently took a promissory note from principal and debtor, payable at two months, for balance due upon the bond. At the time of taking the note there was a general understanding between the principal debtor and the creditor that the remedies upon the bond should not be thereby affected. This amounted to a stipulation between the parties preventing the legal consequences that would have otherwise flowed from the transaction, and surety not released. An agreement that a dealing between creditor and principal debtor shall

not operate as a discharge of the surety may be proved by parol evidence. *Wyke v. Rogers*, 611

Priority. See Mortgage. Will.

Privileged Communications—Party assigned his property for benefit of creditors, one of whom filed bill to set aside deed, and insisted that particular clause inserted in it had been concealed from him. Assignor, in his answer, stated that creditor had known of clause, and in support of his case proposed to examine solicitor of creditor, as to what took place on a certain interview between solicitor and assignor with reference to deed. Demurrer by solicitor to the interrogatory, on ground that it inquired respecting matters which he only knew from confidential communications made to him by or in his agency for his client while he was acting as his solicitor, overruled. *Gore v. Harris*, 10

—Rule as to, between solicitor and client is not founded on ground of confidence, but on that of necessity for the rule to enable the client properly to defend, or prosecute his rights and interests. Rule inapplicable in cases of testamentary disposition, and as between parties claiming under testator. Upon question, whether executors are or are not trustees for next-of-kin, evidence of solicitor who prepared the will as to what passed between himself and testator, or his agent on subject of the will, will not be suppressed on application of executors on the ground of privilege; but all communications between executors and same solicitor, acting as their solicitor, on subject of the will of testator and after his death, are privileged. Evidence otherwise admissible will not be rejected on ground that it may disclose an illegal purpose. *Semble*—Existence of illegal purpose will, as in case of fraud, prevent privilege attaching; because it is as little the part or duty of a solicitor to advise his client how to evade the law, as it is to contrive a fraud. *Russell v. Jackson*, 146

Prochein Amy—A person whose name has been put on the record as next friend without his knowledge or sanction, who has no acquaintance with plaintiff or any of parties to the suit, and has had no means of hearing of suit, and has never heard of it until served with notice of motion to dismiss bill, is nevertheless liable to pay to defendants all costs of suit. A next friend of married woman placed on record after institution of suit is liable, not only for costs of suit incurred after his name was so placed, but for all costs of suit. *Bligh v. Tredgett*, 204

Production of Documents—Defendant, by his answer, denied possession of certain documents, and answer admitted to be sufficient. Plaintiff alleging by affidavit that denial of possession was untrue, and that particular documents were wilfully suppressed, moved for their production. Assuming fraud, falsehood and misrepresentation to be proved, plaintiff not entitled to move for production, but must file a bill. *Reynell v. Sprye*, 13

—See Solicitor and Client.

Railway—Company authorized by three acts of parliament to make distinct railways (not forming one line) with separate amount of capital for each. Another railway company, by a fourth act of parliament authorized to take lease of the three lines, and did so; and whole undertaking placed under controul of joint committee of directors of all the companies. One of the three lines was sufficiently completed to be, and was, opened, and directors made calls for purpose of entirely finishing opened line, other two being abandoned. Injunction, granted at the Rolls, restraining application of money and making of calls for any purposes not authorized

by the three acts, excepting only for purposes of ordinary repair, dissolved, on appeal, as being an interlocutory application, in absence of lessee company, opened line being worked under direction of joint committee. *Hodgson v. Powis*, 17

—Mortgagee in fee died, having devised the lands to infants, and appointed C. his executor. C. contracted with a railway company for sale of part of the lands. On petition under Trustee Act of 1850, that the legal estate might be vested in C, it was held, that the Court had no jurisdiction to make any order either in favour of, or against, the company, as to costs. *In the matter of Reed Devises*, 687

—By special act of railway company certain clauses were introduced, requiring the securing to owner of certain property particular benefits by arching, making roads, &c., if that property or adjoining property were taken. By another section, no building was to be erected on part of the land required by company; and by another section, company were required to buy certain specified property. The Lands Clauses Consolidation Act was incorporated with special act. Company gave notice of intention to take small strip of land within boundary line of a manufactory, but not, at time of passing of special act, or at time of the notice, built upon, but soon afterwards covered with buildings. It was held, first, that the land proposed to be taken formed part of a manufactory within meaning of 92nd section of Lands Clauses Consolidation Act; and, secondly, that the sections in special act were not inconsistent with 92nd section of general act. At the hearing, company produced evidence to shew that what they required could be attained by making tunnel under the land, and so not touch any part of surface; but Court held, that it was not competent for them to set up such a case at the hearing; and—*semble*, that such a tunnel would be taking part of a manufactory; and finally, held, that where construction of an act of parliament, which gives authority for compulsory taking of land is doubtful, it should be construed most favourably to those who seek to protect the land from innovation. *Sparrow v. Oxford, Worcester and Wolverhampton Rail. Co.*, 731

—Court of Chancery will withhold its interference when called upon by either party to act in aid of an agreement, attempting to carry into effect without the intervention of parliament what cannot be lawfully done except by parliament, in the exercise of its discretion with reference to the interests of the public. *Quare*—Whether railways are public highways. *Great Northern Rail. Co. v. Eastern Counties Rail. Co.*, 837

—A local railway act enacted that the whole of certain ground in a seaport town, conveyed to the company, should be used solely for purposes of railway and buildings connected therewith, except for coke ovens or any purposes (other than necessary purposes of railway), which might cause nuisance or damage to the vendor's other property. This not restrain company from allowing part of building to be used as Custom-house, for passing luggage of passengers and travellers and other custom-house duties. *Quare*—Whether part of buildings could be used as sleeping rooms in connexion with an hotel built by company on adjoining ground. *Warden and Assistants of the Harbour of Dover v. South-Eastern Rail. Co.*, 886

—See Foreign Railway. Fund in Court. Specific Performance.

Real Estate—Statute 3 & 4 Will. 4. c. 104. charges debts of every description on real estate of testator;

and a future debt, arising out of previous obligation of testator, is within the act. *In re St. George Steam-Packet Company, ex parte Hamer's Devises*, 832

Receipt. See Trust and Trustee.

Receiver. See Contempt.

Rehearing. See Baron and Feme.

Remoteness. See Will.

Restraint. See Bond.

Revivor—Bill filed by certain persons, as plaintiffs, for administration of personal estate of testator, and usual decree for accounts taken: Master's report made, and decree made on further directions. Suit having been neglected, Master committed prosecution of decrees to a party who had been found by the report to be a legatee. Suit afterwards abated by marriage of one of female plaintiffs. Plaintiffs having declined to take any proceedings to revive, legatee filed a bill of revivor. Demurrer to this bill by plaintiffs in original suit, allowed. *Williams v. Chard*, 9

Sale of Lands. See Specific Performance.

Service—Where service of a bill has been made upon defendant incorrectly named in the bill, leave will be given to enter a memorandum of service upon such defendant, stating his name correctly. *Wilham v. Salvin*, 915

Settlement—Under deed of settlement lands limited to use of trustees for 1,000 years, without impeachment of waste, upon trust, by cutting and selling timber thereon, or by demising, mortgaging, or selling premises, to raise three sums of 10,000*l.* each; and subject to said term, to use of settlor for life, without impeachment of waste, with remainder to A. B. for life, without impeachment of waste, with divers remainders over. After death of settlor, A. B. entered and claimed right to cut timber for his own use exclusively. Upon bill by trustees, held, upon appeal, that upon true construction of settlement, a discretionary power was given to trustees to cut timber and apply proceeds *pro tanto* in discharge of sums to be raised; and that rights of A. B. as tenant for life without impeachment of waste, were subordinate to discretionary power given to trustees; and an injunction was granted to restrain A. B. from cutting timber, on the ground that his so doing would interfere with prior right given to trustees. *Kekewich v. Morter*, 182

—The Court will not support the re-settlement of family estates between father and son where the father obtains extensive advantages to the prejudice of the son and his family, in the absence of unequivocal proof that the whole of the facts were known to the son, that the purposes of the deed were fully explained to him, and the operation of the respective provisions known to him. But various arrangements for relief of the family estates from existing burthens, though the father obtains some advantages, were supported, on the ground that the effect of the transactions were known to the son and even acquiesced in by him. Affidavits under 13 & 14 Vict. c. 35. not admitted to prove that son's marriage was entered into on faith of the re-settlement. *Hoghton v. Hoghton*, 482

—A charge created by C. S. upon his estates to secure the payment of a sum of money borrowed for S. H. S. is a good consideration, not only for a collateral charge upon the estates of S. H. S. to indemnify C. S. and his estate from the payment of the money borrowed, but also for a settlement of the S. estates upon his family. Recital in deed sufficient evidence of contract; and, *quære*, if evi-

dence could have been received to disprove it. *Ford v. Stuart*, 514

—Marriage settlement omitted in an event which happened to declare a life interest in the settled fund for intended wife. The Court being of opinion that the settlor did not intend to reserve any portion of the fund for himself, declared the wife to be entitled by implication to a life interest in the settled property. *Allin v. Crawshaw*, 873

—Equity for. See Baron and Feme.

—See Alienation. Power.

Ship and Shipping—A ship belonged to A. and B. in different shares, and they were registered as owners of it at port of Liverpool. In April 1849 the ship sailed from Liverpool for Sydney. In October, A. executed a power of attorney authorizing B. to sell his shares. In November A. mortgaged his shares in ship and freight to C, and the deed of mortgage was registered at Liverpool. In March 1850, B. being in Sydney (acting under power of attorney as to A.'s shares) sold the ship to D. On this occasion the old certificate of registry was given up, and the ship was registered *de novo* in D.'s name at Sydney. The ship, with a cargo, was put into the London Docks in February 1851, and both C. and D. took possession of it, by each of them putting a man on board. Upon the question as to rights of C. and D, in the ship and freight, it was held, that C. was entitled to A.'s shares in the ship and freight. *Cato v. Irving*, 675

—Where part owners of ship differ on terms of agreement to manage and charter vessel, construction of such agreement is within province of court of equity; and question of its concurrent jurisdiction with Court of Admiralty cannot be raised. *Darby v. Buines*, 801

Ship Registry Act—Court of equity will not enforce specific performance of contract for sale of ship or part of ship. By 34th section of statute 8 & 9 Vict. c. 89. (Ship Registry Act), every sale or transfer of ship, or part of ship, must be registered, and court of equity must construe the section to extend to any contract for sale or contract to transfer. Whether under this statute an action could be maintained on contract for sale of ship or part of ship—*quære*. *Hughes v. Morris*, 761

Solicitor and Client—If a married woman acts only under the opinion of her husband's legal advisers, having no separate solicitor or counsel, the solicitor is to be deemed solicitor of wife as well as of husband; and the wife has a right to inspection of all documents which come into solicitor's possession in relation to and during that employment. *Semble*

—Where husband and wife have distinct interests, and wife is induced, in dealing with those interests, to act under advice of a solicitor employed and paid by the husband, solicitor will be deemed to act as solicitor both of husband and wife. *Warde v. Warde*, 91

—A. contracted to buy equity of redemption of L. estate, and immediately contracted to sell part. He then mortgaged the other part and his other estates to B. for securing 10,000*l.* He then mortgaged the part of L. he had before mortgaged, to C. for securing 3,000*l.* and same part to D. for securing 1,000*l.* Legal estate in L. then conveyed by vendor to trustee for A, and term of years assigned to another trustee to attend inheritance, original mortgages affecting the same being paid off. Before mortgage for 10,000*l.* created, A. was indebted to solicitors in bill of costs, and became indebted to them for conveyance of the legal estate. On occasion of that conveyance, title deeds of L. estates were handed over by vendor to solicitors, as solicitors for A. Subsequently one of firm of soli-

- citors, having no notice of mortgage for 10,000*l.*, took assignment of 3,000*l.* and 1,000*l.* mortgages, and made further advance on same security. Deeds, if in hands of A, were subject to right of B, and were so subject in hands of solicitor. Deeds being delivered by vendor to the solicitors and not to A. and by him to solicitors, made no difference. No distinction between costs due before the mortgage to B. and costs of getting in legal estate, the solicitors in that matter being employed by A, and he alone being responsible for them. A client cannot give a lien to his solicitor of a higher nature than the interest which he himself has in deeds. *Pelly v. Wathen*, 105
- Solicitor and Client* (continued) — J. F. a writer to the Signet in Edinburgh, employed P, a solicitor, as his agent in London, and introduced to him business of some importance, which a client of his had in England. P, by letter, promised to allow J. F. one-half of profits of all such business, so long as he should retain the same, directly or indirectly. Upon discovery of this by the client, who had obtained an order for taxation of P's bills of costs, he presented a petition, asking that taxing Master might disallow all such share of charges as P. had promised to pay to J. F. If agreement illegal, it could not be enforced by J. F. The 22 Geo. 2. c. 46. s. 11. being a penal act must be construed strictly. The business having been done, solicitor entitled to payment, and client could not avail himself of letters to refuse payment, or insist upon deducting from bills of cost what P. had promised to allow to J. F. and production of documents, relating to bills of costs, left to discretion of taxing Master; and petition dismissed, with costs. *Gordon v. Dalzell*, 206
- If a suit be commenced by a solicitor without the authority of his client, it will be dismissed on motion, with costs as between solicitor and client, including costs of motion to dismiss. *Crossley v. Crowther*, 565
- See Mortgage. Privileged Communication. Vendor and Purchaser.
- Solicitor's Bill of Costs*—Solicitors in London appointed to a projected company. Other solicitors appointed as local solicitors, and directed to prepare notices to landowners, and other matters connected with local board. Errors discovered in these, and scheme ultimately abandoned. London solicitors in their bill of costs charged for preparation of these notices, and taxing Master allowed them. The Master of the Rolls disallowed the claim, and "directed" solicitors to establish their right at law, on grounds that facts disputed, and that on facts, as far as they were ascertained, there were questions of law to be decided. On appeal, claim disallowed until it should be established at law, and solicitors "were to be at liberty" to bring such action as they might be advised. *In re Burckell*, 236
- See Taxation. Winding-up Acts.
- Special Case*—After special case under Sir G. Turner's Act had been set down for hearing, a party interested in the question was born. Practice in such case as to amendment of case and setting it down again. *Thistlethwaite v. Garmer*, 16
- Specific Performance*—to enforce an agreement by a railway company to pay for residential injury, although company amalgamated with another company, who formed the railway in another direction, and did not pass through plaintiff's property. *Preston v. Liverpool, &c. Junction Rail. Co.*, 61
- A, in a letter addressed to B, said he would let the coal at L. B. to B. on terms stated in agreement in hands of C. C. had two papers in his hands. One was called terms for letting "coals," &c. at L. B. and G. E.; the other, instructions, &c. "to obtain coal in L. B." A. and another were, in fact, tenants in common in fee of the L. B. and G. E. property. B. assigned his interest to P, who filed bill for specific performance of agreement by A. and other joint owner, but subsequently bill dismissed against other owner. Prayer of bill was, that both might specifically perform agreement, or that A. might perform it if claim should fail against both. "Coals, &c." ambiguous, and it was uncertain which of the documents in hands of C. was meant. Also there being no ground of impropriety or misrepresentation by A, Court would not act against him as owner of an undivided moiety by decreeing specific performance as to that share, with compensation for other moiety which he was unable to demise. *Price v. Griffith*, 78
- Agreement by railway company, in consideration of landowner's opposition being withdrawn, to pay him 4,500*l.* as purchase-money of land not exceeding eight acres to be taken by company for formation of their railway, and for consequential damages to landowner's property. Railway was abandoned, and landowner filed claim for specific performance, which was decreed; but on appeal, claim was dismissed, as plaintiff had means of complete redress at law. *Webb v. Direct London and Portsmouth Rail. Co.*, 337
- Claim for specific performance by A. against B, stating that B. had agreed by writing to demise a house to A, for a certain term, at a certain rent, and that at said time A. had agreed by parol to pay B. a premium of 200*l.* Claim prayed that B. might grant A. a lease, A. offering to pay the premium agreed on by parol. Claim dismissed, as being in contravention of the Statute of Frauds. In consideration of 200*l.* premium paid by A. a lease was granted to A. of a house at a certain rent for a certain term. This term expired. B. agreed to grant A. a lease for a certain term at a certain rent, under and subject to same covenants, clauses, and agreements as were contained in old lease. This agreement did not include term that A. should pay B. a premium of 200*l.* *Martin v. Pycroft*, 448
- Specific performance will not be decreed when the parties can have complete relief at law, if entitled to have any. Case in which the principle of mutuality failed and laches fatal to suit. *Stuart v. London and North-Western Rail. Co.*, 450
- In a contract for sale lands were described as partly freehold and partly leasehold. Title deeds did not clearly define boundaries and extent of the two properties; but the uncertainty did not arise from an instrument incapable of legal construction in that respect. Such uncertainty not an objection to a decree for specific performance. Vendor of leaseholds, held under an ecclesiastical corporation, previously to his contract for sale was in treaty with the lessors for a renewal of the lease, and continued such treaty after the contract. This did not throw upon him the obligation of procuring such renewal for the benefit of the purchaser. *Monro v. Taylor*, 525
- Specific performance of a contract for the sale of a barge, stores, &c., decreed in equity upon a claim. *Claringbould v. Curtis*, 541
- See Lease. Vendor and Purchaser.
- Statute*—9 Geo. 2. c. 36, 81
- 22 Geo. 2. c. 40. s. 11, 206
- 36 Geo. 3. c. 52, 226
- 45 Geo. 3. c. 28, 226
- 52 Geo. 3. c. 101, 25
- 1 & 2 Geo. 4. c. 92, 25
- 6 Geo. 4. c. 53, 231

- 7 Geo. 4. c. 46, 854
- 9 Geo. 4. c. 14. s. 1, 290
- 1 & 2 Vict. c. 110. s. 14, 291, 463
- 3 & 4 Vict. c. 77, 25
- 3 & 4 Vict. c. 82, 291
- 6 & 7 Vict. c. 85, 480
- 10 & 11 Vict. c. 96, 127
- 12 & 13 Vict. c. 74, 127
- 13 & 14 Vict. c. 60. s. 32, 16
- 14 & 15 Vict. c. 83, 20

Statute of Limitations. See Mortgage.

Staying Proceedings.—A party, ordered to pay the general costs of certain suits, pending an appeal, moved for leave to file a supplemental bill in nature of a bill of review, and obtained leave to do so on depositing 50*l.* with the registrar, and he was ordered to pay the costs of the motion. He paid the 50*l.*, but not the costs of the motion, and filed a supplemental bill. Payment of the costs of the motion a condition annexed to the order giving leave to file supplemental bill, and all proceedings in the supplemental suit stayed until payment of them. If a party is ordered to pay the general costs of a suit, and also the costs of a particular motion, and then files a bill against the party entitled to all those costs, if the latter moves to stay all proceedings in the new suit until costs of the particular motion are paid, that is a waiver of any right he may have to stay proceedings until general costs of the suit are paid, and the Court will only stay the proceedings until costs of the particular motion are paid. *Sprye v. Reynell*, 664

— See Chapel.

Stock. See Judgment.

Stop Order. See Baron and Feme.

Substitution. See Will.

Supplemental Answer. See Practice.

Surgeon and Patient. See Jurisdiction.

Survivorship. See Will.

Taxation — Non-compliance with an order, made upon terms at law, to tax a solicitor's bill of costs, and failure of other proceedings at law to obtain renewed orders, should be stated when applying for an order of course to tax a solicitor's bill of costs in equity; and omission to state those facts is a ground for discharging the order, though the party might be entitled to an order upon special application. How far a judgment signed at law for default will prevent the obtaining an order of course in this court: and whether such order, if granted, will not stay execution on such judgment *— quere.* *In re Gedye*, 430

— Receiver in a suit assigned dividends to which she was entitled for life, to her sureties as security for their bond. The receiver paid balance found due from her into court, and recognizances ordered to be vacated. Sureties refused to re-assign the dividends. Solicitors of sureties delivered bills of costs incurred by them in the suit. Receiver borrowed money for her support, and for the support of her children, and had executed a warrant of attorney, upon which judgment was entered up. The creditor threatened execution, and in order to obtain the dividends receiver paid the bills of costs out of the dividends which had accumulated in hands of the trustees of the settlement, but gave notice that she did so under protest, and without prejudice to her rights. A correspondence had taken place between the solicitors of the parties respecting taxation, which ended in the receiver agreeing to pay the costs of it. Payment was made on the 14th of August 1850, and on the 7th of June 1851 the receiver petitioned at the Rolls for an order under 6 & 7 Vict. c. 73, for taxation of

the bill, alleging that it was paid under pressure, and with protest, but the petition was dismissed; and, on appeal, the decision below was affirmed, but without costs, the authorities being conflicting.

In re Browne, 442

Tenant for Life. See Perpetuity.

Tenants in common. See Partition.

Thellusson Act. See Accumulations.

Tithes—Receipt by rector of parish in London for some years, without objection, of fixed sum by way of tithes of particular premises, though less than the annual value, does not necessarily imply a composition. *Quere*—whether rule requiring six months' notice for determining ordinary composition for tithes in kind is applicable to case of composition for a money payment in lieu of tithes. Form of reference to Master to take an account of tithes due under the 37 Hen. 8. c. 12, where rent or annual value of premises is increased by means of implements or fittings not titheable let or used therewith. *Letts v. London Corn Exchange Co.*, 684

Trust and Trustees—Transfer of fund paid into court under Trustees Relief Act can only be directed by order made on petition. *In re Masselin's Trusts*, 53

— Appointment of new trustee upon death of trustee in lifetime of testator. Appointment of new trustees by trustee declining to act. *Hadley's Trusts*, 109

— Trustees who improperly retain balances or cause or permit trust money to be lost, are chargeable for same, with interest at 4*l.* per cent. Where trustees have money in their hands, which they are bound permanently to invest for benefit of their *cestui que trust*, the rule of the Court is generally that they shall invest in 3*l.* per cents.; therefore, if they neglect to do so, and there is no express direction not to do so, or there is an express trust that they shall do so, in the latter case; and *semble*, as to the two former cases, it is in the option of the *cestui que trust* to charge them either with principal sum retained and interest, or with amount of 3*l.* per cents. which would have been purchased if investment had been made. Where trustees lend, or use trust money in trade, they are chargeable not only with the money and interest, but with profits made in the trade, the interest generally being 5*l.* per cent. Turnpike road bonds, secured by a mortgage or charge on tolls and toll-houses, are real estate, and held so to be, overruling the same decree; and although the tenant for life was declared entitled to the interest on them, the Court, considering the social changes resulting from the formation of railways, directed a reference to the Master, to inquire whether it was expedient to leave assets so invested. *Robinson v. Robinson*, 111

— Fund belonging to pauper lunatic was paid by trustees into court under 10 & 11 Vict. c. 96. On petition of guardians of poor, order made for payment to them out of fund of expenses incurred by parish in support of lunatic. *Upfull's Trust*, 119

— By an ante-nuptial settlement trustees were empowered, with consent of parties, to sell out trust funds, and invest proceeds upon real securities: By memorandum executed contemporaneously with and indorsed on settlement, parties requested trustees to advance trust monies to the owners of Vauxhall Gardens upon mortgage as first, second, or third mortgagees. "The owners" meant owners at date of settlement and memorandum, and an advance to the three owners, originally without security, and subsequent acceptance of a mortgage with a joint and several covenant from two of the three owners, one having then retired,

a breach of trust, and trustees ordered to bring fund into court. The bill alleged that some of plaintiffs were children of another plaintiff, and that they and certain defendants were the only children of the marriage. The answer did not deny the allegation, but stated that the defendants did not know that these were all the children, and raised no objection for want of parties on this ground; no evidence was gone into to prove the relationship. The Court refused to entertain an objection, taken for the first time on the rehearing, that some of plaintiffs had not proved their title. *Fowler v. Regnal*, 121

Trust and Trustee (continued)—When trustees have paid monies into court under Trustees Indemnity Acts, the remedy of plaintiff as to sum paid in can be prosecuted only under those statutes, and not under ordinary jurisdiction of the Court by bill or claim. *Goode v. West*, 127

— Trustee desiring to be discharged without change as to trust property, or persons with whom he was associated, and seeking aid of Court for that purpose, not allowed costs, but not compelled to pay any. *Porter v. Watts*, 211

— When a trustee, having good reason to doubt the validity of an appointment of the trust funds, thinks proper to act upon it, he will be affected by all the consequences which follow upon the act. The Court will not undo part only of one entire transaction. Therefore, where *caveat* was sought to impeach an appointment under one deed, without seeking to impeach a subsequent appointment which was directly connected with the former, and by which they were benefited, the Court dismissed the bill, with costs, but without prejudice to a new bill being filed. *Harrison v. Randall*, 294

— Mortgagee in fee died intestate as to mortgaged premises, but appointed an executor. His heir-at-law could not be found or was unknown. Mortgage money still due, and not intended to be paid off, but executor, wishing to make transfer of mortgage, petitioned, under 19th section of 13 & 14 Vict. c. 60, the Trustee Act, 1850, for an order vesting mortgaged premises in him. Court had jurisdiction upon such petition to make the order, and the legislature did not mean to confine its authority to the case of simple "re-conveyance." *Boden's Estate*, 316

— A sum of stock was standing in names of A. and B. in trust for C. for life, with remainders over. A. and B. refused to pay the dividends to C. On petition presented by C. under Trustee Act, 1850, that right to receive dividends accrued and to accrue might vest in her, under 23rd and 24th sections, order made as to dividends already accrued, notwithstanding refusal of two trustees; and no order made as to future dividends. *In re Hartnall's Trusts*, 384

— Stock was standing in names of A. and B. upon trust for C. for life, with remainders over. By order made in cause instituted by C. against A. and B. with respect to the stock, it was ordered that A. and B. should transfer the stock to the credit of the cause. A. refused to make the transfer. On petition by C. under Trustee Act, 1850, and in the cause, praying that right to transfer might be vested in B. alone, the Court had no jurisdiction to make the order. *Mackenzie v. Mackenzie*, 385

— Power of surviving trustee to nominate a sole trustee to act in his place, and appointment by recital good. A receipt signed by more persons than one, that one having power to give receipts, is a valid receipt by that one. *Miller v. Priddon*, 421

— Trustees sold out trust stock and handed proceeds to J, their solicitor, for re-investment, who misapplied the money. In suit by *caveat* against trustees and J, plaintiffs examined J. as a witness, and bill dismissed as against him. Decree made, notwithstanding, against trustees, on ground that J. not a necessary party to suit in order to obtain relief prayed against trustees. *Quare*—whether effect of 6 & 7 Vict. c. 85. is to enable the Court to make a decree against a defendant in equity who has been examined as a witness in the cause. *Rowland v. Witherden*, 480

— Testator devised real estate to A. and B, their executors, administrators and assigns, for 500 years, upon trust to raise by sale or mortgage 2,400*l.*, and directed them to put out the same on government or real securities, and call in and replace out the same from time to time, and to pay the income to C. for life, and after her death to pay the principal to such persons as C. should appoint by will, and in default of appointment to C.'s children. The will did not contain power for trustees to give receipts. A. and B. mortgaged estate to C. for 2,400*l.*, and C. assigned mortgage to D. Power for A. and B. to give receipts implied, and D. entitled to mortgaged premises as against persons claiming under trusts of testator's will. If C. had paid the money to A. and B. he would not have been bound to see to its application; and if the mortgage deed to C. was regular on the face of it, D. would not have been affected by any breach of trust in which A. B. and C. might have been implicated. *Lock v. Lomas*, 503

— Testator bequeathed residue of his personal estate to his executors, in trust for his wife for life, and, after her decease, for his nephews and nieces, whereby legacy duty would be payable at death of the wife. Under 36 Geo. 3. c. 52. s. 13. the executrix of surviving executor might, during life of the widow, transfer the trust fund to new trustees of the will appointed by the Court. *In re Jones's Trust*, 566

— Bill filed against trustees, praying that amount of trust fund which trustees "had, or but for their wilful neglect or default might have, received, might be ascertained." At the hearing, bill dismissed as against one trustee, and amount and particulars of trust fund directed to be ascertained. Nothing was said about wilful default, nor did the trustee ask that bill might be dismissed as to wilful default. Master made his report, which stated certain facts, and referred to certain documents, from which it was alleged that it would appear that there had been wilful default. At the hearing upon further directions, decree made referring it to the Master to inquire whether trustee "could with due diligence, and without wilful neglect or default, have received" more than a particular stated fund, but upon appeal it was held, that direction as to wilful default should be struck out of decree. As a general rule, in order to obtain a direction for inquiry as to wilful default against an executor or trustee, the bill must allege a case, pray for it, and one case at least must be proved; and, *semble*, that if from admission or proof a suspicion arises whether wilful default has or not been committed, and it appears likely that further evidence can be obtained, the Court ought to direct an inquiry short of directing wilful default, but in such a way as to call defendant's attention to it, with the view to ground thereon a new order, at a future stage, directing an inquiry as to wilful default. *Coope v. Carter*, 570

— Case in which an unauthorised management of trust estate, concurred in by the *caveat* *que* trust

and sanctioned by the Court, and which had proved beneficial to the trust estate, was considered as binding on the *cestui que trust*. *Neale v. Pink, ex parte Fletcher*, 574

— Section 32. of 13 & 14 Vict. c. 60. applicable to case where all original trustees had disclaimed. *Tyler's Trusts*, 16

— *Quere*, whether, under section 7. of the Trustee Act, 1850, real estate can be ordered to go to uses to bar dower in favour of the *cestui que trust*. *In re Howard*, 437

— A mortgage in fee was made of real estate. Mortgagee died, having devised estate to an infant. A claim of foreclosure was filed by mortgagee against infant, and an order for sale was made therein. Petition for a vesting order, under section 7. of Trustee Act, 1850, dismissed as unnecessary. *In re Williams*, 437

— Declaration of Trust. See Will.

— Resulting trust for next-of-kin. See Will.

— And see Alienation. Deed. Devise. Limitations. Statute of Lunacy. Payment out of Court.

— Real estate was vested in a trustee in fee for a party for life, with remainder to her children equally. Children took life estates only, all words of limitation being omitted. Recitals will not be allowed to cut down the clear effect of the operative part of a deed. *Holliday v. Overton*, 769

— Trustee, at request of *cestui que trust*, a married woman, who was entitled for life to dividends of 4,000*l.* consols, sold out trust fund, and invested it upon railway debenture. Upon suit by her to have fund re-invested in stock, it was held, that trustee must replace stock and account for dividends as if it had not been sold; no costs given on either side; and costs of parties entitled in remainder paid by plaintiff. *Mant v. Leith*, 719

— Trustee of marriage settlement, who allowed 350*l.* to remain in hands of trading firm for period exceeding fifteen years after death of tenant for life, but who eventually, and before bill filed, paid principal, with 5*l.* per cent. interest, was held liable to account, with annual rests, and also to costs of suit. *Jones v. Foxall*, 725

— Testatrix, by her will, gave 2,000*l.* stock to two trustees, in trust for plaintiff, and after making her will, she expressed her intention of giving a further sum of 2,000*l.* to plaintiff upon the same trusts. One trustee died during life of testatrix: surviving trustee transferred two separate sums of 2,000*l.* stock, at two different times, into her own name, and gave plaintiff a power of attorney to receive dividends upon both sums. There was evidence to prove that trustee knew of the desire of testatrix to give second sum of 2,000*l.* to plaintiff, and that trustee had expressed her intention of carrying that desire into effect. Trustee afterwards became of unsound mind. It was held, that second sum of 2,000*l.* so transferred by trustee was sufficiently impressed with a trust in favour of plaintiff. *Gray v. Gray*, 745

— A, a woman, being entitled to a bond debt due to her from B, by a settlement made on her marriage, and dated in 1829, assigned it to a trustee upon trust for A. for life, for separate use, with remainders over. In 1836, a part of the debt was paid to A. and her husband. In 1842, C. was appointed sole trustee of settlement. In 1843, A. charged her life interest in bond debt in favour of D, by way of collateral security for a debt due from her husband to D. In 1843, B. died, and A. took out administration to B. Bill by D. against C. to enforce security, charging him with wilful default for omitting to get in the part of debt paid to A. and her husband, and residue of the debt

due from estate of B. C. not liable, and bill dismissed. *Thackwell v. Gardiner*, 777

— After a wife had attained her majority, information was given by her to trustees of will under which she was entitled to property, that a bill would be filed against them charging them with breaches of trust and seeking an account. Trustees, after this notice, paid her share into court, under Trustee Act. Upon petition for payment of money out of court, trustees were refused their costs. *In re Waring*, 784

— In cases where new trustees are appointed under Trustee Act, 1850, real estates subject to trust ought to be conveyed to them by deed, and vesting order ought only to be resorted to when it is inconvenient to obtain a conveyance. *Langhorn v. Langhorn*, 860

— The Court will not, under the Trustee Act, order removal of trustee merely on ground of his having gone out of the jurisdiction. *In re Mais*, 875

— A sum of money having been paid into court under Trustees Relief Act, a petition was presented by tenant for life for payment of dividends. *Corpus* of fund not liable to bear costs of application. *Bangle's Trust*, 875

Usury—It is not usury to receive interest on a mortgage debt secured on real estates at 5*l.* per cent. per annum from a day anterior to the day of actual payment of the principal, if from delay not occasioned by the mortgagee the payment of the principal is postponed, and if it was the *bona fide* intention of the parties to have paid and received the principal on the day from which the interest is reserved; and *a fortiori*, if, under the circumstances, less than the legal amount of interest has been paid. *Long v. Storie*, 521

— See Friendly Society.

Vendor and Purchaser—Real estate, including property in possession and in reversion, put up for sale by auction in lots, under condition that vendors should confirm Master's report of purchases on or before the 25th of December 1849, and that, on or before that day, each purchaser should pay his purchase-money into court, or pay interest on it at 5*l.* per cent. from that day. Through default of vendors, Master's report was not confirmed until August 1851. On motion that purchaser of a reversion should pay purchase-money into court with interest from the 25th of December 1849, ordered accordingly. *Wallis v. Sarel*, 717

— Bill by solicitor against his client for specific performance of contract for sale by auction dismissed, with costs; purchase being made by solicitor (who had conduct of sale) whilst his client was a minor, and sale not having been conducted with due regard to interests of client or protection of estate. Solicitor for vendor, bidding in person at sale on his own behalf, is bound to state that fact publicly, in order to exclude inference that he is bidding on behalf of estate. A reserved bidding is proper in case of sale of infant's estate; but where there is no reserved bidding, that fact should be publicly stated. *Cutts v. Salmon*, 760

— Leasehold property put up for sale with condition that lessor's title would not be shewn and should not be inquired into. In inquiry as to title in a reference to Master, purchaser shewed that lessors were a canal company, and that company had, under their act, power of selling the property, but not power of leasing it. Purchaser was precluded by conditions of sale from taking that objection to title. *Hume v. Bentley*, 760

Vendor and Purchaser (continued)—A. signed the usual agreement for purchase at an auction, and also memorandum that he had purchased as trustee for B, who was present and paid deposit. The abstract of title was sent to solicitor, but whether he acted for A. or B, or both, was disputed, and was afterwards sent by vendors to B's solicitor. On bill filed by vendors against A. and B. for specific performance, A. stated as above, but B. stated that he had bought the property as sub-purchaser from B. The contract having been entered into by the vendors with A, bill dismissed as against B, but A. not bound by any communications or proceeding which had taken place as to title or otherwise between vendors and B. *Chadwick v. Maden*, 878

— Under contract to sell copyhold estate and timber upon it, at a certain price for the estate, and an additional price for the timber, according to the amount at which the timber may have been previously valued for purpose of sale, vendor not bound to shew any licence, custom, or grant to sell or cut the timber. *Crosse v. Keene*, 892

— Where there is one entire contract for sale of intermixed freehold and copyhold lands and of timber on both lands, and vendor stipulates against distinguishing freeholds from copyholds, the title to the timber follows the land, and the purchaser cannot insist upon the timber growing on the copyholds being distinguished from that growing on the freeholds, although the price for the timber is in addition to that for the land. *Crosse v. Lawrence*, 889

— See Ship Registry.

Voluntary Assignment—Assignee of debt under voluntary assignment, filed claim against representatives of deceased debtor and assignor for payment of debt or administration of debtor's estate. Plaintiff no equity, and claim dismissed. *Sewell v. Moxy*, 824

Waste—Several persons were entitled successively to life estates in real property limited in strict settlement: they became bankrupt, and their assignees cut down timber left for ornament and shelter. Upon bill filed on behalf of H. L. then first tenant in tail in existence, who was an infant, assignees were ordered to bring the money into court; this, with accumulations, amounted to 26,183*l.* 2*s.* 10*d.* Two of the tenants for life died without issue; H. L. attained twenty-one, and being still first tenant in tail, and entitled to first estate of inheritance, he presented petition for payment to him of fund and accumulations: which were ordered to be transferred to him. *Lushington v. Boldero*, 49

— See Church.

Watercourse—A person may by long user acquire a right to water of a stream free from pollution, though he may have no proprietorship in the stream, and may acquire a right to pour polluted matter into a stream as against all new comers. *Wood v. Sutcliffe*, 253

Will—upon construction of which it was held that annuities payable out of interest and dividends of money in the funds had no priority over legacies, but annuities and legacies must abate rateably; and that the annuities were not chargeable on the corpus. *Miller v. Huddleston*, 1

— Gift to "the husbands of my daughters" construed to mean the individuals whom testatrix knew as the then husbands. *Bryan's Trust*, 7

— Testator by will disposed of his own property, and then by virtue of a power in his marriage settlement, appointed trust property among six of his children, *nominatim*, in equal shares, and re-

quested them "not to sink into or spend their respective shares, but to leave the same for the benefit of their respective children, and if any of them have no children then to leave the same so that their share may go in the same way as my general estate and effects are limited." These words formed no part of the appointment; but were inconsistent with the power. No trust raised for the grandchildren; no case of election arose; and children entitled to their shares absolutely. *Black v. Lamb*, 46

— Testator gave residue of his property, both real and personal, to his son Matthew, his heirs, executors, administrators and assigns, with proviso that in case his son Matthew should die without leaving any lawful issue of his body, such part of residuary estate as might be in the nature of freehold, should at his death be divided into two equal parts, one half part whereof he gave to his son Charles and the other half to his daughter Frances. Testator's son Matthew took an estate in fee in freeholds, with an executory devise over to take effect in event of his dying without issue living at his death. *Ex parte Davies, in re Wills, Somerset and Weymouth Rail. Co.*, 135

— Testator, by will, bequeathed a policy of assurance on his own life to A. and B, upon uses of letter signed by them and himself. At date of will there was no such letter. Subsequently testator addressed a note to his executors and signed a memorandum, by which he stated his wishes as to disposition of monies to be received in respect of policy. Testator kept policy in his possession until his death. No trust created by memorandum, and policy formed part of residue. *Johnson v. Ball*, 210

— Trusts, substituting issue for parent after youngest child attained twenty-one void for remoteness; trusts of estate, after death of last survivor of children of M. G. void for remoteness; and trusts of produce of residue of real estates directed to be sold after decease of last surviving child of M. G. void for remoteness. *Gooch v. Gooch*, 238

— Testator directed trustees to set apart sufficient stock to produce 700*l.* a year, and pay, among others, an annuity of 200*l.* a year to his brother Thomas for life, and after his decease to continue it amongst his brother's children then living, in equal shares, during their lives, and at the decease of any of them, the stock from which the 200*l.* a year arose, to be sold, and produce divided equally amongst children of him or her so dying, as they should severally attain twenty-one, with interest in mean time to be applied for their benefit; and he said, "I give them vested interests therein;" and if any of his brother's children should at his decease be dead, and have left issue, such issue should be entitled amongst them to the money they would eventually have been entitled to had their parent outlived his brother. If any of parties anticipated the payment, or sold his interest before due, it was declared to be forfeited, and applied as if such parties had died before legacy fell due. Testator then appointed his trustees executors and residuary legatees. 23,333*l.* 6*s.* 8*d.* was set aside to answer the 700*l.* a year. Testator's brother Thomas died, leaving six children, of whom Richard was one, living at date of will, and he, after decease of his father until his death, received an annuity of 36*l.* 6*s.* 8*d.*, being one-sixth of 200*l.* a year. Richard died, leaving three children surviving, one of whom was born in lifetime of original testator. The children of Richard not entitled to money representing the annuity to which he was entitled, it fell into testator's residuary estate. *Greenwood v. Roberts*, 262

- Testatrix by will gave to S. P. whom she appointed her sole executrix, 3,000*l.*, and like sum of 3,000*l.* in addition for the trouble she would have in acting as executrix; and she gave all the residue of her personal estate to S. P. her executors, administrators and assigns, "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes." Among the papers of testatrix were found some memorandums in writing made since 1 Will. 4. c. 40. and unattested, specifying certain charitable and other bequests which testatrix desired to be made, one of which was addressed to S. P. S. P. by her answer denied all knowledge of the "views and wishes" of the testatrix previously to her death. S. P. not take residue beneficially, but a trustee for next-of-kin. *Quere*—if the unattested papers were admissible in evidence to explain intentions of testatrix. *Briggs v. Penny*, 265
- Under bequest for all and every the "issue" of E. living at decease of her and her husband, but if any of issue of E. should die in lifetime of survivor of E. and her husband leaving issue, the issue of such issue so dying should take the share his parent would have been entitled to. "Issue" meant children, and if the testator had intended to express descendants, words "issue of issue" would have had no meaning. *Pope v. Pope*, 276
- A specific enumeration of articles after bequest to J. E. K. of "all and everything I die possessed of," followed by declaration, "I leave everything I die possessed of to J. E. K. for her entire and sole use and benefit," is a general residuary bequest. *In re Kendall*, 278
- Testator gave 25,000*l.* upon trust to pay the income to his daughter for life, and after her death to pay the capital to the children of his daughter equally, on their attaining twenty-one; the interest of their shares until their becoming entitled to the principal to be applied for their maintenance; and in case any of the children should die before being entitled in possession to his, her, or their shares, the shares of those so dying should go to the survivors. Testator's daughter had two children living at his death, who both attained twenty-one; one of whom died in the lifetime of her mother. Representatives of deceased child entitled to moiety of fund. *Yates's Trust*, 281
- Testator bequeathed interest of 3,000*l.* at 5*l.* per cent. to his daughter for life, and after her death, he gave the 3,000*l.* in trust for all the children of his daughter, share and share alike, to be paid to sons at twenty-one and daughters at twenty-one or marriage, with interest in the mean time on their shares for their maintenance and education, and benefit of survivorship, in event of any of said children dying without issue. Testator's daughter had five children living at his death, one of whom attained twenty-one and died in her lifetime without issue. Representatives of deceased child entitled to his share. *Tribe v. Newland*, 276
- Testator at his decease left a widow and three children all of whom attained twenty-one and survived the wife. By his will he gave real and personal estate to trustees "to transfer to each of his children their share after the death of his wife, or as soon as they arrived at twenty-one years, but if one of the three children should die leaving no children, his or her share should be equally divided between the other two, and their heirs for ever." One of testator's children married, and died, leaving no children, but leaving his wife surviving. He took a vested interest in his share of testator's property not liable to be defeated upon his afterwards dying without leaving a child surviving. *Edwards v. Edwards*, 324
- Revocation of, as to mortgaged estate, and estate contracted to be purchased before date of will, by re-conveyance of mortgaged estate and conveyance of purchased estate to uses to bar dower. Testator's heir, who claimed these estates by descent, not put to his election. *Plowden v. Hyde*, 329
- Testator bequeathed all his property to his widow, her heirs, executors, administrators and assigns, for her sole benefit, in full confidence that she would appropriate and apply same for benefit of his children. This a gift of an estate for life to the widow, with power of appointment in favour of the children, with gift in default of appointment to the children as joint tenants. *Wace v. Mallard*, 355
- Testatrix directed trustees to pay dividends arising from personal estate invested at her decease in or upon any stocks, funds, or securities whatsoever, yielding interest to certain persons mentioned in her will. Testatrix, at her death, left a balance in hands of her banker, who was in the habit of allowing his customers interest upon the amount standing to their credit on a particular day in the year. This balance did not come within terms used by testatrix, but undisposed of by the will. *Archibald v. Hartley*, 399
- Testator bequeathed all rents and arrears of rent, with timber felled, and other annual profits due to him at time of his decease, from his Berwick Hill estate, unto person or persons who should be entitled to the freehold "and" inheritance of the same estate in possession at his decease. On death of testator, his brother became tenant for life of his estate. The words "freehold and inheritance," read "freehold or inheritance," and tenant for life entitled to the rents, &c. specified in above clause. Also tenant for life entitled under this bequest to rents payable from last quarter-day up to day of testator's death, and also to certain bricks, tiles, and brick-earth being upon the estate at death of testator. *Stapleton v. Stapleton*, 434
- Testator bequeathed to his son William dividends, interest and annual produce to arise from sum of 3,000*l.* 3*l.* per cent. Bank annuities for his life; and after his decease he gave said principal sum of 3,000*l.* to all and every the child or children of his said son, to be equally divided between them, or if only one child, then the whole to such only child, to be paid on their respectively attaining the age of twenty-one; interest in the mean time to be applied for their maintenance and education. Testator gave two further sums of 3,000*l.* to another son and daughter in similar terms: and upon the death of either of his said sons and daughter without issue, then he directed interest, dividends and produce so given to him, her, or them so dying to be paid to the survivors and survivor in equal shares and proportions. Testator's son William had one child only, who died an infant during his father's lifetime. Infant took a vested interest in the 3,000*l.*, liable to be divested by the death of his father without leaving issue living at his death; and that event having happened, gift over took effect. *Westwood v. Southey*, 473
- Testator gave leasehold house, let for twenty-eight years, to trustees to pay rents and profits for benefit of his five children, whom he named, or the survivors or survivor of them, in equal shares and proportions, share and share alike. The words "survivors or survivor" referred to death of any of them in his lifetime and the words "share

- and share alike" referred to those children who should survive him, and created a tenancy in common, and the interest vested in the children on death of testator. *Ashford v. Haines*, 496
- Will* (continued) — Cases illustrating the rules governing the cases in which one legatee in case of death is substituted for another, whether they are prior legatees or legatees specifically named, or whether it is one of a class to be ascertained. *Coulthurst v. Carter*, 555, and *Ive v. King*, 560
- An estate was settled to such uses as W. D, a *feme covert*, should by deed or will appoint. W. D. devised the estate to R. D, her husband, with power to sell and dispose of the same, and to raise any sum or sums of money thereon by mortgage or otherwise as he should think proper, but with this proviso, "Provided, and these presents are upon this express condition, that such part of all and every sum and sums of money as aforesaid raised by the said R. D, either by sale or mortgage, as shall be unexpended at my (his) decease shall be charged upon the houses belonging to the said R. D, situate at, &c., to be disposed of immediately after the decease of the said R. D; that is to say, that that sum shall be paid to my four nieces, share and share alike." And in case the estate should not be mortgaged to its full value, the testatrix devised the reversion to her said four nieces; and in case the estate should not be sold or mortgaged by R. D, she devised the same to her four nieces, and their heirs, as tenants in common. R. D. mortgaged the estate, and died without having made any charge of the mortgage-money or any part thereof upon his houses. This condition not a condition precedent, and the mortgages made by R. D. valid. *Watkins v. Williams. Haverd v. Davis*, 601
- Testator directed trustees to pay the interest of 1,000*l.* to A. for life, and after her death, to divide the principal between the child and children of A, and if there should be only one child, then the whole to such child, to be a vested interest or vested interests on their respectively attaining the age of thirty years, and directed that, if any child should die under thirty years, without lawful issue, the share of him or her so dying should go to the survivors or survivor, and become vested at the same time as their original shares. B, one of the children of A, died in the lifetime of A. under thirty years of age. The gift to B. as one of the children of A, a valid bequest, and the gift over on death of B. without issue, void for remoteness, and therefore the representatives of B. entitled to a share of the fund. *Taylor v. Frobisher*, 605
- Testator bequeathed all his property of whatever description to his wife, her executors, administrators and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her that she would dispose of the same to and for the joint benefit of herself and his children. Widow entitled to have entire residuary property transferred and paid to her for her own use and benefit. *Webb v. Woods*, 625
- Testator, a mortgagee in fee of real estate, gave and bequeathed to A. all his monies, securities for money, and all his goods, chattels, personal estate and effects whatsoever and wheresoever, to hold to A, his executors, administrators and assigns, he paying thereout all his debts. The legal estate in the mortgaged property passed to A. *King's Estate*, 673
- Testator, a mortgagee in fee of real estate, gave and bequeathed to A. and B. all and singular his household furniture, goods, plate, linen, and utensils whatsoever, and all and every other his goods and chattels, stock-in-trade, monies, debts, and securities for money, and all and every other his personal estate and effects whatsoever and wheresoever, upon trust to get in his debts and to sell his personal estate, and hold the money arising therefrom upon the trusts therein mentioned. Under these words, the legal estate in the mortgaged property passed to the trustees. *Walker's Estate*, 674
- Testator, by his will, bequeathed all the residue of his real and personal estate to his executors, upon trust to pay his wife the income and profits thereof, so long as she should continue his widow. A part of personal estate of testator, at his death, consisted of a debt of 12,000*l.* payable by annual instalments of 1,500*l.*, with interest at 5*l.* per cent. from the death on the debt or such part as for the time being should remain unpaid. Tenant for life entitled to 4*l.* per cent. on debt or such part as should remain unpaid, and the other 1*l.* per cent. to be invested for benefit of tenant for life and those entitled in remainder. *Meyer v. Simonson*, 678
- Testator devised real estate to A. in fee, charged with an annuity to B. for life, and directed that after death of B, estate should be charged with payment of 100*l.* a-piece to X, Y. and Z, and that the same should be paid to them respectively within six calendar months after death of B, or such of them as should be then living. X. died in lifetime of B. Legacy to X. had not vested, and was not payable to his representatives. *Goodman v. Drury*, 680
- Testator directed three trustees to raise fund sufficient to pay annuity to one of them, and gave power to resort to residue if the fund should become deficient. Trustees invested more than enough on mortgage, and on mortgage being paid off, the annuitant (a trustee) received the money, and misapplied it. Annuity had been assigned, and the assignment recited the appropriation. Purchaser filed bill against all the trustees. It was held, that there had been an appropriation: that recital was binding on purchaser as to appropriation, and that he had no claim upon residue. *Barnett v. Sheffield*, 692
- Residue, including railway shares, bequeathed to certain persons for their lives, and after decease of survivor to religious societies. It was held, that railway shares must be sold and produce invested in stock. *Thornton v. Ellis*, 714
- Testator gave his freehold estate and "property whether real or personal" to M. S. for life, and after her decease he gave all his said freehold estate and property to S. H. and his wife for their lives, and after their decease he gave all his said freehold property to their children in fee simple; but in case none should attain twenty-one, he gave his freehold estate and property to W. M. in fee simple. He charged his personal estate with payment of several legacies, and the residue of what he should die possessed of was to become the property of M. S. M. S. entitled to the personal estate, and S. H. his wife and children took no interest in the personal estate. *Hollingsworth v. Shakeshaft. Andrews v. Shakeshaft*, 722
- A. devised freehold and leasehold estates to B. and C, their heirs, executors, administrators and assigns, with power for B. and C. or survivor of them, his heirs, executors and administrators, to sell the devised property. A. survived B, and died, leaving C. his heir-at-law, and having by his will devised all his trust estates to C. and D. and appointed them his executors. Neither C. alone,

nor C. and D. together, had the power of selling estates devised by A. *Wilson v. Bennett*, 741

— Testator gave to his wife all his stock in trade, working jewellery and implements, and all his book debts, ready cash, money in the funds, bills, bonds, notes, or other securities whatsoever, for her life, if she should so long continue his widow; but at her death, or second marriage, he gave the said stock in trade, monies, debts and assets, and also all his household furniture, to be equally divided among the children he then had, or might thereafter have. But in case his wife should not marry again, then testator bequeathed to her, all and every his personal estate and effects whatsoever for her life, and same to be equally divided amongst such of his children as should be living at her decease, share and share alike. It was held, that first clause in will was not intended to be a specific bequest, and the last a residuary bequest; but that both clauses were intended to deal with the whole property, and were applicable to different events: the first applying to testator's widow marrying again, the latter to her dying without marrying again, and the latter event being the one which happened, the children living at her death became entitled, to exclusion of the representatives of those who had died. *Wiggins v. Wiggins*, 742

— Testator after giving directions for maintenance and education of his sons M. and N. during their minorities, declared that when they should have attained twenty-one years, his trustees should pay the then residue of his estate unto his two sons, provided that they should be in the opinion of his trustees, of competent understanding to take due care thereof. M. and N. were both lunatic at time of their attaining their majority. Qualification as to sons being of competent understanding not make gift to them conditional, and testator's estate vested in them absolutely. *Wright v. Wright*, 775

— Testator directed investment of personal estate sufficient to pay 2*l.* a week to J. W., during his life; and after his death, capital to fall into residue. He directed that when his youngest child attained twenty-one, residue of his personal estate should be divided equally among his (testator's) children, except J. W., and in like manner, on the death of J. W., to divide fund invested for annuity among all testator's other children then living, and issue of such as were then dead, equally. Residue was invested, and was not sufficient for payment of annuity. Annuitant entitled to his annuity in full, and to have arrears and future payments made good by sale, from time to time, of capital of appropriated fund. *Wright v. Callender*, 787

— Testator gave to trustees a sum of money on usual trust for investment, and directed them to pay income to A. for life, and, after his death, to divide principal between children of A. who should be living at time of his (A.'s) death, and issue of such as should be then dead, leaving issue, so that issue of such child so dying should take part which their deceased parent would have taken if living, to be paid to such children and issue, upon their attaining, and in case they should live to attain, twenty-one. A. had a child B., who died in his lifetime, leaving four children. Two of these children died in their infancy, in lifetime of A. Class to take was all the children left by B., and the gift vested absolutely in all those children. *Barber v. Barber*, 794

— Testator, by his will, gave to A., a married woman, annuity for life for separate use, and by codicil, gave to A., in addition to legacy mentioned in his will, the sum of 300*l.* No legacy had been

given to A. by will. A. entitled to 300*l.* for her separate use. *Warwick v. Hawkins*, 796

— Where real estate is contracted to be purchased, and purchaser then makes a will devising all his real estate which he had contracted to buy, and subsequently takes conveyance to ordinary uses to bar dower, conveyance operates as revocation of devise of this estate. Where estate stood limited to ordinary uses to bar dower, and owner mortgaged it in fee, with proviso that on payment estate should be conveyed to mortgagee, his heirs, appointees, or assigns, or to such uses as he or they should direct, and then made his will, devising all his real estate upon trust for sale, and afterwards mortgagee reconveyed to mortgagor to ordinary uses to bar dower, it was held, reversing decree below, that re-conveyance was not revocation of will as to this estate. *Flowden v. Hyde*, 796

— Testator gave residue of his estate to trustees upon trust to pay dividends of 1,500*l.* consols to A. for life, and, after his death, to divide dividends equally between E. B. and F. B., and survivor of them. Testator gave all the residue of his estate to E. B. for life, with remainders over. F. B. died. It was held, that E. B. was entitled only to life estate in the 1,500*l.* consols, and not to the principal. Testator gave residue of his real and personal estate to trustees upon trust to pay legacies, and then, as to all residue of his freehold, copyhold and leasehold estates, and all other his effects, upon trust to pay dividends, interest, rents, profits and annual produce to his wife for her life. Testator at his death was possessed of leaseholds, shares in companies and Dutch bonds. It was held, that widow was entitled to enjoyment of leaseholds in specie, but not of shares or Dutch bonds. Testator directed his debts to be paid, and gave all his real and personal estate to trustees upon trust to pay certain legacies, and then declared certain trusts of residue of his estates. Personal estate primary fund for payment of debts and legacies; and real estate only charged with them as subsidiary fund. *Bliss v. Bell*, 811

— Testator appointed A. and B. to be his executors, to receive all monies in his possession, or due to him at his death, to be invested in the funds or otherwise on security, and interest thereof to be paid to his wife for life, and after her death the monies to be divided between his two nieces. Testator had at his death only a small balance at his bankers, and 1,200*l.* consols. Consols were disposed of by will under term of monies. *Watts v. Combes*, 814

— Testator recited in his will that he had nine children, whom he named and described, and he bequeathed the income of his estate to his wife for life; and after her death, the capital to be divided among his children by his wife then living, and issue of them who should be then dead. Various other trusts were declared by the will, and among them that trustees should pay interest during life of such of his "said children" as should be a daughter in a particular manner. One of the daughters was illegitimate:—Held, (Lord Cranworth laying great stress on the latter clause, but the Lord Chief Justice considering the will sufficient without it,) that intention of testator was on the will manifest that illegitimate daughter should take a share with the legitimate children. There is no inflexible general rule that illegitimate children cannot participate in a gift to children. *Owen v. Bryant*, 860

— See Administration of Estate. Alienation. Annuity. Legacy. Power. Power of Sale.

D

Wills Act, 1 & 2 Vict. c. 26, s. 27. See *Power*.

Winding-up Acts—Member of provisional committee of projected railway company, who after an abandonment of the concern attended a meeting, at which, under the impression that they were personally liable, the provisional committee came to certain resolutions as to contributions among themselves in respect to expenses incurred, and who afterwards took an active part in carrying out the resolutions—not liable as a contributory. *In re Direct Exeter, &c. Rail. Co., ex parte Tanner*, 212

—Members of completely registered company are not liable for preliminary expenses, unless they have expressly or impliedly rendered themselves liable; and bill of costs being so framed that it was impossible to distinguish preliminary from subsequent expenses, the Master right in allowing the whole bill as a claim only. *In re Independent Assur. Co., ex parte Terrell*, 222

—The 38th section of 11 & 12 Vict. c. 45. does not give the Master authority to exclude contributories from meeting held for purpose of fixing a reserved bidding. *In re Imperial Salt and Alkali Company*, 224

—A. signed a deed by which he and other parties agreed to pay all expenses incurred and to be incurred, with a view to the formation of a projected railway company, such expenses to be assessed rateably on the sums subscribed. Some expenses were incurred, but the undertaking was abandoned, and the company ordered to be wound up. The Master made a list of contributories, in which all parties to the subscription contract were included. It appeared that a suit and an action were in prosecution by and against the official manager, and that the official manager had no assets in hand, and that it was necessary that some funds should be supplied. The Master made a call on all the subscribers to subscription contract. This was resisted by some subscribers on the ground that the managing committee, who were included in the list of contributories, had received large sums which they had not accounted for, and that these sums ought in the first instance to be obtained and applied. In answer to this, evidence was given that the persons forming this committee were not in solvent circumstances. Under all these circumstances, Master had authority to make the call, and had properly exercised his discretion in making it. *In re London and Birmingham Extension and Northampton, &c. Rail. Co., ex parte Gay*, 284

—An association was provisionally registered, but no deed of settlement executed, and it was ordered to be wound up. Master, by his report, found that the only contributories were provisional and managing committee-men, who had agreed to take shares, and thereby became liable equally among them to expenses of forming the concern and to expenses of its being wound up; that greater part of expenses had been paid by means of calls and other payments: but for paying all remaining expenses, costs of winding up, &c., which he estimated at a certain sum, money must be raised by a call of 60*l.* on each contributory. He accordingly made an order for a call, dated same day as his report. Each contributory liable to pay the call; principle on which Master had proceeded correct; no objection to call that if all contributories paid, more than sufficient would be raised; and it was unimportant whether liabilities liquidated or unliquidated. Also, the call, being founded on a report, which contributories had an opportunity of questioning, but which they did not question, could not be impeached on ground of invalidity

of report. *Ex parte Dale, in re Wolverhampton, &c. Rail. Co.*, 341

—A person who has only conditionally accepted shares is not a contributory if condition could not be performed. *Ex parte Manwaring*, 416

—Provisional committee of projected railway company passed a resolution that fifty shares should be offered to each provisional committee-man. A, a provisional committee-man, applied for fifty shares. A. stated on affidavit that no reply was given to his application, and that he never received any communication respecting it, and that he never attended any meetings, and did not pay anything by way of deposit or call. No evidence of any allotment of shares was given in opposition to A.'s statement. A.'s case differed from Upfill's case, and he was properly excluded from list of contributories. *Ex parte Conway*, 461

—A. purchased fifty shares in banking company from directors. No deed of transfer executed, as required by deed of settlement, but directors gave him certificates of the shares, and he received the dividends on them from time to time. Upon order for winding up, A. properly put on the list of contributories in respect of these shares. A. purchased of B, a shareholder of the company, thirty shares. No deed of transfer executed, as required by deed of settlement, but directors gave A. certificates, and he received dividends on them. Formality waived, and transfer complete; and A. properly put on list of contributories in respect of the shares. *In re North of England Joint-Stock Bank Co., ex parte Bernard*, 468

—Costs of obtaining an act of parliament for winding up a company, are not a charge against the company, not being authorised by deed of settlement or by individual shareholders. *In re St. George Steam-Packet Co., ex parte Cropper*, 593

—At meeting of managing committee of provisionally registered railway company, at which A. and B. were present as members, it was resolved that 500 shares should be allotted to each member of managing committee under head of "reserves" In fact 100 shares only were allotted to and accepted by A. and B. respectively, and for that number only they signed parliamentary contract. On winding up of company,—Held, that A. and B. were liable as contributories in respect of 100 shares only; and not for 500. *In re Oxford and Worcester and Chichester Junction Rail. Co., ex parte Sharp*, 767

—A, a shareholder in joint-stock company, was made bankrupt in October 1841. In November 1850, company ceased to carry on business, and was shortly afterwards ordered to be wound up. Assignees disclaimed the shares. Master put on list of contributories the assignees of A, in respect of losses incurred before bankruptcy, and A, in respect of losses incurred after the bankruptcy. The Court ordered name of A. to be erased from list of contributories. *In re Liverpool Marine Assurance Co., ex parte Greenfields*, 773

—An extraordinary general meeting of a company passed a resolution authorising directors to purchase shares of any member who would lend company a sum of money equal to purchase-money of his shares. The notice calling the meeting did not state the specific object of meeting. At subsequent general meeting directors were authorised to give further time to members who had not yet complied with terms of the resolution. W. L. then sold his shares to a trustee for company upon the terms stated in the resolution, and died before transfer effected; and directors, at instance of his executor, completed requisite formalities of the

transfer. Resolution of extraordinary meeting invalid for want of due notice; and subsequent ratification inoperative, as in excess of powers of general meeting; and executor of W. L. retained on list of contributories without qualification. *In re Vale of Neath and South Wales Brewery Joint-Stock Co., ex parte Lawes*, 688

Decision of the Court below, 19 Law J. Rep. (n.s.) Chanc. 391 affirmed. *In re Borough of Marylebone Joint-Stock Banking Co., ex parte Busk*, 688

In July 1849 A. gave B, the secretary of a joint-stock company, in course of formation, a power of attorney authorizing him to execute deed of settlement in the name of A, for five shares. In August a correspondence passed between A. and B. to this effect: A. desired to terminate all connexion with the society; B. requested A. to pay the calls; A. hoped directors would excuse him, and B. stated that directors would not release him. Nothing further took place between A. and B. In October company was completely registered, and B. executed deed of settlement in the name of A. Company was wound up. It was held, that A. had not revoked power of attorney, and was properly placed on list of contributories of company, in respect of five shares. Whether A. could revoke the power of attorney—*quære*. *In re the Sea, Fire, and Life Assurance Society, ex parte Burton*, 781

Directors of one railway company passed resolution to lend money to directors of another company on their personal responsibility, and money was so lent, and some of the directors signed guarantee for repayment. Under order for winding up company, the directors of which borrowed the money, claim was carried in on behalf of lending company, but was disallowed; and on appeal, it was held,—affirming decision of Master,—that where a company or association is ordered to be wound up, Master has no jurisdiction under order to take cognizance of claim not alleged to be due from company, but only from individual members of it, and that it made no difference that money was applied for purposes of company. *Ex parte Wryghte, in re Great Western Extension Atmospheric Rail. Co.*, 807

Joint-stock company overdraw its account with its bankers, and was subsequently ordered to be wound up. Amount of debt was disputed, and public officer of bank (also a company) carried in claim before Master, who refused to admit it as a claim until debt was proved at law. The Court on appeal admitted claim, and gave public officer of bank liberty to bring such action against such person or persons as he should be advised. *Ex parte the East of England Bank Co., in re Norwich Yarn Co.*, 822

A. was holder of shares in joint-stock company, the members of which had by covenant, not binding their heirs, engaged that partnership should continue for ninety-nine years; that there should be no right of survivorship, and that shares should be deemed personal estate. A. died in 1838, having, by his will, devised his real estate to B, and appointed C. his executrix. At his death company were solvent, and all the then existing liabilities were afterwards discharged. C, after A.'s death, was treated as proprietor of the shares: and for five years received dividends upon them as executrix. Company became insolvent; and, it appearing that testator's personal estate was exhausted, B.'s name was put on the list of contributories, in his character of devisee of real estate. B. rightly placed on list of contributories. *In St. George*

Steam-Packet Co., ex parte Hamer's Devisees, 832

A railway company was formed, and a large number of shares in it was allotted, and a considerable sum paid in respect of deposits. A managing committee of the company was appointed, and five of its members were appointed a finance committee, with power to draw cheques. By direction of managing committee, large sums, part of company's funds, were employed in purchasing shares in the market. The Master to whom the winding up of the company was referred, charged the members of finance committee with these sums, on the ground that managing committee was implicated in the breach of trust. Master's order overruled. *In re London and Birmingham Extension, and Northampton, &c. Rail. Co., ex parte Carpenter's Executors*, 835

A. subscribed the deed of settlement of a joint-stock company, instituted for purposes of granting assurances on ships, for 1,000 shares of 25*l.* each. By deed of settlement it was declared that deposit of 2*l.* 2*s.* should be paid on each share, and that further call of 2*l.* 2*s.* might be made by directors, but that no further call should be made without a previous resolution of shareholders assembled at a general meeting. Company granted several policies. Company was afterwards made bankrupt, under 7 & 8 Vict. c. 111, and debts were proved against it to amount of 70,000*l.*, and upwards. It was afterwards ordered to be wound up. Master placed A. on list of contributories, and made an order that he should pay 25,000*l.* Motion, that the order as to the call should be discharged refused. *In re Merchant Traders' Ship, Loan, and Assurance Association, ex parte Talbot*, 846

A joint-stock company was completely registered, and a person applied for and accepted shares and paid deposit on shares allotted to him. Company's deed required that on its execution names of parties executing should be entered on list of shareholders, and be returned to Stamp Office, &c., and thenceforth they should have privileges and be subject to liabilities of shareholders. In this instance deed not executed, but directors entered and returned, &c. the name. Nevertheless, the name of this person properly placed by Master, under winding-up order, on list of contributories to debts and liabilities of company. *Ex parte Yelland, in re the Port of London Shipowners' Loan and Assurance Co.*, 852

Seven persons were elected the managing committee of a company, and performed acts in that character. The scheme proved abortive. Actions were brought against one of the seven, and he obtained an order for winding up the company. Others of the seven had made a similar attempt, but were not in time to do so before the order was actually obtained. An official manager was appointed, and the order was prosecuted with the concurrence of all seven. Four of the seven appealed from the order for winding up, and also from an order for a call to pay the costs and expenses and the debt; but it was held, first, that whether the order for winding up were rightly or wrongly made, the four could not move to discharge it; and, secondly, that the order for the call was properly made on the seven members of the managing committee. *Ex parte Woolmer, in re Direct Exeter, Plymouth and Devonport Rail. Co.*, 888

Witness—A commission directed to issue for examination of witnesses, upon the certificate of the Master, having miscarried by reason of defendant

being deprived of an opportunity of cross-examining plaintiff's witnesses, a new commission was directed without further certificate of the Master. *Forsyth v. Ellice*, 590

Witness (continued) — Testator gave residue of his property to be held in deposit for purpose of inquiring whether there were any relations of his blood living, and if so said residue to be divided equally among them. Upon reference to the Master to make inquiries in conformity with above residuary bequest, Master reported that a commission ought to be sent to Venice to examine witnesses as to who were the next-of-kin. The Court, upon the application of the executors, made an order for a foreign commission, and also directed what sum should be allowed out of testator's property for expenses. *Heath v. Chapman*, 614

— Examination of co-defendant. See Trust and Trustee.

Words—"And" to be read *or*, 434

- "Children," meaning of, in will, 860
- "Die before entitled in possession," construction of in will, 281
- "Education and learning," 406
- "Having" or "leaving" issue, 402
- "Issue," meaning of, in will, 276
- "Well knowing," meaning of, in will, 265
- "Next-of-kin," 405
- "Owners," meaning of, in memorandum indorsed on settlement, 121
- "Share and share alike," 496
- "Survivors or survivor," 496
- "Then living," — "Dying," — "Shall die," meaning of in will, 656
- "Vested," 605

BANKRUPTCY.

Act of Bankruptcy—Non-payment after summons. See Adjudication.

Adjudication and Advertisement — Under 12 & 13 Vict. c. 106, s. 104, notice of application to suspend the advertisement having been given within seven days after the adjudication, the Commissioner has power, after the expiration of the seven days, to suspend the advertisement and extend the time. *In re Castelli*, 5

— After advertisement, the Commissioner has no jurisdiction to entertain a petition to review his adjudication. Such petition must be to the Vice Chancellor sitting in Bankruptcy. *In re Carter*, *ex parte Carter*, 23

— A creditor petitions against an adjudication within the proper time, and the petition is not heard within the twenty-one days from the adjudication, and when heard it is dismissed, and the creditor appeals within twenty-one days after the Commissioner's decision on his petition. Appeal in time under the 12th section of the 12 & 13 Vict. c. 106. Petition to Commissioner to annul adjudication not an appeal within that section. *Ex parte Bean*, *in re Wilkinson*, 26

— A creditor, a wholesale dealer, issued a summons under section 78. of 12 & 13 Vict. c. 106, demanding payment of money due from a retail dealer in the same line of business, and described the items in the particulars of demand as "goods." This described with sufficient certainty the wares supplied, so as to prevent the annulling of the adjudication on the ground of uncertainty. The situation of parties and nature of demand are to be considered in determining what is convenient certainty. A doubt on the legal validity of an adjudication is not sufficient ground for annulling it. *Ex parte Bower*, *in re Bowers*, 61

— Annuling. See Trader.

Appeal—Creditor who had not given notice of opposition not allowed to appear before Court of Appeal. *In re Holthouse*, 3

— Jurisdiction of Court of. *In re Cheetham*, 5

Assignees—The removal of assignees is in the entire discretion of the Commissioner, and where assignees appointed solicitors, related by marriage to the bankrupt, and the Commissioner deeming the appointment objectionable, gave the assignees

time to decide whether they would discharge the solicitors, or would themselves retire from their office, and at the time appointed the assignees refused to do either, whereupon the Commissioner removed the assignees, the Court, upon appeal, refused to interfere, and dismissed the appeal, with costs. *Ex parte Bates*, *in re Williams*, 20

Certificate of Conformity—Bankrupt was refused his certificate by Commissioner for an offence not enumerated in section 256. of 12 & 13 Vict. c. 106, namely, for systematically buying goods at a small price and short credit and immediately selling the same at still lower prices. He was also refused any protection, except pending an appeal. On an appeal, certificate refused, but order made, by consent of assignees, giving protection for person of bankrupt, but leaving his property liable. Creditor who had not given three days notice of opposition under section 198, and who was, therefore, refused a hearing, not allowed to appear before the appeal Court on motion to discharge above order. *In re Holthouse*, 3

— Railway stock is within the 201st section of 12 & 13 Vict. c. 106, which enacts, that no bankrupt shall be entitled to his certificate if he shall within one year before his bankruptcy have lost 200*l.* by any contract for the sale or purchase of "any Government or other stock." *Ex parte Matheson*, *in re Matheson*, 18

— *Quere*—whether the Court of Appeal has jurisdiction to refer back the question of certificate after the Commissioner has refused it. *Quere*—whether the grant of the certificate by the Commissioner, after he has once refused it, would be valid. *Ex parte Whitaker*, *in re Whitaker*, 25

— Bankrupt, having had his certificate refused, was taken in execution, and lodged in gaol. Ground of refusal of Commissioner was a fraudulent preference within section 256. of 12 & 13 Vict. c. 106. Court of Appeal being of opinion that charge not sustained, granted a certificate of the third class, and directed release of bankrupt from prison on a given day. *Ex parte Hunt*, *in re Hunt*, 29

— Bankers who, upon evidence before the Court must be taken to have been, and to have known that they were, deeply insolvent, continued to re-

ceive deposits, and to issue notes for eighteen months, during which time their assets would not pay more than 5s. in the pound; on adjudication of bankruptcy, Commissioner refused them any certificate or protection. On appeal, the Court affirmed the refusal of certificate on above ground; but, upon consent of assignees and of opposing creditors, granted protection to their persons. Certificate a benefit to which bankrupt may entitle himself by good conduct. *Quære*,—whether after refusal of certificate, grant of protection of any avail against common-law right of creditors who do not come in under the bankruptcy. *Ex parte Rufford, in re Rufford, Ex parte Wragge, in re Wragge, 32*

— Authority of Commissioner under section 198. of 12 & 13 Vict. c. 106, to appoint a sitting for consideration of grant of certificate to a bankrupt, although the bankrupt does not make the application himself. *Ex parte Sherlock, in re Sherlock, 36*

— A, a tallow-broker in business with B, became bankrupt, and on application for his certificate had the same suspended for two years, and then to be of the third class. The case of suspension was supported by Commissioner on two grounds: first, that bankrupt had fraudulently induced a creditor to forbear enforcing payment of a certain sum by withholding information known to him and not known to the creditor, and which, if known would have induced creditor to enforce payment; the other case was for receiving money for goods alleged by the bankrupt to have been purchased, and then re-transferring the goods to the person of whom he bought them, so that the creditor did not receive the goods, and lost his money. The Lords Justices were of opinion that the withholding of information, or the silence of the bankrupt regarding that information, was not dishonestly intended in the one case, and the act by which the goods were re-transferred and the money lost in the second case was, upon the evidence before the Court, not fraudulent so far as petitioner was concerned, and they granted an immediate certificate of the first class. *Ex parte Gull, in re Gull, 43*

— E. M. and H. M. purchased a business of their brothers, but it was not paid for. E. M. attended to the accounts, so far as they were attended to, and H. M. performed the duties of traveller. E. M. and H. M. on various occasions raised money by deposits of goods and paid 60l. per cent. for discount. H. M. ordered goods one day and pledged them on the next. The brothers, vendors of the business, sued for the purchase-money, and issued execution on a judgment in the action. Both E. M. and H. M. were adjudicated bankrupts, and the Commissioner refused them their certificates or protection on the ground of not keeping proper books of account (as to E. M. destruction of books), obtaining goods for the purpose of pledging, and pledging them, and fraudulent preference to the brothers who sold the business. H. M. appealed, and swore that he pledged the goods to meet a sudden demand for payment of bills falling due; that he believed he was solvent when the goods were bought, and that he had nothing to do with the keeping of the books, and he produced a witness who swore that the goods were ordered because they were wanted in the stock. The Lords Justices being of opinion there was no wrong intention as to the books or the pawning, and that there was pressure by the vendors, and acquitting the appellant of fraud, granted him a second-class certificate, to be dated eight months after the adjudication. *Ex parte Martyn, in re Martyn, 46*

— Bankrupt, who had twice before compounded with his creditors, made false and fraudulent entries in his books, consisting of fictitious accounts in particular names. He stopped payment, being at the time able to pay 12s. in the pound, and soon after offered 11s. in the pound. Commissioner refused him his certificate and all protection, excepting for twenty-one days; and on appeal, the Lords Justices, acting under discretion given by 198th section of 12 & 13 Vict. c. 106, dismissed petition of appeal, with costs, affirming decision of Commissioner, and refusing any protection whatever. *Ex parte Curteis, in re Curteis, 53*

— Before a bankrupt can ask for his certificate he should have conformed to the bankrupt law since his bankruptcy. If a trader obtains money by fraud, though not in the course of his trade, or in matters connected with his business, it is, on a question of certificate, conduct as a trader, within the meaning of 12 & 13 Vict. c. 106; and if a case comes otherwise within the act, it is not the less so because the conduct complained of took place before the passing of the act. *Ex parte Staner, in re Staner, 56*

— See Protection.

Commissioner—Discretion of. See Assignees.

— Jurisdiction of. See Adjudication and Advertisement.

Evidence. See Inspection of Documents.

Fraudulent Preference. See Certificate of Conformity.

Friendly Societies. See Payment of Debts in full.

Inspection of Documents—A creditor, who had proved his debt, applied by his attorney, under section 232. of 12 & 13 Vict. c. 106, for leave to inspect the affidavit of debt, the proof of the act of bankruptcy, and other proofs filed in court, on which adjudication founded, with a view to impeach the adjudication. On appeal, it was held, that this was not a "reasonable" request, within the meaning of the statute, and the appeal was dismissed, with costs. *Quære*—whether above-mentioned documents and proofs are within the language of section 232. *Ex parte Rimell, in re Brewer, 27*

Jurisdiction—of Court of Appeal. See Payment out of Court.

— of Commissioner. See Adjudication and Advertisement. Certificate of Conformity. Protection.

Notice of Opposition. See Certificate of Conformity.

Official Assignees—Section 54. of 12 & 13 Vict. c. 106. having enacted that certain amounts, not less nor greater than specified amounts per cent. on gross produce from time to time should be paid by official assignees to "Chief Registrar's Account," amount to be fixed by senior Commissioner, with approval of Lord Chancellor; and chief Commissioner having fixed the sums, with such approval, Court refused to interfere to alter the same; but Commissioner having made such allowances to official assignee as, according to amount of bankrupt's estate and nature of duties performed, were, in his opinion, just and reasonable, the Court differing from opinion of Commissioner, and official assignee not requesting the Court to fix amount of allowance, the matter was, on this point, sent back to Commissioner for re-consideration. *Ex parte Glyn, in re Ashkin, 49*

Payment of Debts in full—Money which, by rules of friendly society, ought to have been deposited with treasurer, was paid directly to bankers of society. Bankers adjudicated bankrupts, and society, under section 167, of 12 & 13 Vict. c. 106, claimed to be paid in full, and in support of the claim filed an affidavit, swearing that the bankers were "employed in the office of treasurer." Petitioners not entitled to payment in full. *Ex parte Oxford, in re Rufford*, 31

Payment out of Court—The primary jurisdiction in Bankruptcy being, by 12 & 13 Vict. c. 106, s. 12, transferred to Commissioners, and the jurisdiction of Vice Chancellor under that act having been exclusively appellate and transferred to the Court of Appeal by 14 & 15 Vict. c. 83, the Court of Appeal cannot order payment of money out of Bankruptcy Court, unless application be made by way of appeal from Commissioner. *In re Cheetham*, 5

Proof of Debts—An insolvent trader about to marry, the intended wife being ignorant of the insolvency, entered into covenant with trustees to pay them a moderate sum of money, interest to be paid to wife's appointment, and, in default, to intended wife for life for her separate use, then to husband for life, and the capital to be in trust for the survivor absolutely. Property of the wife was also agreed to be settled upon same trusts. The husband having become bankrupt, it was held in a special case that the trustees were entitled to prove for the amount. *Ex parte Mac Birnie's Trustees, in re Mac Birnie*, 15

— A. B. was a shareholder in a joint-stock banking company, which stopped payment. He became bankrupt, and afterwards, before he obtained his certificate, an order for winding up the banking company was obtained, and subsequently, he obtained his certificate. Under the 14th and 30th sections of the Winding-up Act of 1849, official manager entitled to go in, and prove for the amount of calls in competition with his separate creditors. *Ex parte Nicholas, in re Monmouthshire and Glamorganshire Banking Co.*, 64

Protection—granted by Court of Appeal though certificate of conformity refused. *In re Holthous*, 3

— Under 12 & 13 Vict. c. 106, the Commissioner may refuse protection to a bankrupt for other causes than for the commission of any of the offences enumerated in section 256. The issue of certificate of penalty, under section 257, depends upon the refusal of protection generally, and is not limited to such refusal for either of the offences enumerated in the preceding section. The discretion vested with the Commissioner by this statute in granting or withholding protection is very large, excepting in the cases enumerated in section 256, in which cases his functions are merely ministerial, and he is bound to refuse protection. So held, by the full Court of Appeal, *Knight Bruce, L.J. dubitante. Ex parte Stanton, in re Stanton*, 7

— An order under section 211, of 12 & 13 Vict. c. 106, granting protection until a day certain, exceeding two months from its date, is irregular, and will not protect the debtor. *Quære*—whether, after an order granting protection under the 211th section, a creditor can proceed under the 78th section. *Ex parte Bowers, in re Bowers*, 13

— See Certificate of Conformity.

Railway Stock. See Certificate of Conformity.

Solicitor—not a scrivener. See Trader.

Trader—A solicitor was adjudicated bankrupt as a scrivener, on evidence clearly establishing the fact; on appeal against the adjudication, he was examined, and the Court being satisfied that, upon the additional evidence, he was not a scrivener within the meaning of the bankrupt law, annulled the adjudication; the Lord Chief Justice expressing his agreement in the decision only on the authority of cases determined by Lord Eldon and Lord Chief Justice Gibbs. *Ex parte Dufaur, in re Dufaur*, 38

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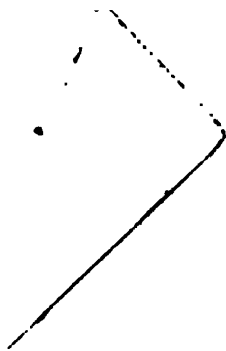
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ERRATUM.

The Subscribers are requested to correct an error at page 8, left column, line 31, "*or to each of them as may be living at the time of my decease.*" The word "her" should be substituted for "my."



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